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POLICY DEPARTMENT C
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS

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PRIVATE PROPERTIES ISSUES FOLLOWING THE CHANGE OF POLITICAL REGIME IN FORMER SOCIALIST OR COMMUNIST COUNTRIES

STUDY

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PETITIONS

Private properties issues following the change of political regime in former socialist or communist countries Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Romania and Serbia

STUDY

Abstract

Some transformations occurred in the area of private property ownership following the change of political regime in former socialist or communist countries. The six analysed countries (Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Romania and Serbia) illustrate well the whole range of contentious problems in a region where the Communist regimes have varied tremendously in their approach to private property, intensity of social control, repression and overall legitimacy. This diversity of situations poses today different types of dilemmas for the property restitution process and these six countries responded in different manners to these general challenges, in the context of their own peculiar social and economic history.

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AUTHORS

Project leader:	Romanian Academic Society (RAS), Romania
With the collaboration of:	Centre for Liberal Strategies (CLS), Bulgaria
	Partnership for Social Development (PSD), Croatia

RESPONSIBLE ADMINISTRATOR

Ms Claire GENTA
Policy Department Citizens' Rights and Constitutional Affairs
European Parliament
B-1047 Brussels
E-mail: poldep-citizens@europarl.europa.eu

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ABOUT THE EDITOR

To contact the Policy Department or to subscribe to its monthly newsletter please write to: poldep-citizens@europarl.europa.eu

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DISCLAIMER

FOREWORD

The present research deals with private properties issues in Romania, Bulgaria and the Western Balkans. It consists of two studies: the first one has the title "Private properties issues following the change of political regime in former socialist or communist countries" (Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Romania and Serbia) and the second one has the title "Private properties issues following the regional conflict" (Bosnia and Herzegovina, Croatia and Kosovo).

The aim of the first study is to analyse the transformations that occurred in the area of private property ownership following the change of political regime in former socialist or communist countries. The six countries looked at are: Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Romania and Serbia. These countries illustrate well the whole range of contentious problems in a region where the Communist regimes have varied tremendously in their approach to private property, intensity of social control, repression and overall legitimacy. This diversity of situations poses today different types of dilemmas for the property restitution process, dilemmas which are approached by each country in a different manner.

The second study - besides sketching out the legal background of international and EU law for property restitution/compensation in the context of the conflict or war in former Yugoslavia - deals with the effects of this conflict in terms of the property issues arising from it; it covers Bosnia and Herzegovina, Croatia and Kosovo. In a civil war or regional conflict, like the one in former Yugoslavia, the members of an ethnic group may be dispossessed by the 'winners' and forced to leave their property or may leave for fear of reprisals; both alternatives result in ethnic cleansing. In the post-conflict phase property restitution/compensation has become a crucial component of the return of internally displaced persons to their homes of origin.

The main question for the countries in both studies is how an emerging democracy can "respond to public demands for redress of the legitimate grievances of some without creating new injustices for others."1 Moreover, property rights and transparency represent the very bases of a functioning market economy: each of the countries faces the difficult task of finding a balance between remedying violations of property rights and guaranteeing a functioning land market, which enables or will enable full freedom of movement of capital in the EU.

[1] Solomon, R.H., 'Preface', in: Kritz, N.J. (ed.), *Transitional Justice,* vol. III, 1995, p. xv.

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LIST OF ABBREVIATIONS

ADS	Agency for Public Domains
AKKP	Albanian Property Restitution and Compensation Agency
BCC	Bulgarian Constitutional Court
BiH	Bosnia and Herzegovina
BMAFLR	Bulgarian Ministry of Agriculture, Forestry and Land Reform
BSP	Bulgarian Socialist Party
CAP	Agricultural production cooperative (Cooperative Agricole de Productie in Romanian)
CASBI	State Commission for the Administration of Assets from Enemies
CCEC	Central Commission for Establishing Compensations
COM	Council of Ministers
CSD	Centre for the Study of Democracy
DFJ	Democratic Federal Yugoslavia
DPA	Dayton Peace Accord
EC	European Commission
ECJ	European Union Court of Justice
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EP	European Parliament
EU	European Union
FNRJ	Federal People's Republic of Yugoslavia
FRA	Fundamental Rights Agency
GDP	Gross Domestic Product
GERB	Citizens for European Development of Bulgaria (Bulgarian abbreviation)
IAS	State owned farms (Romanian abbreviation)
IDP	Internally displaced persons
LCONA	Law on the Compensation of Owners of Nationalised Assets
LOUAL	Law on Property and Use of Agricultural Land
LRNIP	Law on Restitution of Nationalised Immovable Property
LTPSCE	Law on Transformation and Privatisation of State and Communal Enterprises
MP	Member of Parliament
MRF	Movement for Rights and Freedoms
NARP	National Agency for Restitution of Property in Romania
OECD	Organisation for Economic Cooperation and Development
OHR	Office of High Representative for Bosnia and Herzegovina
OJ	Official Journal
OSCE	Organisation for Security and Cooperation in Europe
OTR	Occupancy/tenancy rights
RS	Republic of Srpska
SAA	Stabilisation and Associations Agreements
SAR	Romanian Academic Society
SFRJ	Socialist Federal Republic of Yugoslavia
TEC	Treaty establishing the European Community
TFEU	Treaty on the Functioning of the European Union
TKZS	Agricultural labour cooperative farms (Bulgarian abbreviation)
UDF	Union of Democratic Forces
UNHCR	United Nations High Commission on Refugees
WW II	2nd World War

EXECUTIVE SUMMARY

The restitution of confiscated property to former owners in the ex-communist states of Central and Eastern Europe was a policy decision with momentous consequences, as the level of assets concerned was huge and the impact of handing back to former owners residential or commercial property, four decades after nationalization, was difficult to anticipate. The solutions adopted – relatively quickly, or slowly and incoherently, in many steps spanning a long period of time – were very different from country to country.

The historical legacies explain some of this variation in approach. The implementation of the Communist project was uneven and country-specific. In societies with little established aristocracy and fewer large real-estate owners, the nationalization of residential houses and farming land was more difficult to justify in political terms, so it took about a decade or more after taking power for the Communist governments to consolidate sufficiently to enable them to embark upon the expropriation of millions of peasant farmers or urban lower-middle classes. By contrast, large real-estates and the factories tended to be confiscated earlier. In mountainous areas, confiscation of property was less frequent than in lower, more productive areas.

The determination of the political push towards property nationalisation, especially in the rural sector, was another diverging factor. At one end of the scale, in Romania or Albania the state took control of almost all properties, either directly or through the cooperatives. By contrast, in Yugoslavia (as in Poland) most of the land had remained in individual family farms during the socialist period. In addition, some regimes (Yugoslavia, Hungary) started to relax central control in the '70s or the '80s, trying to simulate a market economy through ”competition” between two or more state-owned enterprises. Therefore the search for a way to put property into private ownership started earlier in some of the Communist countries, while others remained totally unprepared up until 1989.

Still, 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, so the restitution of the actual assets – buildings, land, industrial assets – was a feasible option. In practice, however, there were many practical difficulties. Often the land became unavailable: for example in urban localities which changed and expanded during Communism, when whole neighbourhoods were erased in order to make room for the socialist housing units. Land improvement works, artificial lakes of experimental farms lie today on top of former plots. In consequence, land swaps or compensation arrangements had to be made.

In the countries that pursued this strategy, the restitution did not necessarily lead to land fragmentation, but it may have facilitated the transition from socialist cooperatives to corporate farms. In other countries such as Romania and Bulgaria (and many in Central Europe) some large state farms were downsized, but managed to survive as corporations. But in general the social pressure to dismantle the agro-cooperatives was so high that no post-1989 cabinet could have resisted it.

There are a number of **fundamental difficulties and dilemmas** the post-Communist governments in Bulgaria, Romania and the Western Balkans had to face:

- How far back in time should the process go? Should only Communist expropriations (or "collectivization") done through law or decree be considered, or cases that occurred during World War II or immediately after, sometimes through unlawful abuse (as in the case of the Jewish community, for example) be included?
- Should former owners be given back their same physical property, or another one of similar value, or should they be compensated financially instead? In the last case, should the compensation be in cash, or in vouchers which are the equivalent of shares in some specially-established funds or in existing state companies? Should the

amount of the compensation be at full value, or should it be capped (i.e. some confiscation and redistribution may occur)? Should vouchers be immediately tradable, or should temporary restrictions be imposed?

- Related to the point above, how far can we go with the argument that the state is liable and should redress the wrongs done forty or fifty years ago to some individuals? Do the post-Communist generations have a moral obligation to finance the restitution process fully, or are there other social considerations that should play a role? For example, if a building nationalized in 1950 still exists, but is occupied by many tenants, can it be restored with no restrictions attached to the (inheritors of the) former owner? Can absentee landlords be reinstated on their land, even if this would mean evicting families with no title but who have used the land for decades (the case of many Roma communities)? Such concerns of inter-generational redistribution are legitimate in any sort of public policy and formed the crux of the argument, even though not always explicitly, when the issue of restitution was discussed in the early nineties.
- Can the restitution process follow fully the inheritance rules from the Civil Code, or should eligibility be more restricted, for instance only to the original owners and their children? Should only individuals who are residents of the country be eligible, or should émigrés qualify too?
- Regarding industrial assets or agricultural land, how can the opposing goals of justice and economic efficiency be reconciled, since in many cases restitution is likely to result in a fragmented and unmanageable ownership structure?
- Finally, can the post-Communist public administrative apparatus be trusted to discharge in a reasonably fair and effective way the daunting task of identifying the lawful owners, assessing properties and compensating the eligible individuals for their lost properties? What procedures and institutions must be created, at the central and local level, to ensure property restitution proceeds accurately and expeditiously?

This report outlines the manner in which six South-East European countries – Romania, Bulgaria, Croatia, Bosnia, Serbia and Albania – responded to these general challenges, in the context of their own peculiar social and economic history. Like Central Europe, they all had to confront these dilemmas in the first years after the fall of the Communist regime, because the more the process of restitution dragged on, the more complicated the situation became. The liberalization of the economies after 1990 created a market for all types of assets and as a result of this natural pressure, transactions proliferated, even in situations where ownership rights were not certain. It was obvious from the start that delays or piecemeal strategies tended to create more conflicts, overlapping property rights and actions in courts.

The similarities and differences are all highlighted in the report and the answers given to the dilemmas highlighted above. Both nationalisation and restitution policies varied significantly, and these variations had an impact for the structure of the case-studies presented in this report. The main structure of the case studies includes an overview, the historical background of the expropriation process, the restitution/compensation process and conclusions. However, the inner structure of each topic is not the same in all countries – for instance because some of them have adopted legislation for restitution, while others have not.

Most of these countries (with the exception of Serbia) attempted to restore in kind or compensate the previous owners for the property confiscated during the communist regime. However, the restitution or compensation process has been inconsistent, the procedures (legal, administrative) have not been coherent, and the process itself has generally been slow. **The main common problems** related to restitution in the six countries under scrutiny, as they resulted from our analysis, are:

- Belated adoption of property restitution policies;
- Unclear and unpredictable policy on property restitution;
- Weak institutional capacity to implement the policy;
- The emergence of conflicting rights on the same property;
- Ineffective compensation systems.

All these problems have caused a lot of discontent among previous owners or current tenants, and generated waves of complaints to external institutions such as the European Court of Human Rights (ECtHR) and petitions to the European Parliament (EP).

However, the issue of restitution or compensation for property confiscated by the former communist regimes does not fit into the sphere of competence of the European Union, so that any future developments linked to the accession of EU to the ECHR will be completely neutral to it.

The role of the European Court of Human Rights.

The ECtHR can examine applications only to the extent that they relate to events which occurred after the Convention entered into force. In those cases where the property was confiscated in the period 1949-1989, that is, before the date of the entry into force of the Convention with regard to all six States, the Court is not competent *ratione temporis* to examine the circumstances of the expropriation or the continuing effects produced by it up to the present date.
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 had lost their possessions before 1989 can have a chance to win a case before the ECtHR.

The judgments finding a violation of Article 1 of Protocol No. 1, in cases of property lost during the communist regime, are related not to the fact of the nationalisation or confiscation by the authoritarian power, but to the actual failure of the States to comply with their own legislation providing for compensation or restoration of property or with final judicial or administrative decisions restoring property or awarding compensation, rendered by domestic authorities in favour of the applicants, during the period following the ratification of the Convention.

This amounts to the paradoxical, but nevertheless real situation that if a post-communist state refuses to take any steps to address in law the issue of properties nationalized before 1989, that state is fully insulated against claims before ECtHR. Only once a country begins to pass national legislation on the matter can it become liable in international courts. However, it must be said that, in spite of this strong institutional incentive for non-action, most post-communist countries in CEE and SEE [abbreviations not explained] could not avoid passing some sort of legislation on property restitution, as a result of domestic political pressure. It is the difference in timing and quality among these bodies of national law that explain the wide variation in the number of claims (and, subsequently, successful claims) coming before ECtHR from each state.

When comparing the judgments rendered by the Court in cases involving each of the countries, some common patterns emerge for all (or only a subgroup), in addition to a relatively less important set of specific features for each country. With regard to those countries that have a significant number of judgments, a leading judgment can be identified. These are normally followed by dozens of similar judgments, which address the same legal issue and give place to well-established case-law.

The main issues under the Convention are the non-enforcement of final judicial decisions; the quashing of final judicial decision and failure by the courts to respect the final character of judgments; the failure of the domestic authorities to provide compensation to which the applicants were entitled under domestic law; deprivations of property in the context of special protected tenancy and access to court in order to ask for restitution of confiscated property.

The role of the European Union.

The countries under scrutiny differ as regards their status vis-à-vis the European Union: Romania and Bulgaria are already members, Croatia is a candidate country, while the other three countries, Albania, Bosnia and Herzegovina and Serbia, are potential candidates. In this respect it follows that the **European Union has at present different leverage and different mechanisms to influence the process of property restitution in each of them**. The issue of property restitution has been always addressed in country reports of the European Commission from the perspective of human rights; concrete examples of country reports are given in each of the case-studies presented in Part II of the present study.

Generally speaking, the leverage of the EU on national policy is stronger in the years before a milestone is reached: either as a condition to be fulfilled before the country can start accession negotiations; or during this process, as a benchmark to be monitored before negotiations can be concluded. However, there are peculiarities about the issue of property restitution – it is a particularly sensitive national issue in every country, very political in nature, grounded in moral and historical judgments, with a huge amount of resources at stake. This and the fact that it exceeds the explicit mandate of the EU, tends to limit the Union to the role of guardian of procedures, rather than reviewer of the substance of the national decisions adopted. On the other hand, a reasonable and timely solution to the problem of property in every post-communist state willing to join the EU is crucial, one way or another, as a building block of the rule of law, which is a membership prerequisite. This is the dilemma confronting the EU institutions: encouraging a fair policy on restitution, but only using indirect instruments for this goal.

Recommendations:

In our opinion, the European Union should continue to use its traditional monitoring mechanisms and conditionality systems to assess the extent to which countries have implemented policies to address the issue of property restitution. In this process the EU should not limit its assessment to the review of legislation, but should also request concrete action plans with clear benchmarks, budgetary allocations and responsible institutions, once the national governments have adopted a law. In other words, the Union cannot impose a solution on East European societies, but once such a solution is agreed by the legitimate authorities of the particular country, it can request that the government and the administration do not undermine the policy through implementation flaws.

This would be a good strategy bearing in mind a well-known phenomenon: it is often easier for the national voters and the public to make the government embrace the broad principles of a policy, and even to adopt a law, but much more difficult to monitor their implementation. External monitoring of administrative performance in this field, as well as the performance and fairness of other structures, such as the judiciary, which play a role in the process of property restitution, may be an important contribution to an increased level of accountability in the candidate / prospective candidate country, and thus a tool to improve the quality of governance.

On the particular case of property restitution, the solutions do not come without significant costs (which would be lower if restitution in kind were to be the solution adopted by the countries). In this context the EU may explore together with the countries concerned a mechanism for financing such costs in a manner which is both practical and morally acceptable. Various arrangements may be considered, from linking restitution

with the privatization process, to mutual funds, selling of state assets, special purpose loans, etc. Due consideration must also be given to the implications for the national budgetary deficit likely to be impacted.

National cases

1. The section on **Albania** deals with the complex problems concerning property restitution in a country that for almost a decade suffered from social turmoil and unstable governments. First, the legal framework has been volatile and incoherent over time. The financial burden that the amount of compensation to former owners would place on the state has never been estimated. Furthermore, as described in the relevant section of the report, there have been serious issues regarding the methodology for establishing the compensation sums. The current law on restitution allows for restitution in kind or compensation in cash at the property's market price, and the methodology to establish the compensation value has been approved by the National Property Restitution and Compensation Agency. However, it has been criticised by international organisations, because it makes the value of compensation dependant on the income the property would have generated if it had been in the possession of the rightful owners. The chapter also describes the administrative procedure of the restitution process.

The 2008 EC Progress Report highlighted that, despite the problems created by the lack of property registration and the legalisation of informal use of land, Albania had registered some advance in the restitution process and the enforcement of property rights. In the same year, a report issued by the European Parliament on the property restitution process in Albania discussed thoroughly the problems created by the disruptive legal framework and the inefficient institutional setup for the management of property issues after 1990. Its conclusions and recommendations were in line with those of the EC 2009 progress report, according to which Albania showed little progress on issues related to property rights in general. The report urged the adoption of a comprehensive working plan in order to improve the situation regarding property rights.
Another report, made by the Property Restitution and Compensation Agency in October 2009 for the use of the Prime Minister's office, shows that no decisions have been taken after July 2009, since the deadline stated in the law had not yet been postponed. This means that besides new claims the Agency will have to provide an answer to pending claims, the administrative investigation of which has not yet been finalized. Usually claims are still pending due to missing documents or procedural mistakes which impeded or delayed the adoption of a final decision. However, human resources are not available to speed up the process or support better communication with beneficiaries. At this moment the number of requests is already too large for the current administration to handle.

The lack of personnel is reflected in the number of judicial appeals on property restitution issues. Only one third of all appeals were dealt with so far, which reflects a low capacity, to a large extent due to the lack of trained personnel. This issue needs to be addressed by future reform plans.

Making the process of evaluation of restitution claims more efficient is crucial, since unsolved claims end up in judicial courts, a trend that is accelerating: between August and October 2009, 187 lawsuits were initiated against the Agency's decisions. The demand for highly trained staff is urgent, both for dealing administratively with the files and to represent the state in courts. A property fund out of which compensation in kind could be made does not yet exist. Five years after the adoption of the current law on restitution and compensation, despite additional legal acts that aimed at clarifying the procedure, restitution in kind has never been made.

According to the law, property used in the public interest cannot be returned to its owners. This required initial registration of immovable property that could be used for restitution all over the country. The Albanian Assembly took a recent decision to verify

property titles, including those belonging to the State. The institution in charge identified a high level of uncertainty related to registered titles, including the ones in state ownership. Thus, setting up a Property Fund based on the records of the Immovable Property Registration Office is not legally secure.

A yearly fund for cash compensation was included in the state budget. For 2009 this fund reached 10 million Euros and it was used to cover compensations for 211 out of the 521 owners who had their property rights restored that year. The compensation process is made according to the distribution of the claimed land across the value maps of the Agency. These maps need to be continually updated by the final compensation deadline in 2015. Considering the dynamics of the real estate market and of the number of filled and solved claims, the budget needed to cover compensation can be expected to grow.

2. The chapter on **Bosnia and Herzegovina** highlights the special situation of a country with split governance. A law on the denationalisation of property seized during the Communist regime was adopted at the state level, but immediately suspended, thus producing no legal effects. The study describes the events after World War II and the Bosnian war of the '90s which had important implications for the restitution process, and reviews critically the final draft of the proposed law on denationalisation, as well as the governmental and institutional challenges to the implementation of the proposed law. It examines the existing policy conflicts and problems that the proposed law could aggravate, including the complications arising from the Dayton Peace Accords. Then it moves on to predict the impact of government and administrative corruption in the implementation process.

Even though the current draft form of the restitution law has weak points, they can be addressed in by-laws, codes of conduct, and the administrative tools and mechanisms that do not have to be a part of the formal law. Adopting this Law would at least establish an institutional framework, after which there is a six-month period before the actual implementation begins. The adoption of the Denationalisation/Restitution laws in each entity (they are in progress) should be in line with the state level law. The ideal solution, though probably the least likely, would provide that Entity laws be in accordance with the state law, and that they empower the state level law in terms of speed and quality of implementation by creating specific regulations on registering property at municipal/city/district levels and making such data available to the public and all interested parties. New registers of property (a register of confiscated property subject to denationalisation, a register of property that shall be used for the purpose of natural compensation, and a general register of all municipal property) should be in place in each of the municipalities in Bosnia and Herzegovina or at the cantonal or entity level. Such registers, aside from simple counting of the property, should contain data that is in the possession of the public bodies (location, type and size of the property, under which law the property was confiscated and the legal basis for confiscation, who is in possession of such property or who has occupancy rights and on what basis, approximate commercial value of the property). Such registers should be available to the public as well as to all interested parties. In addition, a combined register of persons and companies that have been compensated for their property through bilateral agreements (such as the Agreement between the U.S. Government and SFRJ) should be established and made available to the public and interested parties.

Municipalities should be required by law to establish registers of property which is unaccounted for and provided a binding deadline within the law for beginning of procedure before the court by the relevant public office (public defender) in the name of the targeted municipality, and stating that all property which is unaccounted for after the deadline belongs to the State of Bosnia and Herzegovina.

Transparency and access to data should be improved at all levels, in the policy-making process (draft laws, future by-laws and other relevant policy documents, registers of property subject to restitution law, decisions in the process of denationalisation as well as statistical and other relevant data). Integrity and anti-corruption measures should be

imbedded either in the law or by-laws and codes of conduct of relevant bodies, as requested for the implementation of the Dayton package of property laws. Special attention should be given to conflict of interest-related issues in the appointment of members of the municipal commissions, as well as the appointment of members of the Appellate Commission, with both soft (prevention) and hard (ban on appointment to public service employment) measures against those that breach the codes of conduct or other similar instruments.

The international community should give special attention to the issue, as it is one of the last issues in Bosnia and Herzegovina that precedes the beginning of the development of a free market – corruption aside. Therefore, the denationalisation issue, as well as effective, timely, fair and just implementation of the Law and international treaties, should become a criterion for Bosnian progress in accession to the EU.

By the end of the denationalisation process, Bosnia and Herzegovina should consider a special approach to the property that belonged to victims of the Holocaust or the last war in Bosnia and Herzegovina. Even though the country is in a difficult economic situation, no state should benefit from sufferings of the past. Such measures pay tribute to the victims of tragic historical events, and at the same time prevent special interests within the State from making money and taking precedence over the interests of all citizens. In complex situations, the tenants should be given the right to buy such apartments as guaranteed under the law. Bosnia and Herzegovina can consider a solution similar to the one in Macedonia, and create a fund out of the money received through the sale of public property to be used for paying compensation to victims and their descendents. The fact that proper and fair denationalisation is not a condition for the BiH roadmap to the EU raises suspicions that this matter will never be adequately or fairly resolved. Since there is almost no leverage from the international community in relation to denationalisation policies, it is expected by many that the final outcome of denationalisation will be a failure.

3. In the chapter on **Bulgaria**, we describe and analyse the restitution process against its historical and political background. The process of nationalisation of agricultural land, or urban, industrial and other property in the early communist period and the subsequent practices of alienation of property are also briefly presented in order to facilitate the understanding of subsequent developments. The legislation, the judicial practice and the decisions of the Bulgarian Constitutional Court on property restitution in the transition period are discussed in detail. The social, economic and urban development consequences of this process are also outlined with a special attention given to the minorities, with an emphasis on the restitution of property to the Bulgarian ethnic Turks.

The restitution of property in Bulgaria over the last twenty years has been one of the most far-reaching and complex social processes. It has been shaped by and has itself shaped Bulgarian politics. Issues of the balance between retributive justice and the general public good, issues of evaluation of the past and projections for the future, and indeed issues of political identity were all entangled in this process. Therefore, any overall judgment is necessarily partial and controversial. One thing is clear, however: the process of restitution has determined the outlook of contemporary Bulgaria in a variety of important ways.

In terms of *economic efficiency* the restitution of agricultural lands in their real boundaries has fragmented the plots, and has created a serious need for consolidation of lands. Bulgarian agriculture, partly as a result of this fragmentation, has been one of the sectors with the most severe difficulties to recover after the crisis of the 1990s. This fragmentation also creates problems in absorbing EU funding in the sector.
The benefits of the restitution process should therefore be sought mostly in the area of social (retributive) justice and the legitimacy of the transition to liberal-democracy and

market economy. Here, the restitution efforts of the political elite indeed created a significant constituency of owners supporting the political transformation.

4. The chapter on **Croatia** reviews the various positions of the European bodies and other international organisations such as the Organisation for Security and Cooperation in Europe (OSCE), ECtHR etc, in relation to the process of restitution and compensation. It further covers the legal framework and analyses critically the Law on Compensation, weakened by the inherent conflict of interest of the County Administration Offices. There are also important issues with the implementation of the legal framework: the slow pace of procedures in the County Administration Offices and the decisions taken by the national courts that affect the process of restitution and compensation.

A number of problems stem from the choice of the County Public Administration Offices as the responsible body for the arbitration of claims to restitution and compensation: (i) the inherent conflict of interest; (ii) the different principles applied to the administrative procedure, and (iii) the slow pace of the procedure. The conflict of interest problem is the greatest threat to the just settlement of claims to restitution and compensation. However, it is also at this point in time the most difficult to change because 71% of all cases have been settled by this administrative mechanism. The recommendation here must then be generalized to the politics of the Republic of Croatia in the future. A possible solution to prevent future conflict of interest problems could be by introducing a practice that would permit the Committee for the Prevention of the Conflict of Interest to consider and point out any potential areas of concern before any act of legislation is presented to the Parliament. Of course, the Committee would not have the power to change the legislation but at least it would have oversight and whistle-blower status. This would also work towards giving the Committee a more prominent position within the structure of government.

The problem of the different principles of procedure being applied in different counties could be solved by the passing of additional regulations and the changing of the contradictory wording in the Law on Compensation by the legislature. This sort of solution should at least be contemplated for the most contentious issues. The less controversial issues must continue to rely on the Administrative Court for their resolution as foreseen by the legislative framework.

The third problem of the slow pace of the administrative procedures calls for Government pressure to be placed on the counties to complete the administrative stage of the process of restitution and compensation. The European Commission and the European Parliament could also encourage the Croatian Government to the complete the process.

The last recommendation is based on the general problem of ownership and tenancy rights. These problems can be partially remedied by a proactive organisational policy by the Republic of Croatia. Three different registers for the categorisation of property for the restitution and compensation process could be created: (i) one register would document the current property whose restitution is requested; (ii) the second register would document the property that is set aside for compensation by the state or counties; (iii) the third register would document the current owners of the property whose restitution is requested and when these ownership rights were gained.

These three registers would avoid a plethora of problems that surround the tenancy and ownership issues: tenants who have requested to be granted ownership rights of privately owned apartments could be easily identified. These cases would obviously be dismissed because they are based on a basic misunderstanding of the Croatian civil law. The second problem that would be solved is that the tenants who have legitimately requested ownership rights for state-owned apartments could also be easily identified. The conclusion of these cases would then depend on the pace of the administrative procedure. The tenants in these cases would receive the right to purchase the property and the original owner would receive compensation.

The third problem that would be placed in a clearer light is the minority of cases where corruption or a conflict of interest within the legal or administrative bodies is in question. The cross- referencing of the first and third register would clearly identify the property that has been given to individuals through illicit means. Since the third register would contain both the owner and the date their ownership rights where granted this would set the stage for a more detailed investigation by the authorities of those individuals who gained property without proper tenancy rights or the rights to restitution and compensation. This final recommendation would require a political action to regulate and sanction corruption within the Republic of Croatia.

5. **Romania** is distinctive among the countries in the region because of the combination of widespread nationalisation, high expectations – the target was *restitutio in integrum* – and weak institutions to implement these challenging tasks. The restitution policy was designed and re-designed gradually, over a period of almost 20 years, so it lacked a coherent vision. The report highlights the frequent changes in legislation which lead to overlapping entitlements provided by the law at various moments in time. The outcome was a slow process with a disjointed practice both in the administration and the judicial system. The restitution in kind of agricultural land and forestry is slowly coming to an end, but the process of compensation for the claims that could not be addressed in this way is very protracted. The restitution of urban property has barely reached half way, again with a major delay in providing compensation. The prospects are not encouraging because at the current pace the restitution process is likely to be prolonged over several decades.

The poor implementation of the restitution policy made Romania a leader in the number of cases taken to the ECtHR and also in the number of sanctions applied in respect of property issues. The failure of the administration and judiciary to comply with the rules created by this intricate framework and the different interpretation given to the rules triggered a clear reaction from the international organisations Romania adhered to, especially the ECtHR.

The most important idea emerging from this research is the fact that a lack of political vision and frequent changes in the legal framework were the main causes of the existing uncertainties regarding the restitution of property. Therefore, there is an obvious need for the political class to refrain from major policy shift. The key word should be consolidation of the legal framework by a clear-cut interpretation of the law by the Constitutional and High Courts, in order to provide the lower courts with the necessary basis for a unitary practice.

Secondly, increasing the capacity of the administrative bodies in charge of restitution should become a priority. Institutional audits for the central level, Bucharest City Hall and other laggard institutions are recommended in order to find pragmatic ways for speeding up the bureaucratic process by eliminating redundant checks and streamlining the procedures. The compensation mechanism should become truly effective. Payment titles should be directly enforceable, and the Proprietatea Fund should be listed on the stock market as soon as possible.

Another important aspect to be considered is the capacity of the state to pay the promised compensation. The economic crisis greatly affected the Romanian treasury, with the public budget facing high deficits and lower incomes at a time when the social expenditure is rising. As the payment of compensation is already a cumbersome process, it is not advisable that budgetary constraints should add to this delay. In addition, the value at which the shares in the *Proprietatea Fund* are traded now on the unregulated market indicates that the real price of the shares may be significantly lower than the nominal value used for compensation. As compensation will be at the trading value, a higher rate of transfer of the shares owned by the state to private recipients should be anticipated. The Fund has already transferred about 40% of the value of assets into titles to claimants.

Under these circumstances, it is advisable to have more restitution in kind or compensation with other properties of equivalent value, which are not claimed back by former owners. However, the laggard local authorities such as Bucharest have not finalised an inventory of properties, although the deadline provided by the applicable law expired years ago. A better enforcement of such laws and an improvement in the performance of other institutions, such as the land register (cadastre) or archives, are crucial for reducing the total monetary cost of the restitution process to the rest of the society, by maximizing the in-kind or equivalent options.

6. In **Serbia**, property restitution has not yet been fully addressed in legislation or administrative practice, but similar issues are expected to arise if the country's government makes the same mistakes as its neighbours in designing the restitution/compensation policy. The first step towards denationalisation was the Law on Declaring and Registration of Seized Property in 2005. The Law regulated the procedure for declaring and registering seized property, as the first step in the process of returning property to its owners. The purpose was to quantify the property seized by means of nationalisation, expropriation, confiscation etc, applied after 1945 in Serbia, in order to establish the appropriate manner of returning it to the owners by enacting the law on denationalisation.
About 73,000 applications were filed within the deadline, and some more submitted after the deadline with the expectation that it would be extended. Up to September 2009 it is estimated that around 76,000 claims submitted by approximately 130,000 individuals were collected. There are 49,400 applications containing the requested documentation, and 16,100 without sufficient data for identification of the nationalised property.

In 2007 Serbia produced a second important draft law, this time called by its proper name: the Law on Denationalisation. It entered the adoption procedure, it was accepted by the Government of Serbia and released for public debate. During the public debate many objections were raised, however, such as those related to violation of the rights of current owners, as the law provided for the seizure of assets from the current owners without compensation. It also contained provisions on the restitution of construction land by establishing a dual ownership between the building owners and land owners. After sharp criticism during the public debate, the Government withdrew the draft law from the legislative procedure.

Such a delay of almost two decades is likely to make Serbia a very special showcase for the difficulties of the restitution process in South-Eastern Europe. The market pressure has produced situations which, after successive transactions, will be hard to disentangle. In addition, the government is pressed to come up with a separate law, dealing with the division of public property between the state and Serbia's 174 municipalities. It plans to do this in 2010, largely because without clarifying the situation of municipal property, many investment projects, including those financed by the EU, cannot proceed. But securing municipal property in law before the broad lines of restitution are set is likely to complicate the matter further.

The assessments as to the financial implications of restitution or compensation are rather blurry and give rise to disputes between various stakeholders and the Government. In-kind restitution could decrease the direct financial costs to society, as this method would eliminate monetary compensations. However, the more the issue drags on, the more difficult it will become to use this mechanism, as Serbia delays a clear decision on this matter.

INTRODUCTION

The restitution of confiscated property to former owners in the ex-communist states of Central and Eastern Europe has been in general little discussed and analyzed in the policy and the political literature of transit in spite of the heated and polarising debates around the issue in the societies concerned. Things stand in marked contrast with the subject of privatization, which is much better known and has produced an impressive body of written analysis. This is just one among the many paradoxes and dilemmas outlined in this report – because the stakes in the restitution process were similarly high and the broader social consequences of handing back in a way or another buildings, land, forests or industrial assets to their original owners, four decades after they were nationalized, could be momentous and, to some extent, difficult to anticipate at the moment when such a decision to restitution was made.

Not only the subject was under-researched in theory, but even the practical details of the decisions made by the legitimate authorities installed after 1989 were muddled to a large extent. The big moral and public policy dilemmas implied were addressed mostly by default, without having a consistent discussion in society, or at odds with the direction of this discussion. The solutions reached were as a result different, adopted relatively quickly, or slowly and incoherently, in many steps spanning a long period of time.

The historical legacies explain some of this variation in approach. The Communist project was aimed to function as a great social equalizer, within – but also across – societies in the region, but its unique general framework was pressed upon different social, economic and cultural realities in the aftermath of the World War II. The motives for nationalization were political as well as economic. It was a central theme of the state socialist policy that the means of production, distribution and exchange, should be owned by the state on behalf of the people or working class to allow for rational allocation of output, consolidation of resources, rational planning of the economy and changing the patterns of living in urban and rural areas. Private property was regarded as the main impediment to these goals of the Communist regime, and as a result it had to be severely curtailed.

However, the implementation of the Communist project allowed for substantial cross-country – and, sometimes, intra-country – variation. In societies with little established aristocracy and even fewer large real-estate owners, the nationalization of residential houses and farming land was more difficult to justify in political terms, so it took about a decade or more after taking power for the Communist governments to consolidate enough until they were able to embark upon the expropriation of millions of peasant farmers or urban lower-middle classes. By contrast, large real-estates and the factories tended to be confiscated earlier. In mountainous areas, confiscated property was less frequent than in lower, more productive areas.

In Romania, Bulgaria and the countries of the Western Balkans, we are dealing precisely with the type of historical social structure where nationalizations were bound to be ideologically difficult: nations of smallholders, predominantly rural, with a thin layer of urban middle strata just emerging in the decades before the Communist takeover[2]. The states themselves were quite young, a result of a fervent process of nation-building in the second part of the 19th century, and the rural smallholder had been exalted in the fledgling national cultures as the backbone of the young polity. What is more, some governments had already redistributed some agricultural land to the poorest peasants immediately after 1945, before the full Communist take-over. Reversing the trend and going against this class in the name of social justice was difficult, at least at the beginning.

[2] Joyce Gutteridge (1952). Expropriation and Nationalisation in Hungary, Bulgaria and Romania. International & Comparative Law Quarterly , Volume 1 , Issue 01 , pp 14-28 Published online by Cambridge University Press, 2008.

Nevertheless, it happened, sooner or later, in all these countries. In rural areas the metaphor of "collectivization" imported from USSR helped making the things look acceptable politically: the farming land would not be technically nationalized, but "consolidated" in larger exploitations "managed collectively" by the former owners. In Yugoslavia, a similar structure was adopted even for many industrial plants. However, this was nationalization in all but name, because the state and party bodies performed a centralized control over the decisions made, exit was not possible and micro-management from the top became the norm.

While Communism was a common blueprint for the whole region, however, the determination of the political push towards property nationalisation, especially in the rural sector, varied a lot from one country to another. At one end of the scale, in Romania or Albania the state took control of almost all properties, either directly or through the cooperatives. By contrast, in Yugoslavia (like in Poland) most of the land had remained in individual family farms during the socialist period. In addition, some regimes (again, Yugoslavia, or Hungary) started to relax the central control in the '70s or the '80s, attempting to simulate a market economy through ”competition” between two or more state-owned enterprises trying to act as private enterprises would. Thus the search for a process that would put property into private ownership started earlier in some of the Communist countries, while others remained totally unprepared to explore the issue up until 1989.

Still, unlike in the former Soviet Union, in Western Balkans, Bulgaria and Romania legal records of previous owners still existed, for both commercial and residential property. Restitution of the actual assets – buildings, land, industrial assets – was a feasible option, had the post-Communist governments decided to pursue it. People lost the right to utilize their land, but they did not lose the nominal title to the land[3]. Over the years, as rural residents moved to the city or died, some land became the property of the cooperative.

In actual practice, it was not always possible to return the exact plot of land or building to an individual or to his/her descendents. Often other pieces of property were offered to former owners in compensation, either to avoid agricultural fragmentation or because the property ceased to exist as such – for example in urban localities which changed and expanded a lot during Communism, and whole neighbourhoods were erased in order to make room for the new socialist housing units. In the countries that pursued this strategy, the restitution did not necessarily lead to land fragmentation, but it may have facilitated the transition from socialist cooperatives to corporate farms. In other countries such as Romania and Bulgaria (and many in Central Europe) some large state farms were downsized, but managed to survive as corporations. But in general the social pressure to dismantle the cooperatives was so high that no post-1989 cabinet could have resisted it.

There are a number of **fundamental difficulties and dilemmas** the post-Communist governments in Bulgaria, Romania and the Western Balkans had to face:

- How far back in time should the process go? Should only Communist expropriations (or "collectivization") done through law or decree be considered, or cases that occurred during the World War II or immediately after, sometimes through unlawful abuse (like in the case of the Jewish community, but not only) be included?

- Should former owners be given back their very same physical property, or another one of similar value, or should they be compensated financially instead? In the last case, should the compensation be in cash, or in vouchers which are the equivalent of shares in some specially-established funds or in existing state companies? Should the amount of the compensation be at full value, or should it be capped (i.e. some

[3] Dudwick, N., Fock, K., and Sedik, D. (2007): *Land Reform and Farm Restructuring in Transition Countries. The Experience of Bulgaria, Moldova, Azerbaijan and Kazakhstan*, World Bank Working Paper No. 104, (Washington, DC: World Bank)

confiscation and redistribution may occur)? Should vouchers be immediately tradable, or temporary restrictions must be imposed?

- Related to the point above, how far can we go with the argument that the state is liable and should redress the wrongs done forty of fifty years ago to some individuals? Do the post-Communist generations have a moral obligation to finance the restitution process fully, or there are other social considerations that should play a role? For example, if a building nationalized in 1950 still exists, but is occupied by many tenants, can it be restored with no restrictions attached to the (inheritors of the) former owner? Can absentee landlords be reinstated on their land, even if this would mean evicting families with no title but who have used the land for decades (the case of many Rroma communities)? Such concerns of inter-generational redistribution are legitimate in any sort of public policy and made the crux of the argument, even though not always explicitly, when the issue of restitution was discussed in early nineties.

- Can the restitution process follow fully the inheritance rules from the Civil Code, or eligibility should be more restricted, for instance only to the original owners and their children? Should only individuals who are residents of the country be eligible, or émigrés should qualify too?

- Regarding industrial assets or agricultural land, how can the opposing goals of justice and economic efficiency be reconciled, since many times restitution is likely to result in a fragmented and unmanageable ownership structure?

- Finally, can the post-Communist public administrative apparatus be trusted to discharge in a reasonably fair and effective way the daunting task of identifying the lawful owners, assessing properties and compensating the eligible individuals for their lost properties? What procedures and institutions must be created, at the central and local level, to ensure property restitution proceeds accurately and expeditiously?

This report outlines the manner in which six South-East European countries – Romania, Bulgaria, Croatia, Bosnia, Serbia and Albania – responded to these general challenges, in the context of their own peculiar social and economic history. Like Central Europe, they all had to confront these dilemmas in the first years after the fall of the Communist regime, because the more the process of restitution dragged, the more complicated the situation would became. The liberalization of the economies after 1990 created a market for all types of assets and as a result of this natural pressure, transactions proliferated, even in situations when ownership rights were not certain. It was obvious from the start that delays or piecemeal strategies tended to create more conflicts, overlapping property rights and actions in courts.

The similarities and differences are all highlighted in the report and the answers given to the dilemmas above emphasized. Both nationalisation and restitution policies varied significantly, these variations having an impact also for the structure of this case-studies presented in this report. The main structure of the case studies includes an overview, the historical background of the expropriation process, the restitution/compensation process and conclusions. However, the inner structure of each topic is not the same in all countries, for instance because some of them have adopted legislation for restitution while others have not.

Part One - International law and the role of the European Union

Chapter 1 - The role of the European Court of Human Rights

1. THE RELEVANT INTERNATIONAL LAW PROVIDING FOR THE PROTECTION OF PROPERTY: THE EUROPEAN CONVENTION OF HUMAN RIGHTS AND ITS MECHANISM OF ENFORCEMENT

1.1 The Council of Europe and the European Court of Human Rights

Sooner or later after the fall of the communist regime, all the six countries became members of the Council of Europe, a political intergovernmental organisation, created in 1949, which has now 47 member States[4], namely almost all the European Countries, except Belarus, but including Russia and Caucasian countries. The main objectives of the Council of Europe are to develop and maintain democracy and respect for human rights and rule of law. Several important international treaties were concluded by the Council of Europe member States, in order to guarantee that the three objectives were met.

The **most important piece of international law created within the Council of Europe is** the Convention for the Protection of Human Rights and Fundamental Freedoms (also known under a shorter title, as the **European Convention of Human Rights**), of 1950. The Convention is not only a declaration of the most important civil and political rights, but provides an efficient mechanism of collective enforcement of those rights, by the means of the European Court of Human Rights. Fourteen Protocols amended the Convention during the last 60 years. Protocol No. 1, of 1951, provided in its Article 1, for protection of property - a right which was not initially included in the Convention. Once the six countries acceded to the Council of Europe, they also ratified the European Convention of Human Rights and its Protocols, as a requirement for membership.

Table 1. Dates of Accession to the Council of Europe

Country	Albania	Bosnia-Herzegovina	Bulgaria	Croatia	Romania	Serbia
Date of ratification ECHR	2.10.1996	12.07.2002	7.09.1992	5.11.1997	20.06.1994	3.3.2004

Any person or group of persons[5] under the jurisdiction of all the 47 Countries of the Council of Europe can file an individual application against one or more of those countries, to the European Court of Human Rights, which, in 1998, after the entry into force of Protocol No. 11 to the Convention, had become the unique judicial body[6] competent to supervise the respect for the European Convention of Human Rights. Following such an application, the Court can state, by a reasoned judgment, that there was a violation by the State of one or more of the human rights and fundamental

[4] For the dates of accession, see Council of Europe's internet site: www.coe.int.
[5] See Article 34 of the ECHR.
[6] Before the entry into force of Protocol No. 11, there were two judicial bodies: the European Commission of Human Rights, competent to deal with the admissibility of the applications and the Court.

freedoms provided for in the Convention. The Court can also award a just satisfaction[7] to the applicant, in respect of the violation of his rights. According to the Court case-law cited in the judgment *Brumărescu v. Romania* on just satisfaction (Article 41) of 23 January 2001[8]"a judgment in which it finds a breach imposes on the respondent State a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach". The Court also stated that "the Contracting States that are parties to a case are in principle free to choose the means whereby they will comply with a judgment in which the Court has found a breach" because "this discretion as to the manner of execution of a judgment reflects the freedom of choice attaching to the primary obligation of the Contracting States under the Convention to secure the rights and freedoms guaranteed". Moreover, "if the nature of the breach allows of *restitutio in integrum*, it is for the respondent State to effect it. If, on the other hand, national law does not allow – or allows only partial – reparation to be made for the consequences of the breach, Article 41 empowers the Court to afford the injured party such satisfaction as appears to it to be appropriate"[9].

The Council of Europe's executive body, namely, the Committee of Ministers is competent to supervise the execution of the ECtHR judgments by the respondent States, as far as the individual measures in order to redress the violation are concerned, but also with regard to general measures, as changes of legislation or administrative practice, in order to prevent similar violations of human rights.

1.2 The accession process to the European Union: a vector for the ECtHR judgments enforcement

A couple of years after their accession to the Council of Europe, Bulgaria and Romania expressed their willingness to become members of the European Union (EU), which seemed to offer them prospects of economic relief and greater political stability. The preparation for accession to the EU was a long process of institutional and legal changes by the mechanism of law approximation, aimed to ensure that the two countries were able to comply with the criteria for membership[10]. Those criteria were either economic, such as having a functioning market economy, or political, i.e 'stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities.'

Bulgaria and Romania joined the EU in 2007. The negotiation for accession with Croatia began in 2005. Stabilisation and Associations Agreements (SAA)[11] were subsequently signed with Bosnia and Herzegovina, Serbia and Albania[12] with the prospect of membership once they are ready for it.
The progress of each candidate country towards accession was or is constantly monitored by the European Commission. Regular reports are released to the public, in which the European Commission deals with the level of protection for human rights, including the right to property, by candidate countries. The main indicators for the EU institutions, in this area, are the judgments of the European Court of Human Rights. Thus, the **commitment toward accession to the EU became eventually a platform for enforcing the ECtHR judgments** and preventing other violations of human rights.

[7] According to Article 41 of the ECHR:" If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."
[8] Application no. 28342/95, published in *Reports of Judgments and Decisions 2001-I.*
[9] See also *Papamichalopoulos and Others v. Greece* (Article 50), judgment of 31 October 1995, Series A no. 330-B, pp. 58-59, § 34.
[10] The criteria were laid down by the Copenhagen European Council, in June 1993.
[11] More information available on the European Commission website: http://ec.europa.eu/enlargement/potential-candidates/index_en.htm
[12] For general information about enlargement, see www.europa.eu

The EU Reform Treaty (Treaty of Lisbon) which entered in force from 1st of December 2009 says that 'the Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms'[13]. Once the EU will be a party to the Convention, individuals will be able to bring applications against EU before the European Court of Human Rights, if they can argue that EU institutions violated their human rights provided for in the Convention and its Protocols. By virtue of Article 35 of the Convention, such applications could be brought only after exhaustion of 'domestic remedies'. At the EU level, actions before the Court of Justice of the European Union (ECJ) could be seen as domestic remedies. Such a judicial mechanism is now only a matter of future legal development. In any event, the area of the **restitution or compensation for property confiscated by the former communist regimes does not fit into the sphere of competences of the European Union**, so that any future developments linked to the accession of EU to the ECHR will be completely neutral to it. According to the Treaty of Lisbon, 'such accession shall not affect the Union's competences as defined in the Treaties'[14].

2. RESPECT FOR PROPERTY THROUGH ECtHR GENERAL FIGURES

2.1. Statistics concerning ECtHR judgments on property issues and pending applications

The relevant general figures published in the last European Court of Human Rights' annual report[15] refer to the period between 1 November 1998[16] and 31 December 2009[17].

In respect to Bulgaria, 'only' 35 out of 272[18] judgments are about property (slightly over 10 %); meanwhile Bulgaria had, during the relevant period, 110 judgments which concerned length of proceedings (violation of Article 6 of the Convention) and 201 judgments concerning the right to liberty and security (violation of Article 5 of the Convention) – see Tab. 2. Similar figures show that Croatia had 'only' 4 out of a total of 133 judgments finding a violation, namely less than 5%, concerned property. Meanwhile, Croatia had 72 judgments concerning length of proceedings (violation of Article 6).

However, in respect to Romania, the Court's statistics show a different situation: 372 out of 582 judgments finding a violation, which represent almost 65 %, concerned property issues (Tab. 2).

These statistics include all the cases of violation of Article 1 of Protocol No. 1, not only the cases concerning property confiscated during the communist regime. The Court does not provide any official statistics about the particular number of judgments concerning property lost during the communist regime as a separate issue in property related cases. However, the Court's database available on its Internet site[19] offers the complete collection of judgments, including those concerning property lost under the communist regime. Therefore, the Court's Internet site can be the source of unofficial statistical data. The total number of judgments concerning property lost under the communist regime can be obtained from it, as well as the figures related to various subgroups, determined by the nature of the legal issues at stake.

[13] Article 6 of the TEU.
[14] Idem.
[15] See the provisional version of the *Annual Report 2009*, published on 29 January 2010 on www.echr.coe.int and the *Annual Report 2008 of the European Court of Human Rights, Council of Europe* (2009) Strasbourg.
[16] Creation of the new Court, following the entry into force of Protocol no 11 to the Convention. There were only 4 judgments of the former Court, against Bulgaria and Romania; only one of them – *Vasilescu v. Romania,* of 22 May 1998 – concerning property (gold coins confiscated during the communist regime).
[17] *Annual Report 2009*, p. 144-145.
[18] Only those judgments finding a violation are reported here.
[19] http://www.echr.coe.int/

Table 2. Statistics on cases before ECtHR, all six countries

	Total number of application 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 of Protocol No. 1 (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

Before discussing those special cases, it should be noted that Albania, Bosnia-Herzegovina and Serbia – namely half of the states covered by the study – do not have yet a significant amount of judgments rendered by the European Court. This situation can be partially explained either by the fact the Convention was relatively recently ratified by Bosnia-Herzegovina (on 12 July 2002) and Serbia (on 3 March 2004) – i.e. some ten years after Bulgaria or Romania – or by the fact that only a relatively small number of applications are brought before the Court, as is the case with Albania, which had 228 applications pending on 31 December 2009. However, it is important to see that almost half of the judgments given by the Court with respect to Albania and Bosnia-Herzegovina were about property issues.

The relatively low figures, for those countries, of ECtHR judgements finding a violation of property should not be seen as an indication that this issue is not important. The number of applications pending before the Court should also be taken into consideration for each of those countries. Only Albania has a relatively low number of applications. The other two countries of the first group, Bosnia-Herzegovina and Serbia, had a relatively high number of applications pending at the relevant time compared with their population. Despite the fact that there are no official statistics on pending applications concerning property lost during the communist regime and related restitution, it is likely that this kind of complaints are filled in significant numbers.

There are no data available concerning the number of pending applications referring to property issues, but the proportion of judgments concerning property can be an indicator; another indicator could be the number of cases communicated to the respondent Governments concerning property issues[20]. If the number of applications pending is relatively high and many applications about property were communicated to the Governments, therefore, potentially, there is room for new violations of property to be found in the future. So, despite the fact that countries like Bosnia and Herzegovina, Serbia or Albania do not have a significant number of judgments concerning property, the evolution of number of judgments against these three States should be monitored for the next few years, in order to have an adequate picture of the situation and the real scale of the confiscated property problems.

[20] Available on Court's website, http://www.echr.coe.int/

In contrast to Albania, Bosnia-Herzegovina and Serbia, **Romania** has the **largest number of judgments finding a violation of property rights**: almost ten times more than the second place, Bulgaria. Romania has also the largest number of applications pending before the ECtHR, which is almost three times more than the second ranked of the six relevant countries, Serbia.

Bulgaria and Croatia have comparatively low records of ECtHR judgments finding a violation of property, when it comes to the proportion of those cases within the general figures of judgments finding a violation. This seem to indicate that property – whether lost during the communist regime or not – is not currently an important issue for those countries, given the fact that both ratified the Convention more than a decade ago. However, before jumping to conclusions, further analysis of the relevant judgments should be conducted in order to see if violations of property rights are only isolated issues or not.

A significant part of the judgments finding a violation of Article 1 of Protocol No. 1 of the Convention concerns property lost during the communist regime. Before going into details of those cases, it should be mentioned that a high number of the applications concerning the property lost before the ratification of the Convention by the respective States are declared inadmissible (see Tab. 3).

2.2. Inadmissible cases

Between 1st November 1998 and 31 December 2009, a significant number of applications were declared inadmissible by the Court[21].

Table 3. Number of applications declared inadmissible before the ECtHR

	Total number of applications allocated to a judicial body	Number of applications declared **inadmissible**	Ratio
Albania	380	139	36%
Bosnia-Herzegovina	2,948	861	29%
Bulgaria	7,099	4,164	58%
Croatia	5,455	4,332	79%
Romania	28,883	19,417	67%
Serbia	5,356	2,455	45%

Nearly 70% of the applications against Romania were declared inadmissible, as well as almost 80% of the applications against Croatia, or some 60% of those against Bulgaria. There is no statistical information about how many of those applications concerned property lost during the communist era. The Court's database offers to the public only those inadmissibility decisions taken by a chamber of seven judges, but not those which are taken by a committee of three judges[22], which are only communicated to the parties. The number of inadmissibility decisions of a chamber, concerning property lost during the communist regime, can only be an indicator of the real number of this kind of inadmissible cases.

The applications are declared inadmissible by the Court for various reasons, according to the admissibility criteria which are laid down by Articles 34 and 35 of the Convention, as being introduced outside the **six months time limit** or without the previous **exhaustion**

[21] *Annual Report, 2009,* p. 144-145
[22] Articles 27 to 29 of the Convention.

of domestic remedies, or as being 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 entered into force**[23]. In those cases where the property was confiscated in the interval 1949-1989, that is, long before the date of the entry into force of the Convention with regard to all six States, **the Court is not competent** *ratione temporis* **to examine the circumstances of the expropriation** or the continuing effects produced by it up to the present date. In this 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'[24]. Moreover, in the Court's view 'possessions', within the meaning of the 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 must establish that it has a sufficient basis in national law**, for example where there is settled case-law of the domestic courts confirming it or where there is a final court judgment in the claimant's favour[25].

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 had lost their possessions before 1989 have a chance to win before the ECtHR.

This amounts to the paradoxical, but nevertheless real situation that if a post-communist country refuses to take any steps to address in law the issue of properties nationalized before 1989, the respective state is fully insulated against claims before ECtHR. Only once a country begins to pass national legislation on the matter can it become liable in international courts. However, it must be said that, in spite of this strong institutional incentive for non-action, most post-communist countries in CEE and SEE could not avoid passing some sort of legislation on property restitution, as a result of domestic political pressure. It is the difference in timing and quality among these bodies of national law that explain the wide variation in the number of claims (and, subsequently, successful claims) coming before ECtHR from each state.

3. MAIN LEGAL ISSUES UNDER THE CONVENTION

3.1. Overview

The judgments finding a violation of Article 1 of Protocol No. 1, in cases of property lost during the communist regime, are therefore related not to the very fact of the nationalisation or confiscation by the authoritarian power, but to the **actual failure of the States** to comply with their own legislation providing for compensation or restoration of property or with final judicial or administrative decisions restoring property or awarding compensation, rendered by domestic authorities in favour of the applicants, during the period following the ratification of the Convention.

These judgments often find, in addition to the violation of Article 1 of Protocol No. 1, a second violation of **Article 6** of the Convention (right to fair trial) regarding a number of particular issues, as for example, the **excessive delays** due to the lack of efficiency of compensatory legislation and proceedings, the breach of the **access to court** requirement because of the lack of enforcement of final judicial or administrative

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

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

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

decisions ordering restitution of lost property or the breach of the **principle of legal certainty** because of the quashing of final judicial decisions ordering restitution of property.

When comparing the judgments rendered by the Court in cases involving each of the countries, some **common patterns** emerge for all (or only a subgroup), in addition to a relatively less important set of specific features for each country. With regard to those countries that have a significant number of judgments, a leading judgment can be identified. These are normally followed by dozens of similar judgments, which address the same legal issue and give place **to well-established case-law**.

The **main issues** under the Convention are the non-enforcement of final judicial decisions; the quashing of final judicial decision and failure by the courts to respect the final character of judgments; the failure of the domestic authorities to provide compensation to which the applicants were entitled under domestic law; deprivations of property in the context of special protected tenancy and access to court in order to ask for restitution of confiscated property.

3.2. Access to court in order to ask for restitution of confiscated property

Outside the scope of Article 1 of Protocol No. 1, but within the sphere of the legal protection of the property lost before 1989, the ECtHR addressed also the issue of the lack of access to court for those persons who wanted to ask for restitution of confiscated property, because of high court fees[26] or other legal obstacles[27].

3.3. ECtHR finding of a 'widespread problem affecting large numbers of people'

Facing a large number of similar applications, the Court found with respect to Romania and Albania that the violation of the applicants' rights guaranteed by Article 1 of Protocol No. 1 in the context of restitution/compensation for confiscated property[28], originated in a widespread problem affecting large numbers of people, namely the unjustified hindrance of their right to the peaceful enjoyment of their property. The Court found that 'there are already dozens of identical applications before the Court. The escalating number of applications is an aggravating factor as regards the State's responsibility under the Convention and is also a threat for the future effectiveness of the system put in place by the Convention, given that in the Court's view, the legal vacuums detected in the applicants' particular case may subsequently give rise to other numerous well-founded applications. (…)'[29]. General measures were required under Article 46 of the Convention, in order for those countries to be able to redress the systemic problem[30].

Consequently, the low number of judgments rendered to date against some States is not at all an indicator for the actual magnitude of the problems (especially with regard to Albania) related to confiscated property, which is far more significant. Moreover, given the finding of the Court in respect of the 'deficiency in the procedural system', other similar applications may be potentially successful.

[26] *Weissman v. Romania,* judgment of 24 May 2006 (application no. 63945/00) and *Iorga v. Romania,* judgment of 25 January 2007, (application no. *4227/02*).
[27] *Lupaş v. Romania,* judgment of 14 December 2006 (applications nos. 1434/02, 35370/02 and 1385/03) published in *ECtHR Reports* 2006-XV (extracts) and *Faimblat v. Romania* judgment of 13 January 2009 (application no. 23066/02).

[28] Article 46 of the Convention was also applied in respect to Bosnia and Herzegovina (see the cases *Čolić and 14 others v. Bosnia and Hertzegovina,* judgment of 10 November 2009, but outside the context of immovable property lost during former regime.
[29] The case *Ramadhi and Others v. Albania*, cited above.
[30] 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).

3.4. Non-enforcement of final judicial decisions and deprivation of property in the context of special protected tenancy

In view of the number of relevant judgments and the extent of this problem among the majority of the six States, the most important issue in this area is the non-enforcement of final judicial decisions ordering the restitution of immovable goods (plots of lands, buildings, apartments) or awarding compensation for lost property (*e.g.* certain amount of money or equivalent goods)

The Court, in its well-established case-law, has examined the non-enforcement of a decision recognising title to property, as interference within the peaceful enjoyment of property[31]. The ECtHR concluded several times, in respect of Albania, that Article 1 of Protocol No. 1 had been violated because of the failure to enforce final judicial decisions concerning the applicants' right to compensation for plots of land which had been nationalised under the communist regime[32]; pleading lack of funds, as the government had done, did not justify the situation[33].

In similar judgments against Bulgaria, the Court had to deal with failure to enforce final court decisions awarding compensation[34] or ordering the restitution of houses, which had been expropriated during the communist regime, (in one case the house was converted into a museum and classified as a national historic monument, before the Bulgarian National Assembly voted, in June 1994, a moratorium on the laws concerning the restitution of properties with historical monument classification, which prevented the applicants from obtaining restitution of their property[35]) or plots of land[36].

The Court had to deal with the same issue, with regard to Romania, concerning failure to enforce or delays in enforcing, by the administrative authorities, final judicial decisions ordering the restitution of property (plots of land, buildings or apartments) lost during the communist period. The leading case *Sabin Popescu* (judgment of 2 March 2004) was followed by more than fifty other similar judgments.

With respect to the non-execution of judgments ordering not the restitution as such, but that the administrative body (*e.g.* Land Commission, in Albania) take a decision regarding the applicants' claims[37] on land appearing to have belonged to their parent and confiscated during the communist period, the ECtHR found a violation of Article 6 §1 of the Convention. However the Court rejected the claim under Article 1 of Protocol No. 1 as incompatible *ratione materiae* with the provisions of the Convention recalling 'that there is a difference between a mere hope of restitution, however understandable that hope may be, and a legitimate expectation, which must be of a nature more concrete than a mere hope and be based on a legal provision or a legal act such as a judicial decision (…)'. The Court concluded that 'in the context of their restitution claim, the applicants had no 'possessions' within the meaning of the first sentence of Article 1 of Protocol No. 1', so that the guarantees of that provision do not therefore apply to the present case.

The Court examined a particular situation of non-enforcement of final judicial decisions with regard to Bosnia-Herzegovina. The judicial decisions in question ordered private banks to release 'old savings', namely the foreign currency savings deposited prior to

[31] see *Burdov v. Russia*, no. 59498/00, ECHR 2002-III, *Jasiūnienė v. Lithuania*, judgment of 6 March 2003 (application no. 41510/98).
[32] ***Ramadhi and 5 others v. Albania,* judgment of 13 November 2007** (application no. 38222/02); *Hamzaraj v. Albania (no. 1)*, judgment of 3 February 2009 (application no. 45264/04); *Nuri v. Albania*, judgment of 3 February 2009 (application no. 12306/04); *Vrioni and Others v. Albania and Italy*, judgment of 29 September 2009 (application no. 35720/04 and other joint applications).
[33] *Beshiri and others v. Albania,* judgment of 22 August 2006 (application no. 7352/03).
[34] *Zaharievi v. Bulgaria*, judgment of 2 July 2009 (application no. 22627/03).
[35] *Debelianovi v. Bulgaria,* judgment of 29 March 2007, (application no. 61951/00).
[36] *Mutishev and others v. Bulgaria,* judgment of 3 December 2009 (application no. 18967/03)
[37] *Gjonbocari and others v. Albania* (judgment of 23 October 2007 (applocation no. 10508/02).

dissolution of the Socialist Federative Republic of Yugoslavia[38]. Although it is questionable to equivalate such cases of property lost because of the fall of the former regime, with cases involving property lost during the communist regime, mention should be made of them.

Another violation of Article 1 of Protocol No. 1 found by the ECtHR originated in the special legislation protecting special tenancies or allowing tenants of nationalised houses to buy the apartments they were occupying despite the fact that the former owners had obtained the restitution of their houses by final court decisions.
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 21 July 2005)[39]. The ECtHR judgment was followed by more than one hundred similar judgments that concerned the sale by the state of apartments nationalised under the communist regime to third parties (tenants) without compensation to the legitimate owners, although the domestic courts declared, after 1994, that the acts of nationalisation had been illegal and ordered the restitution of the houses to their original owners.

The impossibility of obtaining eviction orders against former State tenants occupying applicants' flats was the other issue addressed by the ECtHR in this particular area. The Court concluded that the applicants' right to the peaceful enjoyment of their possessions had been violated in that, for a protracted period, they were prevented from controlling their property and from receiving rent, despite the fact that the Romanian courts had ordered the return of their apartments nationalised during the communist period[40]. Following the tenants' refusal to sign a new lease with them, the former owners applied for eviction orders. However, due to the initial failure to comply with the formalities laid down by Emergency Government Order No. 40/1999 on the protection of tenants and the fixing of rents for residential accommodation, the existing leases were extended for five years, preventing the applicants from receiving any rent. The Court considered that to penalize landlords who failed to comply with the formal conditions laid down in the emergency order, by imposing on them such a heavy obligation as that of keeping tenants in their property for five years without any realistic prospect of being paid any rent, had placed them under an individual and excessive burden such as to upset a fair balance between the competing interests.

The similar issue of non-enforcement of final eviction orders to enable repossession of the flat was also addressed by the ECtHR in a case against Serbia[41] concerning the violation of the applicant's right to the peaceful enjoyment of his possessions due to the authorities' failure to enforce a final eviction order issued by a Belgrade municipality in administrative proceedings in the context of a special 'protected tenancy regime'. The order provided for the applicant's repossession of his flat. Domestic courts have themselves held that the municipality was not only under a legal obligation to enforce the order at issue but also had sufficient funds and available flats to provide the protected tenant with adequate alternative accommodation. Lastly, the domestic courts noted that there were no legal means by which the applicant could have compelled the municipality to honour its own eviction order.

[38] *Jeličić v. Bosnia and Herzegovina*, judgment of 31 October 2006 (application no. 41183/02); *Pejaković and Others v. Bosnia and Herzegovina*, judgment of 18 December 2007 (applications nos. 337/04, 36022/04 and 45219/04).
[39] Application no. 57001/00.
[40] *Radovici and Stănescu,* judgment of 02 November 2006
[41] *Ilić v. Serbia,* judgment of 9 October 2007 (application no. 30132/04).

3.5. Quashing of final judicial decisions and failure by the courts to respect the final character of judgments

The quashing of final judicial decisions ordering the restitution of immovable goods (such as plots of lands, houses or apartments) or awarding compensation, which constituted *inter alia* a breach of Article 1 of Protocol No. 1, was an endemic problem for Romanian and Albanian legal systems[42] before relatively recent legislative changes.

The case *Brumărescu v. Romania,* (judgment of 28 October 1999) is the leading case out of nearly a hundred other similar judgments concerning the Supreme Court's quashing of final court decisions ordering restoration of confiscated property, following a supervisory review lodged by the Prosecutor General on the ground of Article 330 of the Code of Civil Procedure which allowed him to challenge final court decisions.

The Court had also to deal with similar Albanian cases[43] of the quashing of final decisions in favour of the applicants which concerned plots of land awarded by way of compensation for the nationalisation of the applicant's property before 1989, by the Supreme Court in supervisory review proceedings[44].

With regard to somewhat similar situations, the ECtHR addressed the failure by the Bulgarian courts to respect the final character of judgments ordering the restitution of certain plots of land to the applicants[45]. In subsequent proceedings brought by the local authority, the Supreme Court reconsidered the issues already determined by final judicial decision and found that the applicants were not legally entitled to the land in question and that the final decisions in their favour did not have *res judicata* effects for the administrative authorities, as this decision was given in proceedings which were administrative by their nature, with the participation of the restitution commission. The effect of those subsequent proceedings was to deprive the applicants of their possessions, in violation of the principle of legal certainty. Those cases are similar to Romanian and Albanian cases described before, the only difference being that the Romanian and Albanian legislation, unlike the Bulgarian law, provided for a special extraordinary appeal (supervisory review). But despite the fact that different means were employed, the same effect, consisting in a deprivation of property in violation of the principle of legal certainty, was achieved.

3.6. Failure of the domestic authorities to provide compensation to which the applicants were entitled under domestic law

Another important issue within the area of the right to property, related to compensation for the confiscated property provided by the law, concerns the failure of the authorities to provide compensation – or even to determine its nature or amount – to which the applicants were entitled under domestic law for the expropriation, during the communist regime, of properties which had belonged to them or their ancestors.

In Bulgarian cases, at the time of the expropriations the applicants were awarded compensation in the form of flats[46] which the authorities undertook to build but which had still not been finished or handed over to the applicants when the ECtHR delivered its judgments. The Court noted in particular that the uncertainty the applicants faced for many years was coupled with the 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.

[42] See, for example, *Ryabykh v. Russia,* judgment of 24 July 2003 (application no. 52854/99).
[43] *Driza v. Albania*, judgment of 13 November 2007 (application no. 33771/02).
[44] *Vrioni and Others v. Albania*, judgment of 24 March 2009 (application no. 2141/03).
[45] *Kehaya and others v. Bulgaria,* judgment on merits of 12 January 2006 (application no. 47797/99 and others linked to it).
[46] *Kirilova and others,* judgments on merits of 09 June 2005 (joined application no. 42908/98, 44038/98, 44816/98 and 7319/02).

In Croatia and Romania, the main problem was the continuing failure of the authorities to determine the final amount of the compensation and to pay it to the applicants entitled under domestic law for the expropriation of their properties decided before 1989. The ECtHR noted that most of the delays were caused by the successive postponements which, in the Court's view, reveal a deficiency in the procedural system[47]. The case also relates to the lack of an effective remedy under domestic law which would have enabled the applicants to obtain a decision determining the amount of their compensation. It consequently found also a violation of Article 13 of the Convention.

The case *Viaşu v. Romania* (judgment of 9 December 2008)[48] is the leading case of dozens of judgments concerning the failure of the Romanian authorities to determine the amount and to pay compensation for property lost during the communist regime. These cases concern the ineffectiveness of the proceedings provided for in the legislation on compensation, namely Laws Nos. 1/2000 and 10/2001 and their subsequent modifications, including Law No. 247/2005.

[47] The case *Vajagic v. Croatia* , judgment of 20 July 2006 (application no. 30431/03).
[48] Application no. 75951/01.

Chapter 2 - The potential role of the EU

This report presents an analysis of the property restitution process following the change of political regime in former socialist or communist countries. Unlike in the case of restitution of property after a regional conflict where extensive international legislation has been developed, in the field covered by the present study relevant international norms are mostly absent. This is due to the ideologically difficulties to promote at international level rules that would refer to political arrangements in various countries and regulate what should happen in the field of property rights once the political regime of a given country shifts from socialism/communism to democracy. Moreover, should such international rules be developed, the likelihood of socialist or communist countries signing and ratifying them is extremely low. Consequently, apart from the role of the ECHR to which the countries covered by this study are parties and of the ECtHR as accepted jurisdiction to apply the Convention (addressed in the previous chapter), the implications of the Treaty on the Functioning of the European Union must also be assessed.

Article 345 from the Treaty on the Functioning of the European Union (previously article 295 of TEC) reads: *"The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership"*. This article has been interpreted by the European Court of Justice in the case 182/83, Robert Fearon and Company Ltd v. The Irish Land Commission, judgment of 6 November 1984, [1984] ECR 3677. The issue there was related to the adoption by Ireland of a system of compulsory acquisition of land and was referred to the ECJ by the supreme court of Ireland for a preliminary ruling. The ECJ held that *"Although article 22[49] 2 of the Treaty does not call in question the Member States ' right to establish a system of compulsory acquisition by public bodies , such a system remains subject to the fundamental rule of non-discrimination which underlies the chapter of the Treaty relating to the right of establishment".* It follows that Member States may design their own systems provided that they comply with the non-discrimination rule[50]. It is however not clear to what extent this ruling will also cover the issue of property restitution for new Member States that have witnessed a significant change of political regime.

An in-depth analysis - which is also relevant for the present report - of the issue of fundamental freedoms and the implications of the property restitution process for the full enjoyment of these freedoms have also been analysed in the report on *LOT2: private properties issues following the regional conflict*[51]. The issue of fundamental rights and the changes introduced by Treaty of Lisbon which makes ECHR legally binding are also relevant, especially since the European Court of Justice will apply to acts of the Member States when they apply EU law[52]. A poor track record of compliance with ECtHR decisions is by no mean a commendable situation, neither for member states nor for candidate countries to the European Union, as it reflects on the country's capacity to respect and enforce human rights on its territory. While the ECtHR is, as we have seen in the previous chapter, not part of the European Union institutions, the importance of complying with its decisions has often been emphasised during the pre-accession process.

A possible role could be envisaged here also for the Fundamental Rights Agency. The EU has also a special agency, the Fundamental Rights Agency (FRA), competent to undertake researches and formulate opinions concerning the situation of human rights in

[49] Corresponding to art. 345 TFEU
[50] An extensive analysis of the ongoing debates as to the interpretation of article 345 TEU has been provided by the report on LOT2: private properties issues following the regional conflict, pages 25 to 28
[51] Report on LOT2: private properties issues following the regional conflict, pages 28 to 31
[52] Report on LOT2: private properties issues following the regional conflict, pages 31 to 39.

the EU[53]. The reports and opinions given by FRA are not legally binding, but they can offer valuable indicators about the scale of human rights problems in the EU.

The restitution of property in the region over the last twenty years has been one of the most far-reaching and complex social processes. It has been shaped by and has itself shaped politics. Issues of the balance between restorative justice and the general public good, issues of evaluation of the past and projections for the future, and indeed issues of political identity are all entangled in this process. Therefore, any overall judgment will be consequently partial and controversial. One thing is clear, however: the process of restitution, or lack of it, has determined the outlook of the region in a variety of important ways. The research showed a common set of issues that have had an impact on property restitution policy:

Belated adoption of property restitution policies: in some of the countries analysed the political decision in this respect has not yet been taken. Countries that dealt with this issue in the early '90s in a satisfactory manner proved that it is more efficient, including from an economic perspective, to address the issue sooner rather than later, avoiding complications that are partially generated by the passage of time. Continuous hesitations that prolong past injustices are in the end detrimental, as the clarification of the status of property is key to economic development and to respect of human rights. Often privatisation and property restitution are seen as two antagonistic movements, but in reality this is only an issue of timing. Only if privatisation is done before the property issues are settled does it generate conflicts. Otherwise property restitution can be an added value to the process of economic transformation which is the final goal of privatisation.

On the other hand, one could also speak here of a reverse causality: it may not be that certain deliberate decisions about property restitution in the early '90s created confusion and weakened the rule of law – but, on the contrary, those states with weaker institutions and poorer governance were also less likely to adopt a reasonable framework for property restitution. Why some post-communist states were "stronger" than others (in an institutional sense) and more able to implement consistent policies, is a long discussion in the literature of transitology. However, it is clear today that the inconsistent process of property restitution correlates with poor governance in other areas too, all having as common denominator a defective policy-making process and an ineffective public administration.

It was only later, in the second part of the transition (after 2000) and largely under the pressures of the EU pre-accession monitoring, that the quality of governance in these countries improved to some extent. The process of property restitution could not make exception from this general trend. However, in this area in particular the mistakes made in the early '90s created consequences which are hard to reverse today.

Unclear and unpredictable policy on property restitution: in the same vein, frequent changes in the policy on restitution were identified as a vulnerability of the system. Often the shifts in policies were dramatic and highly unpredictable, generating substantive changes in a process of property restitution which was under way. It followed that similar cases received sometimes completely different solutions, depending on the moment when they were initiated, forcing the beneficiaries of the respective decisions to look to the national justice system or to the ECtHR in an attempt to remedy administrative and legal discrimination.

[53] The FRA's duties are to collect, analyse and disseminate objective, reliable and comparable information related to the situation of fundamental rights in the EU; to develop comparability and reliability of data through new methods and standards; to carry out and / or promote research and studies in the fundamental rights field; to formulate and publish conclusions and opinions on specific topics, on its own initiative or at the request of the European Parliament, the Council or the Commission and to promote dialogue with civil society in order to raise public awareness of fundamental rights.
http://fra.europa.eu/fraWebsite/about_us/activities/tasks/tasks_en.htm

Weak institutional capacity of the entities that had to implement the restitution policy, apart from the general state of the public administration in a particular country. The general low administrative performance is extremely visible in this area in all states analyzed. Responsible institutions tend to be new and with a mandate limited in time, so having an air of provisory arrangement than may demotivate their personnel. They are often understaffed and lack real leadership: since the issue is marred by controversy, no top politician in the region has become famous or popular for being seen to push it. The institutional path that must be followed by the beneficiaries of restitution laws is cumbersome, bureaucratic and unclear. Support documents, such as cadastre registries and clear confiscation documents, are often missing or prove to be inaccurate (which, to some extent, is also a reflection of the state of development and the administrative discipline in the respective country *before* the Communist period). As a result of all these, real political determination is often lacking, sending a signal to the administration that delays are not going to be punished, while speeding up the process may create risks. Shifts between the political powers generate changes in the overall policy and legislation, which in turn modify the procedures while the process is ongoing, thus increasing the administrative burden on the competent authorities.

The same forest of issues apply to the justice system, more or less, with a significant impact on property restitution. Courts are overloaded and understaffed, trials are long and costly, and the final decision is often unpredictable due to the lack of unified jurisprudence of the judges. Given the importance of evidence gathering in these cases, the duration and cost of the trials is furthermore increased by the unavailability of reliable data and documents in the administration.

Conflicting rights on the same property. With the passing of the years, the legal situation of immovable property becomes more and more complicated, as what was initially confiscated by the state is later on used as a basis for land ownership or agrarian reforms and thus transferred by the state to new private owners. The same is true for commercial properties which are being sold or concessioned after the privatisation of former state-owned companies. Houses and apartments are often sold to the tenants that occupied them for many years (the price paid often being significantly less than the market price). State property is split by tier of governance – national, regional, municipal – and so additional players appear into the picture, which make the eventual court cases substantially more complex. Through all these decisions the governments create more obstacles to property restitution, increasing also the costs entailed by such a policy once adopted: irrespective of which party will be favoured – the initial owner or the new owner – compensation mechanisms must be envisaged for the other party.

In countries with a multilayered and autonomous polities – such as Bosnia and Herzegovina – a policy on property restitution proves to be even more difficult to design given the decision-making freedom of the constitutive entities. Problems might arise from divergent policies implemented at different levels. The same difficulties arise when the nationally designed policies are to be implemented primarily by local and regional administration – which at some point becomes de facto owner of the property to be given back. Here there is a natural tendency to delay the process so that the administration does not lose its assets.

Ineffective compensation systems. In countries where compensation for nationalised property is awarded to initial owners (or the new owners when conflicting rights exist, depending on the policy choice as to who will get the assets and who will be compensated) it is mainly given in "shares" or "bonds". The case of Romania is illustrative: the *Proprietatea Fund* is still not listed on the stock exchange many years after its establishment, and as a result the shareholders are forced to trade their shares on the non-regulated market at a price equal to one third of the nominal value. In Bulgaria, the people that received securities could only use them to buy economically unattractive state-owned companies.

The countries under scrutiny differ insofar as their status vis-à-vis the European Union is concerned: Romania and Bulgaria are already members, Croatia is a candidate country, while the other three countries, Albania, Bosnia and Herzegovina and Serbia, are potential candidates. In this respect it follows that the European Union has at present different leverage and different mechanisms to influence the process of property restitution in each of them. The issue of property restitution has been always addressed in country reports of the European Commission from the perspective of human rights; concrete examples of country reports are given in each of the case-studies presented in Part two of the present report.

Generally speaking, the leverage of the EU on national policy is stronger in the years before a milestone is reached: either as a condition to be fulfilled before the country can start accession negotiations; or during this process, as a benchmark to be monitored before negotiations can be concluded. However, the peculiarities of property restitution – it is a particularly sensitive national issue in every country, very political in nature, grounded in moral and historical judgements, with a huge amount of resources at stake – and the fact that it exceeds the explicit mandate of the EU, limits somehow the Union to the role of guardian of procedures, rather than reviewer of substance on the national decisions adopted. On the other hand, a reasonable and timely solution to the problem of property in every post-communist state willing to join the EU is crucial, one way or another, as a building block of the rule of law, which is a membership prerequisite. This is the dilemma confronting the EU institutions: encourage a fair policy on restitution, but only using indirect instruments for this goal.

The European Union should continue to use its traditional monitoring mechanisms and conditionality systems to assess the extent to which countries have implemented policies to address the issue of property restitution. In this process the EU should not limit its assessment to the review of legislation, but should also request concrete action plans with clear benchmarks, budgetary allocations and responsible institutions, once the national governments adopted a law. In other words, the Union cannot impose a solution on East-European societies, but once such a solution is agreed by the legitimate authorities of the particular country, it can request that the government and the administration do not undermine the policy through implementation flaws.

This would be a good strategy aware of a well-known phenomenon: it is often easier for the national voters and the public to make the government embrace the broad principles of a policy, and even to adopt a law, but much more difficult to monitor their bureaucratic implementation. External monitoring on the administrative performance in this field, as well as the performance and fairness of other structures, such as the judiciary, which play a role in the process of property restitution, may be an important contribution to an increased level of accountability in the candidate / prospective candidate country, and thus a tool to improve the quality of governance.

On the particular case of property restitution, the solutions do not come without significant costs (which in any case would be lower if restitution in kind would be the solution adopted by the countries). In this context the EU may explore together with the countries concerned a mechanism for financing such costs in a manner which is both practical and morally acceptable. Various arrangements may be considered, from linking restitution with the privatization process, to mutual funds, selling of state assets, special purpose loans, etc. Due consideration must also be given to the implications for the national budgetary deficit likely to be impacted.

Part Two - Analysis of the property restitution process and the legal framework

Chapter 1 - Albania

1. OVERVIEW

As indicated in previous briefings of the European Parliament[54] the legal framework on property restitution in Albania did not bring the desired results. Various laws on restitution or compensation for different types of property have been adopted in Albania since the early '90s. However, it was only through the 1998 Constitution that the right to own private property was formally recognized. The latest law on restitution, issued in 2004, which specifically targets compensation for expropriations carried out after 1944, made the restitution process even more confused. Only the restitution of immovable property is addressed. Moreover, the financial burden that the amount of compensation to former owners would place on the state has never been estimated. Lacking an estimation of how much should be returned and how exactly it should be done, the Albanian government has been found unprepared in the face of an increasing number of non-favourable ECtHR rulings. Currently, 219 claims from former owners are awaiting the ruling of the ECtHR. On the other hand, estimating the value of compensation is very difficult, since there are no complete records of former property titles.

The current law on restitution allows for restitution in kind or compensation in cash at the property's market price. The methodology for establishing the value of compensation has been approved by the National Property Restitution and Compensation Agency. Highly criticized by international organisations, the methodology sets the value of compensation according to the return that the property was expected to have brought when it was not in the possession of its rightful owners. A limit of 100ha was set for restitution of agricultural land. For other types of property, no such limits exist. However, if the property is currently used in the public interest or if it has been already privatized then its restitution to former owners is prohibited and compensation is provided. The total value of approved compensation from 2005 to 2009 amounted to almost 20 million Euros. Legal provisions on restitution in kind do not exist; therefore, no such restitutions have been made. The deadline for submission of claims on restitution of expropriated property, accompanied by supporting evidence, was at the end of 2008. So far, 51,000 decisions have been issued, out of which 10,000 are still waiting to be solved.

The restitution process is managed through central and regional agencies. In Albania there are currently 12 Regional Restitution Agencies, coordinated by the Property Restitution and Compensation Agency. Regional offices are in charge of collecting the claims and issuing a first resolution. The first decision can be appealed to the national agency. Up to October 2009, 950 such appeals had been filed. If the National Agency rejects the appeal, a judicial procedure can be initiated. In 2008, almost 16% of civil law suits were related to property restitution.

The 1998 Albanian Constitution recognizes the right to private property as a fundamental human right. One of its articles refers to the need to adapt and continue improving previous legislation on property seized through expropriations and confiscations carried out before the adoption of the new Constitution. This urged readdressing the issue of unjust seizure of private property during the communist regime. Moreover, the Constitution stresses the need for national legislation to comply with international

[54] Frangakis, N.; Salamun, M. and Gemi, E., *Property Restitution in Albania*, Briefing Paper, Brussels, 2008. http://www.europarl.europa.eu/activities/committees/studies/download.do?language=fr&file=22483#search=%20restitution%20

agreements ratified by the Albanian government on the matter[55]. Thus, international law on human rights takes precedence over national legislation.

The restitution process in Albania was constantly pushed up on the public agenda by local missions of international organisations. From 2003 to 2009, all the Progress Reports of the European Commission Delegation strongly criticized the lack of compliance with the constitutional provisions regarding the restitution of private property[56] while the cooperation of the government with the OSCE mission in Albania for the development of an efficient restitution methodology received positive remarks. On the other hand, the progress reports urged the government to evaluate the situation of public land to be restituted as well as to estimate the budget which should be made available for compensation in cash for seized property[57]. Even though the adoption of the restitution law was welcomed, its implementation received heavy criticism. The 2005 progress report of the EC Delegation warned of the lack of compliance with the established timetable for restitution of property[58]. One of the biggest problems related to the development of the restitution methodology was the lack of proper registration of immovable property before its seizure[59]. The 2006 report acknowledged breaches in regulations regarding property rights to be key factors in the emergence of social conflicts[60]. Another serious issue related to the property restitution process was the high uncertainty of judicial rulings on property rights claims[61].

These issues are encountered in other countries that faced extensive confiscation of property. However, disentangling them in the Albanian case has its specificities. One of them was the adoption of the "legalisation law" at the beginning of the '90s. According to this law, informal inhabitants of public land became owners of the occupied land[62].

The EU Commission criticised also the lack of legal provisions regarding the restitution of property that belonged to religious communities, despite repeated requests to the Albanian government to take a stance on the matter[63]. The 2007 report qualified the restitution process as generally slow. However, the transparency of the institutions in

[55] Thus, international treaties are qualified as directly executable before domestic courts. It further considers the international conventions ratified by law to be part of the national legislation in force all over the territory of the country. It specifically considers that such agreements are directly applicable (if this is possible) and in cases of conflict with the local law, they have priority. Thus, the legal status of any international law ratified is that of the national law. Consequently, the provisions of these treaties have the same effect as domestic law, and may be invoked by individuals in the same way. See art. 122 of the Constitution, which provides that:

1. Any ratified international agreement constitutes part of the internal legal system after it is published in the Official Journal of the Republic of Albania. It is directly applicable, except when it is not self-executing and its application requires the adoption of a law. The amendment and repeal of laws approved by a majority of all members of the Assembly is done by the same majority for the purposes of the ratification of an international agreement.
2. An international agreement ratified by law has priority over the laws of the country that are incompatible with it. The norms issued by an international organisation have priority, in case of conflict, over the law of the country when the direct application of the norms issued by the organisation is expressly contemplated in the agreement ratified by the Republic of Albania for participation therein.

[56] 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

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

[58] European Commission, *Albania 2005 Progress report,* Brussels, COM (2005) 561 final, 09.11.2005 http://ec.europa.eu/enlargement/archives/pdf/key_documents/2005/package/sec_1421_final_progress_report_al_en.pdf

[59] *Ibid*.

[60] 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

[61] *Ibid*., pg. 14.

[62] The law that would formalize the informal properties occupied illegally by people in the country.

[63] Religious communities filed their requests for recognition, restitution and/or restitution of their properties unjustly taken by the communist regime. However, their requests had not been addressed properly and fully.

charge of the restitution process is thought to have increased to some extent. The approval of the strategy on property issues was considered a positive development[64].

The 2008 EC Progress Report highlighted that, despite the problems created by the lack of property registration and the legalisation of informal use of land[65], Albania had registered some advance in the restitution process and the enforcement of laws regarding respect for property rights[66]. In the same year, a report[67] issued by the European Parliament on the property restitution process in Albania discussed thoroughly the problems created by the disruptive legal framework and the inefficient institutional setup for the management of property issues after 1990. Its conclusions and recommendations were in line with those of the EC 2009 progress report, according to which Albania showed little progress on issues related to property rights in general. Moreover, the report urged the adoption of a comprehensive working plan in order to improve the situation regarding property rights. Several problems stood out in relation to private property issues[68], such as:

- the lack of transparency and accuracy in legal provisions on property rights, which has favoured the development of corrupt practices across the sector;
- the large proportion of all claims brought to the People's Advocate which concern potential breaches of property rights;
- the lack of progress regarding the restitution of religious communities' property;
- the delay in the completion of immovable property records;
- the lack of an inventory of public land to be used in the restitution process;
- the lack of transparency and the inefficiency of the land legalisation process, despite assigning an increasing number of personnel to work on it;
- the inefficient results of the agency for the control of property titles, whose activity led to delays in transactions on the real estate market;
- the lack of development of a stable real estate market, due to private property rights issues.

The EU is a major stakeholder in the development of the national property rights policy. The Albania – EU Stabilisation and Association Agreement, which entered into effect in April 2009, strengthened even further the role played by the EC Delegation in future developments on property rights issues in Albania. With a view to future EU integration, the reports issued by the EC Commission are highly regarded by national policymakers. Furthermore, among other issues, they provide a check-list of requirements to be fulfilled in respect to property rights regulations. Hence, Progress Reports are reference tools for the elaboration of national policies.

The OSCE mission in Albania is another important player in the development of national policies on property restitution. The representatives of the OSCE in Albania have constantly been offering advice and support on property rights reform. In 2007 the OSCE helped the Agency for Property Restitution and Compensation to create and manage a database containing all the submitted restitution and compensation claims on immovable property. However, this database is not currently an efficient tool for the administration of claims on property restitution[69]. Currently, the efforts of the OSCE are directed towards property registration, rather than the restitution process itself[70]. Even though

[64] European Commission, *Albania 2007 Progress report*, Brussels, COM(2007) 663, 6.11.2007, pg. 15, http://ec.europa.eu/enlargement/pdf/key_documents/2007/nov/albania_progress_reports_en.pdf
[65] *Ibid*. Pg. 14
[66] *Ibid*.
[67] Frangakis, N.; Salamun, M., Gemi, E., op. cit.
[68] European Commission, *Albania 2009 Progress report,* Brussels, COM(2009) 533 final, 14.10.2009, pg. 12-35 http://ec.europa.eu/enlargement/pdf/key_documents/2009/al_rapport_2009_en.pdf
[69] OSCE Presence in Albania, Press release, Tirana, 27 June 2007, http://www.osce.org/item/25342.html
[70] It has elaborated a project in 2008 aiming at the implementation of an immovable property registration project along the country's largely undeveloped Ionian Sea coast. The project aims to include more than 70,000 properties in the registration process. See OSCE Presence in Albania, "Property reform", http://www.osce.org/albania/18643.html

the OSCE continues to be an important player in property related issues, its position has been significantly reduced in recent years. The reports made by the OSCE mission in Albania to the organisation's Permanent Council include the assessment of progress of reforms on property rights restitution. The latest report, issued in October 2009, urged the government to provide strong guarantees on private property ownership, investments and lending[71]. Such reports provide incentives for Albania to make further advancements in property rights reform.

2. HISTORICAL BACKGROUND OF THE EXPROPRIATION PROCESS

The history of property nationalisation through unjust confiscations and sequestrations, among other methods, overlapped with the withdrawal of the German army from Albanian territories, on November 29th 1944. Immediately after the end of the Second World War, there were four forms of property seizure: (1) massively against the so-called 'bejlere'; (2) through judicial rulings; (3) through Law no. 37, of January 1945, on the extraordinary tax on war benefits; and (4) through Law no. 108, of August 1945, on Agrarian reform[72].

Official data on the amount of land confiscated, sequestrated or nationalised does not exist. However, "Property with Justice", the former owners' association, provides some data on the amount of land seized in 1945[73].

Table 4. Land ownership, 1945

Land-owner class	14450ha	or	3.67%
Rich proprietors	87970ha	or	22.37%
Middel and small proprietors	237668ha	or	60.44%
God-fearing Agency	3163ha	or	0.80%
State-owned property	50000ha	or	12.71%
Total	**393251ha**	**or**	**100%**

Table 5. Distribution of land lots by size within the total amount of nationalised land in 1945

Size of land lot	Total amount	Percentage of total nationalised land
0.00 to 0,50 ha	10707 ha	2,7%
0,51 to 1,00 ha	20072 ha	5,1%
1,01 to 3,00 ha	101995 ha	25,9%
3,01 to 5,00 ha	70417 ha	17,9%
5,01 to 10,00 ha	84775 ha	21,5%
over 10,01 ha	105687 ha	26,9%

The 1950 Constitution of the Popular Republic of Albania set the grounds for the regulation on the management of common property. However, the new Constitution kept the concept of private possessions (see article 11).

[71] OSCE Presence in Albania, *Report by the Head of the OSCE Presence in Albania to the OSCE Permanent Council,* 22 October 2009, http://www.osce.org/documents/pia/2009/10/40893_en.pdf

[72] For further explanations see H. Vukaj (Current deputy General Director of the Agency for Restitution and Compensation for Properties): "The key of the government towards integration – the legal solution of the property related problems", paper presented in the National Scientific Conference "Challenges of the Albanian Society in the process of the European integration", organised by the University of Tirana and Shkodra "Luigj Gurakuqi" University, Tirana, 24.07.2009.

[73] Source: Association of ex-owners "Property with Justice"

Decree no. 4494[74], consequently amended through the law on expropriation and temporary usage of property[75] provided for the expropriation of the immovable property of specific persons in the public interest, for the benefit of the state, cooperatives and social associations. Art 3 foresaw compensation for each expropriation made[76]. These guarantees were revoked by Articles 16 to 19 of the Constitution of the Socialist Popular Republic of Albania. The aforementioned articles declared that private property does not exist and turned the state into the rightful owner of the seized land[77].

3. THE RESTITUTION/COMPENSATION PROCESS

3.1 Legal framework: privatization versus restitution

The policy discourse regarding property rights changed shortly after 1990. The new constitutional rules[78] acknowledged that the right to own private property is a fundamental human right.

Subsequent regulations strengthened the legal basis that would ensure the full enjoyment of private property. Law 7512/1991, on sanctioning and protecting private property, free initiative, *independent economic activity and privatisation*[79] allowed for distribution of the common public property that was owned by the state to Albanian citizens. This law allowed for the land on which the buildings were constructed to be transferred to citizens in return for (small) payment[80]. Later on, in 1992, upon the adoption of a second law, state-owned apartment buildings were sold to tenants, who also gained co-ownership rights over the land on which the apartment building was erected[81].

State-owned property in rural areas was distributed in the same manner. In 1991, the Law on Land[82] allowed for the distribution of agricultural land to families who were currently living in the village or had been living there up to the end of August 1991. All legal and natural persons (Art. 3 Law on Land), families that had been living in the village for a long time and newcomers who had resettled there after 1945 were equally eligible to receive land[83]. As opposed to the law on independent economic activity and privatisation, the Law on Land did not allow for the property to be leased.

None of these laws addressed the issue of former owners. None of the laws of 1991 and 1992 took into account possible claims coming from former owners for restitution of the property that had been unjustly taken away. Thus, it can be said that initially, the Albanian state distributed immovable property to its citizens without taking into consideration the fact that the property could have been unjustly confiscated by the

[74] Decree no. 4494. dated 31.03.1969
[75] Law no. 4626, dated 24.12.1969, published in the "Përmbledhës i Përgjithshëm i Legjislacionit në Fuqi të Republikës Popullore Socialiste të Shqipërisë, 1945-1985" Volume 1, Publication of the Juridical Bureau of the Council of Ministers apparatus, Tirana 1986, pg. 255.
[76] Decree no. 4494/1969 served as a legal basis for expropriations until 1994 when a law was approved on the same issue. Law No.7848 dated 25.7.1994 'On Expropriations in the public interest and acquisitions of immovable properties for temporary users " repealed the Decree.
[77] Law no. 5506, dated 28.12.1976, published in the "Përmbledhës i Përgjithshëm i Legjislacionit në Fuqi të Republikës Popullore Socialiste të Shqipërisë, 1945-1985" Volume 1, Publication of the Juridical Bureau of the Council of Ministers apparatus, Tirana 1986, pg. 9.
[78] Law No. 7491 of 29.4.1991 on the major constitutional provisions, amended. Art. 11; art. 27.
[79] Law No. 7512/1991 on the regulation and the protection of private property, free initiative, private and independent economic activity and privatisation, as amended.
[80] Ibid., Art. 21, paragraph 1
[81] Law No. 7652/1992 on the privatisation of state-owned flats, Art.. 1; Art. 5.
[82] Law No. 7501/1991 on land, published in Official Journal no 5, as amended (and later Law No. 8053 of 21.12.1995 on granting ownership of agricultural land without compensation; a draft amendment of 28.1.2008 provides for the compensation with other land of users of land within urban and tourist zones given to them before February 1996 and for which they have documents of use. See at http://www.keshilliministrave.gov.at).
[83] Frangakis, N.; Salamun, M., Gemi, E., op. cit.

previous regime. These reforms made the restitution problem even more complex. The 1998 Constitution acknowledged and tried to address some of these issues.

3.2 First attempts for restitution

The 1976 Constitution, which had passed all property into state ownership, was amended. Articles 10 and 11 of the 1991 Constitution stated that private property can be owned by natural and legal persons alike, and they have equal rights to enjoy property.

Within this legal framework Law No. 7501, of July 1991, on land[84] was adopted. This law divided the agricultural land among the citizens whose residence was in the villages or areas considered agricultural. According to the law the land was divided on the basis of the family members equally[85]. Law no. 7698, of 1993, on restitution and compensation to ex-owners was approved. This law allowed for the restitution of urban property to former owners whose property was taken after November 1944. Thus, only the land that was within the yellow line, the line that divides the urban from agricultural land, could be given back or compensated. Moreover, the law explicitly addressed the restitution of the property that was unjustly confiscated or expropriated after November, 1944.

Initially, the property that had been seized on the grounds of Law 37 of 1945, on extraordinary tax, was not subject to the restitution law of 1993. An amendment of 1995 extended the meaning of "former owners" to include those whose properties had been seized based on Law 37. The Constitutional Court decided the extension was not constitutional arguing that the property confiscated under Law 37/1945 was confiscated for fiscal purposes and not in an unjust manner[86].

The legal approach to restitution faced severe criticism, which was reflected in subsequent legislative acts. Article 181 of the 1998 Constitution gave a two to three years deadline for the identification of a solution for the unjust effects of the previously adopted legislation on property restitution[87]. Three years after the deadline had passed, in 2004, Law 9235/2004, *on restitution and compensation of property*, was adopted.

The development of the legal framework did not make the restitution problem easier to solve. The estimation of the financial burden that the compensation process would place on the state budget was never made. The Albanian Constitution states that any bill must be accompanied by the financial costs of its implementation. However, no such evaluation was annexed to the restitution law in 2004, nor has been conducted in any way since then[88].

3.3. Current framework for restitution/compensation

A report commissioned by the EP in 2008 presented a detailed account of the current provisions on restitution89. Even though since its adoption it has been amended several times, the 2004 law on restitution is still the only law in Albania the object of which is restitution of property which had been confiscated after the 2nd World War. The current law provides that expropriated subjects (the ex-owners) are the natural or legal persons, or their heirs, whose property had been nationalised, expropriated, confiscated or taken in any other unjust manner by the state90.

The law stipulates the restitution of immovable property, where possible, or compensation at market price. However, there are some limits on the extent to which a property can return to the ownership of its former owner. First of all, only property expropriated after November 29th, 1944 or that was obtained after 1939 and expropriated based on Law 37/1945 *on extraordinary tax for war profits,* can be

[84] Law No. 7501/1991, published in Official Journal no 5, pg. 246.
[85] A similar process began in the urban areas as well, where the apartments and state enterprises were privatized and voucher bills were distributed among citizens.
[86] Decision of the Constitutional Court no 16, dated 17.4.2000.
[87] Frangakis, N.; Salamun, M., Gemi, E., op. cit.
[88] Art. 82 of the Constitution.
[89] Frangakis, N.; Salamun, M., Gemi, E., op. cit..
[90] Ibidem, p. 18

returned. Second, property that has been privatised through previous laws, and property that is used in the public interest cannot be returned. Third, if the owner had not already received agricultural land through the legalisation law, he/ she could recover up to 100ha, independently of the amount of land that was previously confiscated. If the owner benefited already from the legalisation law, the amount of land received would be taken into consideration in the restitution process. Building sites which had been already privatized were returned to owners if they had not already been legally used for construction, while current owners are compensated at market prices. If investments have been made, then different rules apply depending on whether their value is higher or lower than 150% of the building site's value.

As mentioned earlier, restitution of the actual property has rarely been the case, since the procedures are not yet in place. In fact, upon restitution of property rights to former owners, the law provides for restitution in kind, with property of comparable value and utility. The second option is compensation, which can be made in shares in companies with State capital, or money[91].

The value of compensation is set at the market price. The law grants the same rights to religious communities as it does to natural and other legal persons.

Article 5 of the 2004 law provides that the regulation of restitution of movable property should be dealt with in a subsequent law, which has not yet been approved.

The property restitution legislation which is currently in force provided for the establishment of the State Committee on Property Restitution and Compensation, which was composed of politically nominated members of both majority and opposition parties, as well as the President's office. The composition had to finally be approved and appointed by the Albanian Assembly. Commissions composed by the same rules were also foreseen at regional level[92]. However, their structure was seen as an obstacle to the efficiency of the restitution process. Thus, in 2006, an amendment to the law provided for the replacement of the commissions with individual administrative institutions, namely the Property Restitution and Compensation Agency and its regional offices. Twelve such regional offices were in place[93] up to January 2010, when a new amendment to the law abolished[94] them. As from February 2010 only the central agency deals with the property restitution and compensation process. The Ministry of Justice and the institutions of the Prime Minister are in charge of the control and management of this agency, including the appointment of its leader.

The organisation of the national agency is regulated by Decision 566/2006 of the Council of Ministers, *on the organisation and functioning of the Property Restitution and Compensation Agency*[95]. Each regional agency has five to eleven employees[96] who are now going to be transferred to the national agency in Tirana[97]. However, the restructuring process still has a long way to go. The draft regulations for the central agency need to take into account a detailed consideration of the number of claims seeking a resolution, as well as the property restitution deadline which has been set for the end of 2011[98].

[91] Idem.
[92] Law 9235/2004, on restitution and compensation of property, Chapter IV.
[93] See http://www.akkp.gov.al/
[94] Law No. 10.207, dated 23.12.2009, "On some changes in Law no. 9235/2004 on restitution and compensation for property" , amended, published in official journal 194, December 2009, dated 20.1.2010. (according to the law, it came into force 15 days after publication, i.e. on the 5th February 2010)
[95] A new sub-legal act is expected to be approved so that the new rights and duties of the Agency will also be detailed. Art. 2 of Law No. 10207/2010 requires that the Council of Ministers shall approve the rules according to which the Agency will function.
[96] *See* http://www.akkp.gov.al/struktura.html
[97] However, a clear structure of the Agency is expected to be approved soon by the Council of Ministers.
[98] Law 10207/2010, Art. 7.

3.4 Land market value

The 2004 restitution law approved a fair compensation at market value of the property which had been expropriated, which would assume a considerable budgetary effort. However, an estimation of its size has not yet been made. The OSCE mission in Albania attempted to estimate the monetary value of compensations for agricultural land, if restitutions in kind could not be made. The OSCE estimation indicated the value of compensation to be between US $ 26,000- $103,000 / ha[99]. Article 13 of the law in effect leaves the choice of methodology for the estimation of land value to the Property Restitution and Compensation Agency, who need to seek approval by the Assembly[100]. The OSCE and the World Bank were highly critical of the methodology used for compensation for agricultural land, which is based on the potential earnings from agricultural production[101].

The methodology requires the elaboration of a land value map based on the estimated value of land. Compensation would be made according to the map. Since 2006 such maps have been finalized for Tirana and Kavaja[102]. In Tirana, for example, the map set the value of land at somewhere between 131 Euro and 550 Euro per square meter[103]. Based on the figure given by the Property through Justice Association, in Tirana alone compensation should be given for at least 22,000 m^2, which would raise the costs to over 70 mil Euro.

Initially, the value of land was set through regional decisions[104], which all were subsequently replaced by Decision 1620/2008[105]. According to this decision, the price for building sites in all the regions cannot be less than 1,5 Euro/m^2, and up to 12,900 Euro/m^2 in the centre of Tirana[106].

3.5. Limitations to the restitution/compensation and forms of compensation

The 2004 law provides for unlimited restitution of urban properties and a maximum of 100 ha restitution of agricultural land, out of which is deducted the amount of land received under Law 7051/1999, *on land*. The valuation of the value of land already

[99] OSCE Presence in Albania, *Commentary on the draft law "On Recognition, Restitution and Compensation of Property",* presented to the Assembly of the Republic of Albania by OSCE led Technical Expert Group on 27 October 2003. *See* http://www.osce.org/documents/pia/2003/11/1434_en.pdf

[100] Decision of the Assembly of the Republic of Albania No. 183, dated 28.04.2005. On the approval of the methodology on the valuation of immovable property that will be compensated and of the methodology to be used for compensation. Official Journal 33/2005, pg. 1219; published on 18.05.2005.

[101] Aivar Tomson, *Assessment of mass valuation methodology for compensation in land reform process in Albania, Agricultural Services Project*, ASP-LVE, OSCE Presence in Albania and World Bank, September 2005-March 2006.

[102] Decision of the Council of Ministers No. 816, dated 20.12.2006, for the approval of the prices for building sites, defined on the relevant map, for Tirana city and Kavaja district. Published in the Official Journal no. 143, dated 30.122006, pg. 5637.

[103] Ibidem.

[104] Such decisions are:

- Decision 653, dated 29.9.2007, For the approval of the prices for building sites as determined on the relevant maps, for the regions of Lezha, Dibra, Korca and Kukes,
- Decision 555, dated 29.8.2007, For the approval of the prices for building sites as determined on the relevant maps, for the regions of Berat, Gjiroksastara, Vlora, Dibra, and the cities, Bulqiza, Burrels, Klos and Vlora.
- Decision Nr.139, dated 13.2.2008 For the approval of the prices for building cites as determined on the relevant maps, for the regions of Fieri, Elbasan, Tirana, Vlora, Durres and Shkodra, regions. Published in the Official Journal no. 25, dated 25.02.2008, pg. 901. *See* http://www.qpz.gov.al/doc.jsp?doc=docs/Vendim Nr 139 Datë 13-02-2008.htm

[105] Decision 1620/2008, published in the Official Journal no. 196, dated 07.01.2009 pg. 10701 *See* http://www.qpz.gov.al/botime/fletore_zyrtare/2008/PDF-2008/196-2008.pdf

[106] Decision 1620/2008, Annex.

received is also made at market price[107]. Return of the property takes precedence over compensation in money.

As mentioned earlier, an immovable property is not returned to its owner when it serves a public interest and when[108]:

- it is used to fulfil obligations derived from treaties and conventions to which the Albanian government is a party, or
- it is occupied as an effect of one of the following legal acts:
  - Law No. 7501, of 19.7.1991, *on land*
  - Law No. 7983, of 27.7.1995 on purchasing agricultural land, pastures and meadows
  - Law No. 8053, of 21.12.1995, on transfer of agricultural land in ownership without payment
  - Law no.8312, of 26.3.1993, on undivided agricultural land
  - Law no.8337, of 30.4.1998, on transferring into ownership the agricultural land, pastures and meadows
  - Decision No. 452, of 17.10.1992, on Restructuring of Agricultural Enterprises

Even though the law states that restitution in kind takes precedence over compensation in cash, where restitution of property rights was granted, only compensation in cash has been made. The total budget for 2005-2009 spent on cash compensation amounts to 150 m Euro. The sum is already significant, considering that compensation has been paid only for plots of up to 200 m^2, which means that the same subjects could address new claims for the remaining amount of land for which property rights were restored, but compensation has not yet been paid (see Table 3).

Table 6. Cash compensation process during the period 2005-2009

Year	Budget allocated for compensation to expropriated subjects (in millions of Euro)	No of solved claims (up to 200 m^2)[109]	Location of property compensated
2005	1,44	27	Tirana
2006	2,15	59	Tirana, Kavaja
2007	3,59	119	Tirana, Kavaja, Berat, Korce, Diber, Kukes, Vlora
2008	3,59	163	Whole country
2009	9,14	211	Whole country
2010	5,02	-	-

So far, no decisions that would imply compensation in kind have been made. Moreover, no property restitution fund has been created[110].

[107] Law 7051/1999, art. 3.
[108] Law 7051/1999, art. 7. Paragraph 1 provides a list of the situations considered public interest.
[109] See http://www.akkp.gov.al/kompensimi.html
[110] Law 7051/1999, Art. 12. There is only one general Decision no. 868, dt. 18.6.2008 "On the creation of the physical compensation fund from the agricultural land fund". Published in Official Journal 138/2008, dated 2.9.2008. It is seen however as not a proper legal basis to start compensation.

3.6. Administrative procedure for restitution/compensation

The claims for restitution are submitted by the former owners, who have the burden of proof that their claim is legitimate. The list of documents is provided by Decision 747/2006 of the Council of Ministers, *on the procedures for collecting, elaborating, and administering the requests of the expropriated subjects during the process of recognition, restitution or compensation of the property*[111]. The list includes the certificate of registration for the immovable property, documents from the State Archive, cadastral documentation, a map of the property, and so on. It is not easy for expropriated subjects to prepare the claim, especially the map of the property, which is particularly expensive to prepare.

The deadline for the submission of requests was the 31st of December 2008. According to the data provided in a draft document for the reform strategy in the field of property rights, 51,000 decisions for 39,000 ha has been filed by the date[112]. The process continues since the initial deadline was postponed and there are still former owners who have not yet filed their claims[113]. The law states that a request should be resolved within 3 months after its submission[114]. In addition, art. 24 of the law clearly stated that all claims needed to be addressed by the end of June 2009. The deadline was postponed until the end of 2011[115]. Legally the evaluation process of claims has ended. However, 10,000 outstanding decisions are waiting to be finalized[116]. This deadline does not apply to cash compensation, as the law allows for this process to continue until 2015. In 2008, 163 subjects were compensated for plots of up to 200 m^2, based on the land value map. In 2009, 521 requests for compensation in cash were registered, out of which only 211 were paid[117].

Until the end of 2009, the requests were received by the regional offices of the Property Restitution and Compensation Agency (AKKP). Following the restructuring of the claim management institutions, they will be submitted directly to the national agency. The 12 regional offices decided on the restitution of property rights, while the national agency established the amount to be compensated. The latter served also as a higher administrative appeal body to the decisions taken by regional offices. The appeal could be submitted by former owners or by the State Advocate[118]. The agency could also take the initiative in reviewing decisions. It is reported that up to October 2009, around 950 cases were appealed to the AKKP. From July to September 2009, 135 appeals had been registered with the AKKP, out of which 31 were filed by the expropriated persons and 124 by the local offices of the State Advocate[119]. Only 83 decisions were issued during this period. Thus, on average, only 1/3 of the appeals submitted to the Agency had been dealt with.

The process has now changed. Any decision regarding restitution or compensation and all reviews of claims will be done by the Agency, while appeals will be submitted to the Tirana District Court within 30 days after notification of the decision. If no appeal is

[111] Decision 747/2006 of the Council of Ministers, published in Official Journal no. 121, 2006, pg. 4829. *See* http://www.qpz.gov.al/botime/fletore_zyrtare/2006/PDF-2006/121-2006.pdf
[112] "Draft Inter-Sectoral Strategy Reform in the Field of Property Rights", Council of Ministers, Tirana, 2009.
[113] Initially this deadline was two years after the entrance into force of the law. In fact, expropriated subjects express a different view: in an interview with the representative of the Association of expropriated owners Property through justice, Mr. Toro, he expressed the view that there is no reason to limit the right of expropriated subjects to submit their requests. Interview with Mr. Toro on October 27, 2009 (personal communication).
[114] Law 9235/2004, article 18.
[115] Law 10207/2010, Art. 7.
[116] Data referred in the Draft report of K. Kelm, Land Administration and Management Project Component A: "Security of Tenure and Registration of Immovable Property Rights: Study on Security of Registered Titles in Albania", World Bank, Tirana, 23 October 2009.
[117] http://www.akkp.gov.al/1343.html
[118] Law 9235/2004, article 18.
[119] Agency for Restitution and Compensation for Properties, *Report to the Prime Minister*, 16.10.2009.

made, the decision of the Agency is changed into an executive title and is directly enforced[120].

3.7. Judicial review

The law provides for the judicial review of the decisions taken by the AKKP. The appeals have to be made within 30 days upon the receipt of notification of the decision of the AKKP, otherwise the decision becomes final. It is reported that for the period from July to September 2009, there were 187 lawsuits filed against the AKKP for its decisions on compensation issues[121]. However, there is no data on how many decisions of the latter have been appealed in court.

The Annual Statistical Book of the Ministry of Justice does not provide any detailed data on cases related to property restitution or compensation. However, general property-related statistics are provided. Thus, for 2008, it is reported that out of 17,281 civil lawsuits filed in courts of first instance, 2,753 were related to possible breaches of property rights regulation[122]. Out of 12,251 judgments issued by courts of first instance, 1,936 were property related. In fact lawsuits related to property issues form a significant proportion of civil lawsuits[123].

4. CONCLUSION

The efficient development of the restitution process faces several obstacles. A report of the Property Restitution and Compensation Agency issued in October 2009 for the use of the Prime Minister's office shows that the Agency had taken no decisions after the 1st of July 2009, since the deadline stated in the law had not yet been postponed. This means that besides new claims the AKKP will have to provide an answer to pending claims the administrative investigation of which has not yet been finalized. Usually claims are still pending due to missing documents or procedural mistakes which impeded or delayed the adoption of a final decision. However, human resources are not available to speed up the process or support better communication to beneficiaries. Actually, the number of requests is already too large for the current administration to handle. Thus, it is highly recommended for the next phase of the process to look into ways in which more human resources could be allocated to its management. This should be part of a larger process focused on raising the administrative capacity of the institutions that implement the restitution process.

The lack of personnel is reflected in the number of judicial appeals on property restitution issues. As noted above, only one third of all appeals were dealt with, and that reflects a low capacity, to a large extent due to the lack of trained personnel[124]. This issue needs to be addressed by future reform plans.

Making the process of evaluation of restitution claims more efficient is crucial, since unsolved claims end up in judicial courts. As mentioned earlier, between August and October 2009, 187 lawsuits were initiated against the Agency's decisions. Even though the State Advocate is the competent institution to defend in a court of law the property of the state or the legality of decisions made by its institutions, the Agency has to have its own legal representation. Thus, the demand for highly trained staff increases even more.

The change of political power directly affects the institutional setup designed to ensure property restitution. The employees of the Agency do not enjoy civil servant status. Thus, they can be replaced once the party in power changes. This is the situation of the

[120] Law 10207/2010, art. 2 and 5. Also see Civil Procedure Code of the Republic of Albania.
[121] Agency for Restitution and Compensation for Properties, *Report to the Prime Minister*, 16.10.2009
[122] Ministry of Justice, *Annual Statistical Book, 2008*,. *See* http://www.justice.gov.al/UserFiles/File/vjetari/Vjetari_Statistikor_2008.pdf
[123] Ibid., pg. 151, http://www.justice.gov.al/UserFiles/File/vjetari/Vjetari_Statistikor_2008.pdf
[124] Agency for Restitution and Compensation for Properties, *Report to the Prime Minister*, 16.10.2009

leadership position of the Agency, which has been occupied by four different people in five years. Allegations of corruption, as well as political changes, have led to their replacement. The changes in the statute and structure of the Agency also generate ambiguity, making the institution as a whole highly unstable.
Further, the decisions of the Agency have related only to the restitution of property rights accompanied by cash compensation. As mentioned before, a property fund out of which compensation in kind could be made does not yet exist[125]. Five years after the adoption of the current law on restitution and compensation, despite additional legal acts that aimed at clarifying the procedure, restitution in kind had never been made.

According to the law, property used in the public interest cannot be returned to its owners. This required initial registration of immovable property that could be used for restitution all over the country. The Albanian Assembly took a recent decision to verify property titles, including those belonging to the State. The institution in charge identified a high level of uncertainty related to registered titles, including the ones in state ownership. Thus, setting up a Property Fund based on the records of the Immovable Property Registration Office is not quite legally secure.

A yearly fund for cash compensation was included in the state budget. For 2009 this fund reached 10 million Euros and it was used to cover compensations for 211 of the 521 owners who had their property rights restored that year[126].

The compensation process is made according to the distribution of the claimed land across the value maps of the Agency. These maps need to be continually updated by the final compensation deadline in 2015. Considering the dynamics of the real estate market and of the number of filled and solved claims, the budget needed to cover compensation can be expected to grow. The government should take that into consideration for the elaboration of the national yearly budget.

[125] Ibid.
[126] Ibid