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# The Incomprehensible Post-Communist Privatisation

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## Abstract

One of the most important claims of the neoliberal policy prescriptions for Central and East European states in the early 1990s was that 'communist' property should be 'privatised'. I contend that this policy prescription was based on a number of false assumptions about what 'communist' property was and about communist law. As a result, the post-communist process of privatisation was plagued by many unintended and negative effects. The consequence was the great enrichment of the former communist managers who were able to benefit from 'privatisation' at the expense of the public, in a process which was not 'rights based' or 'democratic'. I argue that the reality of 'communist property' was totally different from that assumed by neoliberal agents and policies. The distinctiveness of communist property arrangements resided not in the absence of private property, which was tolerated under communism, but in the organisation of property as an administrative matter.

## Keywords

Central and Eastern Europe (CEE) – civil law – comparative legal history – critical legal theory – globalisation of law – post-communist privatisation – privatisation – socialist law

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## 1 Introduction

A quarter of a century after the transformation of communist property into private property, we can ascertain that this great transformation was undoubtedly one of the most important changes that occurred after the implosion of the communist regimes in Central and Eastern Europe (CEE) in 1989. Mainly realised by a mechanism which could be conceived of as a legal instrument, *privatisation*, this remarkable transformation was a reversal of the 'transfer' of private property into the hands of the state that occurred through all the countries of the region prior to and after the Second World War.<sup>1</sup> However, this initial transfer was operated principally by fascist or communist governments in the shadow or in the outright breach of the law of that time.<sup>2</sup> By contrast, the post-communist transformation of property was based on 'rule of law' ambitions and on privatisation.

From a *transitional justice* perspective, the priority given by the post-communist CEE governments to measures transforming state property into private property is not easily comprehensible, taking into consideration the communist era record of wrongs, and especially those associated with the communist takeover in the late 1940s. Transitional justice programmes would involve the adoption in CEE of strong retributive-compensatory measures and not measures distributional in character such as privatisation.

Nevertheless, this priority given by the post-communist CEE governments to privatisation becomes understandable if one takes into consideration the internal and external influences on the process of elaboration of transitional policies in post-communist CEE. Thus, in the early 1990s, the neoliberal paradigm formed the basis on which the Western governments and the international financial organisations approached the post-communist transitions and supported legal reform programs.<sup>3</sup> This paradigm equalised the transfer of

1 See generally István Pogány, *Righting Wrongs in Eastern Europe* (Manchester University Press, 1997); Joseph Rothschild, *East Central Europe between the Two World Wars* (University of Washington Press, 1974); Samuel Herman, 'War Damage and Nationalization in Eastern Europe', *Law and Contemporary Problems* 16(3) (1951) 498.

2 The nationalisation of private property after WWII was not necessarily operated by communist governments or by governments dominated by communists. The case of Czechoslovakia, where property already nationalised or confiscated by Nazis was transferred to the state by the non-communist Benes Government, in the aftermath of WWII, is paradigmatic for the region. See e.g. Tony Judt, *Postwar: A History of Europe since 1945* (London: Pimlico, 2007).

3 The best-known definition of 'neoliberalism' is that developed by David Harvey. Accordingly to Harvey, neoliberalism is 'A theory of political economic practices that proposes that human wellbeing can best be advanced by liberating individual entrepreneurial freedoms

state property into private property with the rule of law and with economic development.<sup>4</sup> This international influence met in the early 1990s an internal one. During that time, the CEE economists who were instrumental in elaborating the post-communist CEE economic reforms held the idea that communism could not be reformed. They thought that the severance of the links between the socialist state and the socialist enterprise by privatisation of the latter would 'naturally' lead to the disappearance of the communist power base and consequently the communist regime.<sup>5</sup> The meeting of these internal and external neoliberal currents led to the adoption of measures to transform state property into private property, mainly by privatisation, at the expense of retributive and compensatory measures. Thus, while the great transformation of the communist states' property into private property makes less sense from a transitional justice perspective, it represents the accomplishment of the neoliberal agenda and policy prescriptions of the early 1990s.

However, as I will show in this article, the adoption in haste by the political post-communist elites of neoliberal policy recommendations led to a host of unintended consequences. Moreover, the neoliberal prescriptions for privatisation were based on several classical economic and juristic assumptions which do not hold at a closer examination. Important among these assumptions was the idea that the transformation of communist property into private property implied the creation of a 'bundle of rights', clearly delimited and divisible between private holders. Nevertheless, this was not the only false assumption adopted by the post-communist politicians. As I will argue, the particularities of the communist arrangements of property went far beyond

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and skills within an institutional framework characterised by strong private property rights, free market, and free trade. The role of the state is to create and preserve an institutional framework appropriate to such practices.' David Harvey, *A Brief History of Neoliberalism* (Oxford University Press, 2007).

4 See generally David M. Trubek and Alvaro Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (Cambridge University Press, 2006); Ruth E. Gordon and Jon H. Sylvester, 'Deconstructing Development', *Wisconsin International Law Journal* 22(1) (2004) 1.

5 See e.g. Johanna Bockman and Gil Eyal, 'Eastern Europe as a Laboratory for Economic Knowledge: The Transnational Roots of Neoliberalism', *American Journal of Sociology* 108(2) (2002) 310 at 338; Frank Bönker, Klaus Müller and Andreas Pickel, 'Cross-disciplinary Approaches to Postcommunist Transformation: Context and Agenda', in: Frank Bönker, Klaus Müller and Andreas Pickel (eds), *Postcommunist Transformation and the Social Sciences: Cross-disciplinary Approaches* (New York and Oxford: Rowman & Littlefield, 2002) 1 at 6; John A. Gould, 'Out of the Blue? Democracy and Privatisation in Postcommunist Europe', *Comparative European Politics* 1(3) (2003) 277 at 277.

anything that the simplistic economic and juridical descriptions of property adopted at the onset of the post-communist 'transition' would have permitted the observer to recognise. In fact, the particularities of the communist arrangements of property were so great in relation to those assumed by the post-communist governments when adopting policies of property transfer that almost all these policies appear on closer scrutiny to be flawed. Thus, it was not only that the private property did not disappear under 'real existing socialism', so it did not have to be recreated miraculously at the onset of post-communist 'transitions'. More importantly, the 'privatisation' of the communist state property implied an administrative capacity of the post-communist states and a degree of scrutiny – in order to make this privatisation 'just' – that would simply not have been available. The legal concepts and the simplistic assumptions used in post-communist privatisation laws appear in these circumstances to be mere window dressing. They are evidence of a desire to get rid of state property at almost any cost. That, in such circumstances, the post-communist elites entrusted with the administration of the 'give-away' of state property should have profited so handsomely should not be regarded as surprising. It is also unsurprising that, at the lower levels of post-communist societies, the transformations were widely perceived as unlawful and unjust.

To demonstrate the truth of these statements, I will provide first an analysis of communist property, necessary for a basic understanding of the characteristics of property in communist times. I will start with the seminal anthropological description of communist property provided by Katherine Verdery. Next, I will provide an analysis of the problems posed by the communist organisation of property in terms of the post-1989 transformations of such property. As will be shown using comparative law research, there was a degree of comparability between the communist CEE legal orders and the continental Franco-German traditions on which the legal systems of these countries were based, notwithstanding the post-1989 ideological assumptions that 'socialist law' and legal order were totally different from those found in the West. This comparability was accentuated before the fall of the communist system, especially in countries such as Poland and Hungary that experimented with the 'market' system in the 1980s. Moreover, private property during the communist era had not been as exceptional as the post-1989 policies aiming at transforming socialist property may suggest. For example, home ownership in the CEE socialist countries had been well above Western European levels.<sup>6</sup> Therefore, a

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6 See e.g. Kiril Stanilov, 'Housing Trends in Central and Eastern European Cities during and after the Period of Transition', in Kiril Stanilov, *The Post-Socialist City: Urban Form and Space Transformations in Central and Eastern Europe after Socialism* (Springer, 2007) 173; József

significant proportion of those living in the CEE area had owned private property during state socialism, even if private property had enjoyed a lower degree of protection than state-owned property from the standpoint of communist law. These important pockets of private property could not be 'restituted' or transferred by privatisation to private actors after the fall of communism, since they already existed in the form of private property under communism. Thus, the bulk of the state property to be 'transferred' was property belonging to socialist 'enterprises'. In practice, much of this state-owned property was subjected to privatisation and not to restitution. The unit of analysis in this section will therefore be the 'socialist enterprise' and the focus of the analysis will be on the particularities of the socialist enterprise in relation to Western corporate forms. As will be argued, what made this socialist enterprise so radically distinct from Western corporate forms was not necessarily the 'socialist law' which formed the basis of its existence. In many ways the socialist corporate law was not different from Western corporate law and it operated with similar legal concepts.<sup>7</sup> What made the socialist enterprise so distinct were the operational rules on the basis of which this socialist creature functioned. Yet, the post-1989 legal reforms, aiming to 'privatise' this socialist enterprise, superficially addressed the law's pillar while leaving unchanged the operational rules. Moreover, the capacity of the post-communist states to implement different operational rules for socialist enterprises designated for privatisation and the degree of scrutiny needed to change the communist operational codes were simply lacking, if not specifically diminished following neo-liberal rhetoric. Privatisation of socialist enterprises, in such circumstances, widely enriched the post-communist elites entrusted with its application, while contributing to the widespread perception of unlawfulness of this transformation amongst the citizens of the post-communist states. For analytical reasons, this argument is provided in the next three sections of the article: one which deals with the legal characterisation of property during communist times, one dealing with the preservation of communist property organisational rules during the process of privatisation post-1989, and one discussing the major shortcomings

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Hegedüs, Iván Tosics and Stephen K. Mayo, 'Transition of the Housing Sector in Eastern Central Europe', *Review of Urban and Regional Development Studies* 8(2) (1996) 101; G. Andruz, M. Harloe and I. Szelenyi (eds), *Cities after Socialism: Urban and Regional Change and Conflict in Post-Socialist Societies* (Studies in Urban and Social Change, Oxford: Blackwell Publishers, 1996) 192.

7 See e.g. Inga Markovits, 'The Death of Socialist Law?', *Annual Review of the Law and Social Science* 3 (2007) 233 at 236, showing the degree of similarity of formal Soviet law even under Stalin to the Western law in matters related to property, contracts and corporations.

of the neoliberal model of privatisation realised in post-communist Europe. The article ends with a restatement of the findings.

## 2 Communist Property

In the 1980s any meaningful change in CEE was seen to depend on political reform,<sup>8</sup> which was difficult to achieve, if not impossible, in most countries of the region.<sup>9</sup> The sudden collapse of communism in CEE in 1989 resolved almost overnight the intractable political problem of the 1980s, but it brought to the fore the problem of the economic transformation of Eastern Europe.<sup>10</sup> It was in this new context of economic transformation that 'Western neoclassical economics in its 1980s neoliberal variant came to be widely regarded as the fountain of theoretical knowledge and of practical wisdom'<sup>11</sup> by the post-communist governments in CEE. Arguably, the post-communist CEE governments formulating agendas of economic changes looked for such inspiration because this neoliberal variant 'claimed to combine the most advanced theories and methods of social sciences with superior Western values in formulating clear and unambiguous policy recommendations.'<sup>12</sup>

However, this 'Western neoclassical economics in its 1980s neoliberal variant' did not provide any particularly meaningful description or understanding of communist arrangements of property. In addition, it did not provide many justifications for changes of the regime of property on the scale contemplated in post-communist CEE. It preferred, instead, to import the 'thin' classical liberal arguments about the moral superiority of individual property over the communist property arrangements.<sup>13</sup> It also preferred to advance some

8 See e.g. Andreas Pickel, 'Official Ideology? The Role of Neoliberal Economic Reform Doctrines in Post-Communist Transformations', *Polish Sociological Review*, 4(112) (1995) 361 at 362.

9 Romania, Czechoslovakia and the former GDR are countries of the region where the communist elites rejected Gorbachev-style political reforms.

10 Pickel, 'Official Ideology?' (n 8) 362.

11 *Ibid.* See also Harvey, *A Brief History of Neoliberalism* (n 3), and especially Johanna Bockman, *Markets in the Name of Socialism: The Left-wing Origins of Neoliberalism* (Stanford University Press, 2011).

12 Bönker, Müller and Pickel, *Postcommunist Transformation and the Social Sciences* (n 5) 3.

13 See e.g. Joseph Persky, 'On the Thinness of the Utilitarian Defense of Private Property', *Journal of the History of Economic Thought* 32(1) (2010) 63. See also Lawrence C. Becker, 'Review: Too Much Property', *Philosophy and Public Affairs* 21(2) (1992) 196, for a critical review of the arguments brought in favour of private property by Waldron and

important policy objectives, such as those related to the marketisation of the (former) socialist economies, or those related to the privatisation of socialist property in CEE.<sup>14</sup> Nevertheless, as it was observed by the World Bank economists, 'there was neither great theoretical justification nor hard evidence at the beginning of the 1980s that the performance problems of state enterprise could be altered by change in ownership. Thus, the CEE privatisation done before 1992–1993 took place in the absence of empirical support.'<sup>15</sup>

Irrespective of the analytical or justificatory weaknesses of neoliberalism underlined above, the neoliberals were immensely successful in promoting marketisation and privatisation of socialist property. This success of the neo-liberal orthodoxy was due in no small part to its ideological ability to reduce the 'problem of economic transformation to a narrow technical problem.'<sup>16</sup> Since a technical solution could be usually provided for a technical problem, the neoliberals suggested that the technical problem consisted in the replacement of the old and irrational socialist system with a new and rational system. And that this new system, 'the essential market system', required merely the establishment of 'a set of well-known and well-tried institutions.'<sup>17</sup> Once such institutions had been established, everything else would 'automatically fall in place.'<sup>18</sup> Thus, the post-communist CEE countries' move to markets implied, in the neoliberal view, the adoption of a 'relatively closed list of laws and institutions.'<sup>19</sup> Legal reform meant for neoliberals the adoption of a number of rules and 'good laws' that furthered development in a globally integrated economy, and the harmonisation of national legal regimes so that they became compatible with dominant norms and institutions.<sup>20</sup> Such rules and good laws

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Munzer, following the classic liberal cannon, and especially Alan Carter, *The Philosophical Foundations of Property Rights* (Harvester Wheatsheaf, 1989), for a critique of all philosophical arguments brought in liberal thought in support of private property, including those of Demsetz.

14 See e.g. World Bank, *World Bank Development Report 1996: From Plan to Market* (New York: Oxford University Press, 1996); Anders Åslund, *How Capitalism Was Built: The Transformations of Central and Eastern Europe, Russia, and Central Asia* (Cambridge University Press, 2007) 1 at 6.

15 Sunita Kikeri and John Nellis, 'An Assessment of Privatization', *The World Bank Research Observer* 19(1) (2004) 87 at 92.

16 Pickel, 'Official Ideology?' (n 8) 368.

17 *Ibid.*

18 *Ibid.* 369.

19 Kerry Rittich, *Recharacterizing Restructuring: Law, Distribution and Gender in Market Reform* (The Hague, London and New York: Kluwer Law International, 2002) 131.

20 *Ibid.*



were for neoliberals 'neutral' in their effects, supplied 'a depoliticised framework for economic activity', and were able 'to provide a neutral and just context in which all can presumptively expect to thrive, as long as they make the requisite effort.'<sup>21</sup> Moreover, they were 'universal in their applicability rather than specific to particular cultures, times or places', and they were 'uncontroversial as to the interest and values they promote.'<sup>22</sup> In other words, the neoliberal privatisation programme was advocated as 'a fundamentally apolitical exercise' which represented the 'best route to the pursuit of greater human freedom and welfare.'<sup>23</sup>

It is little surprising that, given the above vague and rather naïve neoliberal assumptions of the early 1990s, the privatisation and marketisation of the post-communist CEE economies were protracted and arduous processes. It is also unsurprising that all the economic utility arguments brought forward to justify large-scale privatisation in post-communist CEE (and later in the former USSR) were invalidated by subsequent economic developments in the region,<sup>24</sup> or that, as late as 2002 and contrary to neoliberal assertions, only five CEE countries had exceeded their 1989 GDP levels.<sup>25</sup> Moreover, in contrast to this economic collapse of CEE and the former USSR in the early 1990s, China (and Vietnam), which did not officially repudiate socialism and did not apply large-scale privatisation programmes similar to those applied in CEE and the former USSR during that period, experienced impressive rates of economic growth.<sup>26</sup>

Given these failures of the neoliberal policies, in relation to neoliberals' own predictions and benchmarks, a question may arise: what makes the neoliberal

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21 *Ibid.*

22 *Ibid.*

23 *Ibid.*

24 For example, all the economies of the post-communist CEE countries took a sharp downturn in the years immediately after 1989, and several of these economies stabilised only towards the end of the first decade of transformation. See e.g. Ivan T. Berend, *From the Soviet Bloc to the European Union: The Economic and Social Transformation of Central and Eastern Europe since 1973* (Cambridge University Press, 2009) 6.

25 See e.g. David Lane, 'Introduction: Two Outcomes of Transformation', in: David Lane (ed.), *The Transformation of State Socialism: System Change, Capitalism or Something Else?* (Palgrave Macmillan, 2007) 9. If the former USSR is taken into consideration, most of the post-communist countries were in 2002 characterised by lower levels of GDP than at the beginning of the reform period. *Ibid.*

26 See e.g. Berend, *From the Soviet Bloc to the European Union* (n 24) 76, 171; Tsuneaki Sato, 'Convergence and Divergence in Transformation: Comparison of Experiences of CEECs and China', in: Shinichi Ichimura, Tsuneaki Sato and William James (eds), *Transition from Socialist to Market Economies: Comparison of European and Asian Experiences* (Palgrave Macmillan, 2009) 12–13.

recommendations for privatisation in post-communist CEE so erroneous? The brief answer to this question is that the neoliberals completely misunderstood the realities of the communist property arrangements. Therefore, they wanted to transform so feverishly into private property a 'communist property' that they completely misunderstood.

In arguably one of the best anthropological descriptions of what made the transformation of state property into private property so difficult after the fall of communism in CEE, Katherine Verdery gives the following account of her encounter with 'restitution' in a small village in Transylvania:

A North American urbanite might imagine (as I did myself) that this process [of restitution] would unfold something as follows. Land was collectivized by putting together all peasant farms in a village and working them in common. Therefore because a field and its constituent parcels are fixed goods – like a table with so many place mats on it, marking where each piece begins and ends – to restore those parcels to their original owners is only a matter of determining the coordinate of the place mats prior to 1959 and reattributing them to whoever had them at the time. This should not be a complicated matter. Whoever thinks this is mistaken.<sup>27</sup>

In addition to these simplistic views of property, Verdery further identifies in her text two of the sources of difficulties related to the politics of transformation of property relations via restitution: the political attempt to reconstruct an earlier, idealised reality several decades later, and the political decision to retribute a part of the former private property while keeping another part in state property. She then concentrates on a third and major source of difficulty, consisting in the application of a 'neoliberal' (restitution) law on a rural landscape, which was engendered by the 'socialist' transformation with 'elastic qualities.'<sup>28</sup>

Verdery's above insights clearly allude to a more 'physicalist' conception of things which, although matched conceptually in the case of land, was not necessarily characteristic of all objects of property in socialism.<sup>29</sup> Equally, her

27 Katherine Verdery, 'The Elasticity of Land: Problems of Property Restitution in Transylvania', in: K. Verdery, *What Was Socialism, and What Comes Next?* (Princeton University Press, 1996) 133–134.

28 Verdery, 'The Elasticity of Land' (n 27) 134–135.

29 For the physicalist conception of 'things' in Blackstone, and earlier 19th-century American legal thought and its development in the modern conception, which in my view

insights were drawn from a particular Romanian restitution context which was not necessarily applicable to the whole region.<sup>30</sup>

Irrespective of these limitations, Verdery's metaphor of the 'elastic qualities' of socialist objects of property, nevertheless, captures a larger reality applicable to the whole region. Moreover, even if every analytical scheme advanced for the purpose of the description of property arrangements simplifies and generalises, such schemes make, nonetheless, a conceptual analysis possible. Compared with the simplistic schemes of property based on 'economic' assumptions proposed at the onset of the post-communist 'transitions' by neoliberals, Verdery's analysis is more sophisticated and arguably more apt to capture the complex reality of property arrangements under socialism. Furthermore, while the early study by Katherine Verdery cited above was restricted to the Romanian context and was probably less ambitious in terms of generalisation, her subsequent work on property transformations after the fall of communism came to enrich the initial picture.<sup>31</sup>

Thus, in 2003, Verdery provides an analytic scheme of property arrangements under socialism which, in spite of variations in one country or another, offers nevertheless a framework which could be applied all over the region.<sup>32</sup>

First, according to this scheme, *from the perspective of communism as a cultural system and as organisation of power*, property was in the 'real existing

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characterises similar developments in common and civil law of the period, see for example Kenneth Vandevle, 'The New Property of the Nineteenth Century: The Development of the Modern Concept of Law', *Buffalo Law Review* 29 (1980) 325.

30 For example Poland, where the Jaruzelski regime was forced in the early 1980s to grant constitutional standing to private landownership, and Hungary, where similar changes occurred, were in many ways dissimilar to Romania, and to other CEE countries, where a stricter 'socialist' regime was applied with respect to property. Verdery is aware of such differences when she observes that 'Even to speak of socialist property already oversimplifies, homogenizing a reality that was much more complex and varied across both space and time, with several parallel property arrangements coexisting at any given moment.' Verdery, *What Was Socialism, and What Comes Next?* (n 27) 47.

31 See e.g. Katherine Verdery, 'The Obligations of Ownership: Restoring Rights to Land in Postsocialist Transylvania', in: Katherine Verdery and Caroline Humphrey (eds), *Property in Question: Value Transformation in the Global Economy* (Oxford and New York: Berg, 2004) 139, and Humphrey and Verdery, 'Introduction: Raising Questions about Property', in: Verdery and Humphrey (eds), *Property in Question* 1.

32 See generally Katherine Verdery, *The Vanishing Hectare: Property and Value in Postsocialist Transylvania* (Cornell University Press, 2003). In this scheme, property is seen as simultaneously a cultural system, an organisation of power, and sets of social relations, all coming together in social processes. *Ibid.* 48.

socialism' more an administrative matter than a legal one.<sup>33</sup> Therefore, it was governed by administrative measures which involved a high degree of discretion, rather than by legal procedures aiming at creating regularity or certainty.<sup>34</sup> The consequence of this characteristic was that the communist decrees and administrative procedures were more important than the laws in matters related to property. And the former were regarded 'as having the force of law but not created through a legislative process.'<sup>35</sup> This characteristic had enormous implications in terms of property redistribution after the fall of communism, as in time the communist administrative procedures would create the sort of operational rules of property administration often at odds with the formal law, and so entrenched in the local psyche as to prevail over the formal law enacted from the centre.<sup>36</sup>

Second, and also from the perspective of communism as a cultural system and as organisation of power, the real existing socialism divided property on the basis of the *identity of owners* and of the *social relations* among them. Such division was in sharp contrast with the pre-communist legal divisions and with the Western legal systems' division of property based on property types (for example, real and personal, or state, commons and private).<sup>37</sup> Thus, socialist law recognised four property types: state, cooperative, personal, and private. Each type had its own regime and each related to one of the three main property subjects: state, cooperatives, and individuals or households.<sup>38</sup> These three classes of subjects were distinguished in the socialist law precisely by their property status, respectively by the type of property and objects which they were empowered to own.<sup>39</sup> In addition, crucial to the socialist concepts of property were two ideas related to the property of the state. First, there was the idea that state property formed an inalienable and

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33 *Ibid.* 48.

34 *Ibid.*

35 *Ibid.*

36 For an example of such operational rules aptly manipulated by the former socialist local elites in charge of 'restitution', see Katherine Verdery, 'Seeing Like a Mayor. Or, How Local Officials Obstructed Romanian Land Restitution', *Ethnography* 3(1) (2002) 5.

37 Verdery, *The Vanishing Hectare* (n 32) 49. We should note, however, that the attachment of property to (the civil status of) persons, i.e. the *de jure* understanding of property, has roots in Roman law, and serves as the basis of the Hegelian argument for property based on personality development. See Alan Carter, *Philosophical Foundations of Property Rights* (n 13) 94–97.

38 Verdery, *The Vanishing Hectare* (n 32) 49.

39 *Ibid.* 50.

indivisible fund, immune from attachment of debts.<sup>40</sup> Second, there was the right of *direct* (operational) *administration* of state property (or the idea of 'administrative rights' on state property).<sup>41</sup> Equally important were the 'hierarchical relations of property forms' established in communism. In these hierarchical relations, 'state property was prior to all others and it enjoyed full legal protection, while (in descendent order) cooperative, personal and private property' were delegated to inferior ranks and enjoyed less protection than state property.<sup>42</sup> In other words, 'socialist state property was more inalienable, more exclusive and more property' than any other form of property,<sup>43</sup> and the rights held at each level of the hierarchy constrained those at the inferior levels.<sup>44</sup>

Third, and *from a dynamic perspective of communism as a cultural system and as an organisation of power*, the socialist hierarchy of property types was producing what Verdery called, following Gluckmann's insights, a 'hierarchy of estates of administration.'<sup>45</sup> In such a hierarchy, characteristic of redistributive systems, the supreme owner of the land allows for grants to its hierarchical

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40 *Ibid.* 50 The idea resembles somehow the ideas related to state patrimony which could be found in Western civil law, for example. However, in the civil law systems there is an important distinction between the public and the private patrimony of the state. Accordingly to this distinction only the public patrimony forms an indivisible and inalienable fund. The private property of the state can be attached to public actors as, for example, in the case of public utilities and then be assigned, contracted out, sold, etc., exactly as any other private actor's property, because the state acts as any private actor with respect to this private property. This later possibility was inexistent in socialist law.

41 Verdery, *The Vanishing Hectare* (n 32) 50. See also Aurélian Ionasco, 'Les types et les formes de propriété en droit socialiste' (The types and forms of property in socialist law), *Revue internationale de droit comparé* 21(3) (1969) 499 at 504–505, for a description of the 'operational right' of direct administration of socialist property in socialist law.

42 Verdery, *The Vanishing Hectare* (n 32) 51. The application of Max Gluckman's anthropological insights (derived from his observation of African societies) to communist realities was first utilised by Caroline Humphrey in her pioneering study on a Soviet collective farm; see Caroline Humphrey, *Karl Marx Collective: Economy, Politics and Religion on a Siberian Collective Farm* (Cambridge: Cambridge University Press, 1983). See also Chris Hann, 'A New Double Movement? Anthropological Perspectives on Property in the Age of Neoliberalism', *Socio-Economic Review* 5 (2007) 287 at 295.

43 Verdery, *The Vanishing Hectare* (n 32) 51.

44 *Ibid.*

45 *Ibid.* 56. In this respect Verdery appears to follow Caroline Humphrey's application of Max Gluckman's insights to communist arrangements of property, even if Verdery does not mention this explicitly.

inferiors. These inferiors could further grant rights downwards, similarly to the ways in which such grants were allotted in feudalism.<sup>46</sup> Although any holder of such a grant could behave as the owner of the objects granted, she could not alienate permanently the object of the grant. Therefore, in practice nobody saw these downward allocations as diminishing or dismembering the ownership at the centre, since the centre could annul the grants discretionarily at any given moment.

In the 'real existing socialism', this would mean that the 'party-state retained its claim to supreme ownership,'<sup>47</sup> even if it exercised that ownership by passing the rights downward to lower-level entities. The party state would thus assign various kinds of control over parts of the property of the whole people to inferior levels in the bureaucratic hierarchy. Recipients of these rights could further parcel them out to other recipients, still lower down the scale. For example, a ministry could assign such ownership rights to its regional branch, then to county-level planning structures, and finally to a state farm director.<sup>48</sup> Nevertheless, the rights transmitted these ways were prevented by a complex set of rules from becoming fully autonomous.<sup>49</sup>

What further distinguished the 'rights' associated with these socialist 'administrative estates' from the rights associated with the patrimonies of juridical persons in Western and in pre-communist law was that the lower-level entities were granted a sort of 'administrative right' on the estates.<sup>50</sup> The authors who analysed such administrative rights resisted the temptation to associate the right to administrate state socialist property for productive use with the civil law *usus* or *usufructus*, since the 'socialist' administrative rights were different and had more of a *sui generis* character.<sup>51</sup> Verdery even prefers

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46 *Ibid.*

47 *Ibid.*

48 *Ibid.* 57.

49 *Ibid.*, based on Dunn: 'The heads of these lower units were to use the rights to generate products for the state to appropriate and redistribute; meanwhile, complex rules of accounting aimed to prevent them from obtaining the information they would need in order to become fully autonomous.' See also Elizabeth Dunn, 'Accounting for Change', in: Mihaela Kelemen and Monika Kostera (eds), *Critical Management Research in Eastern Europe: Managing the Transition* (London: Palgrave, 2002) 38.

50 Verdery, *The Vanishing Hectare* (n 32) 57.

51 *Ibid.* 57. See also Randy Bregman and Dorothy C. Lawrence, 'New Developments in Soviet Property Law', *Columbia Journal of Transnational Law* 28 (1990) 189 at 191, for the point that 'under operative management principles, the Soviet State assigns limited ownership rights to various state organisations that produce goods and performs services. These assigned rights include the possession, use and disposition of property.'

to introduce a new category for them, namely 'estates of production.'<sup>52</sup> This denomination has the merit of suggesting the scope of such rights, although it is not perfectly clear in Verdery's description what exact 'rights' such estates would involve, what the boundaries between the administrative and productive estates would be, or whether in practice they would not overlap.<sup>53</sup> Nevertheless, her conclusion that this system of 'multiple and overlapping administrative rights' over the 'state's unitary fund' allowed in practice for more or less similar transactions to those occurring in capitalist economies seems to be valid. Furthermore, it is Verdery's additional insight which captures the *dynamics* of the process – the fact that socialism allowed for transactions of socialist property objects without changing the 'socialist' character of this property. Thus, accordingly to Verdery, such transactions did not involve any change in ownership. What changed hands was in fact the *administrative right* over one product or another, the state remaining in theory the owner of the respective product.<sup>54</sup> Finally, an additional factor which made such 'socialist arrangements' related to property so distinctive was 'the right of socialist managers to move items of socialist property around at will,'<sup>55</sup> in huge networks of trading made by similar socialist managers of state enterprises.

The consequence of such practices, as Verdery aptly showed, was that in time all the *boundaries* within the *state's unitary fund of property* were blurred, as objects moved among various people and juridical entities exercising rights on them similar to property rights, but not recognised as such.<sup>56</sup> This blurring of boundaries within the state property would produce hoarding, dissimulation, plan bargaining, and manipulations of state property by managers. All these negative phenomena would eventually contribute to the dismissal of the idea of the state as a unitary actor and that of coherent planning.<sup>57</sup> In addition,

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52 Verdery, *The Vanishing Hectare* (n 32) 57.

53 *Ibid.* Following Gluckman, again, Verdery describes the difference between the two kinds of estates as follows: 'Superiors hold estates of administration, allocating rights downward, whereas those at the base hold estates of production, using the rights granted them to fructify collective assets.' Verdery also appears to see these 'estates of production' as being dynamic and generating a constant vertical conflict between the centre and the higher echelons and the periphery and the lower echelons to which the estates were granted. 'It seems that sources of tension between these two kinds of estates, a consequence of these latter rights in the socialist case, was a steady erosion of the center's capacity to grant the former, administrative ones', *ibid.* 57.

54 *Ibid.* 58.

55 *Ibid.*

56 *Ibid.* 58–59.

57 *Ibid.*

this blurring of boundaries within the state property would also greatly complicate the *assessment of value* and ownership rights during post-communist privatisation (or restitution). As Verdery correctly observed, by the time restitution and privatisation were announced, many of the 'socialist' directors were becoming private owners, in a process 'that socialism's hierarchy of administrative estates had facilitated.'<sup>58</sup> This inability of the centre to control the managers and productive estates was not only critical in eroding the communist states' legitimacy and initiating the post-socialist transformations. It also set the stage for the havoc played by the powerful communist technocratic elites on the state property, in the conditions of a much weakened post-socialist state.<sup>59</sup>

The major differences between the communist and the post-communist organisation of property are provided in Table 1.

Besides the above traits of property under socialism, several additional characteristics smoothed the functioning of socialist property. These additional characteristics allow us to understand the survival and pervasiveness of *communist operational rules* during post-communist transformations, and also the profound illegitimacy of these rules, so it worth mentioning them.

First, it should be noted that the socialist system of property was rendered *operational* and running by a sophisticated network of barter and gifts among socialist managers. This network of barter and gifts was far more important than the formal communist decrees and regulations related to socialist property. Thus, the socialist managers lived not only in a hierarchy of estates but also in an economy of shortage with few penalties for irrational or inefficient behaviour. These socialist managers had to hide labour and materials provided by the state or produced by themselves above the planned targets, in order to improve their output. Such hoarded labour and materials were traded or exchanged for reciprocal favours in the horizontal and vertical networks which operated in the socialist state, and after 1989 proved to be major sources of social capital.<sup>60</sup> The obligations and reciprocity resulting from the operation of these networks were highly binding for the socialist managers, although

<sup>58</sup> *Ibid.*

<sup>59</sup> Venelin I. Ganev, *Preying on the State: The Transformation of Bulgaria after 1989* (Cornell University Press, 2007). Political backlashes in Poland and Hungary accompanied the communist states' 'liberalisation' of corporate regimes before 1989, as this 'liberalisation' was followed immediately by nomenklatura privatisations.

<sup>60</sup> Verdery, *The Vanishing Hectare* (n 32) 60–61. See also 'Symposium: Postsocialist Pathways: Transforming Politics and Property in East Central Europe', *East European Constitutional Review* 9 (2000) 101.



TABLE 1 *Characteristics of property under socialism*

Perspective	Property	
	Under communism	Pre- and post-communism (continental, civil legal systems)
Property as a cultural system and organisation of power (static)	Administrative matter (administrative decrees prevail over laws, administrative practices prevail) Division of property types on the basis of <i>identity of owners</i> and <i>social relations</i> among them (state, cooperatives and individuals or households)	Legal matter  Division of property on the <i>basis of property types</i> (e.g. real and personal, or state, commons, and private)
Property as a cultural system and organisation of power (static)	<i>Administrative rights</i> over state property far more important than any legal (formal) classification of property <i>Administrative rights</i> usually not defined precisely (via the law) and had porous boundaries  State property inalienable and indivisible	No such 'administrative rights'; law defines the right of administration precisely  'Right of administration' usually defined as a legal institution (e.g. via mandate, institution precisely defined by civil codes) or as part of the 'bundle of rights' (e.g. use) with precise boundaries State property treated as ordinary 'private property' when state engages in private transactions
Property as a cultural system and organisation of power	Characterised by <i>hierarchies of estates of administration</i> with porous boundaries Goods moved freely between porous hierarchies	No such 'hierarchies'  Goods could only move between clearly delimited 'patrimonies', usually on the basis of contract
Legal	Socialist law 'imported' all definitions of property from pre-communist law	

not required at all by the *formal* system. And in time, these practices of manipulation of collective property to ensure production (quotas), which depended not only on good relations of the communist technocracy with superiors in a chain of command but also on good relations of these communist technocrats with their equals or inferiors, consolidated. In other words, behind the curtain of communist decrees and regulations, what rendered the system *operational* was a sophisticated network of barter and gifts which kept the system running.<sup>61</sup>

Second, the socialist regime, while tolerating the practices of socialist managers, discouraged severely the appropriation of socialist property's objects by direct producers. Such appropriation was categorised as 'theft' and strictly punished.<sup>62</sup> Therefore, the strategies of the socialist managers to hide labour and materials and trade them for reciprocal favours had the potential to put these socialist managers in conflict with the direct producers. For example, the producers could hardly understand the socialist regime's acceptance of the managers' practices to move things upward, between the boundaries of the hierarchies of socialist estates, or laterally, within the fuzzy socialist categories. This acceptance contrasted sharply with the same socialist regime's rejection of producers' practices to move things downward, across the boundary between socialist property and lower types, and with the severe punishment contemplated by direct producers for such practices. Similarly, the direct producers could not understand why the communist state tolerated the appropriation of socialist property by managers who were feathering their own nests. Obviously, the communist state tolerated such practices of socialist managers for various reasons, having to do with the inner logic of the system. For example, the managers' role in the lubrication of the planned economy and the enhancement of officials' position of authority within it, or their position as efficient communist cadres,<sup>63</sup> were important reasons for the socialist

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61 Verdery, *The Vanishing Hectare* (n 32) 62. With respect to the functioning of networks of reciprocal gifts and favours, Verdery makes the following observation: 'Socialist firms were not units at the end of a chain of command but were linked in extended webs of managers and politicians, all striking bargains to optimize their situations. If we stop with the allocation of administrative rights, we miss this crucial aspect of socialist property, so dependent on a corresponding system of obligations.'

62 *Ibid.*

63 *Ibid.* Verdery gives the example of a state cooperative manager who decided to cultivate an idle field without authority and appropriating the surplus for himself. While the producers saw such practice as outright theft, the manager replicated that, albeit the field was idle anyway and the 'system' did not require him to put it on productive use (this would be a sort of Lockean argument), part of the appropriation was marked for 'attentions' to higher state bureaucrats who had the last word on plan quotas and allocations of

state to tolerate communist managers' misappropriation of socialist property. Moreover, the deferential treatment of socialist managers in cases of misappropriation of socialist property was *embedded* in the organisation of socialist property, with its priority of administration over legal regulation, its hierarchy of property types, and its specificity with respect to assets evaluation. Nevertheless, it was hard to justify to direct producers this unequal treatment in cases of misappropriations of state property. And in time such unequal treatment increased the illegitimacy of the socialist regime.

To conclude so far, the socialist system entailed a very complex system of property.<sup>64</sup> In such a system, Verdery's observation that in order to grasp the system workings one has to set aside questions related to ownership, and look instead at the *patterns of use, administrative rights and social networks of exchange and reciprocity*, is probably more than pertinent. In this context, the establishment by the communist states of hierarchies of 'administrative and productive estates', and the preference of communist states for political-administrative decisions over legal procedures, paved the way for the restitution and privatisation's logistical nightmares encountered post-1989 all over CEE.<sup>65</sup> In addition, the 'real existing' socialist regime of property did not establish among people and things relations which rested mainly on *commodification*.<sup>66</sup> Because the relations among people and things were not based primarily on commodification, the evaluation of resources within the socialist property was not driven by the market but by politics. Thus, post-1989 it became excruciatingly difficult to assess the value of the assets being privatised, as the state had absorbed the liabilities of its subordinate firms.<sup>67</sup> In the end, the 'solution' often found by the former socialist managers to this evaluation problem was to decrease massively the value of the state's assets to be privatised. As observed by Verdery, this decrease was made possible by the third aspect of the socialist property regime, namely its *ranked hierarchy of property forms*.<sup>68</sup> This socialist hierarchy of property forms produced a powerful stratum of 'state-enterprise directors who could extract maximum benefits from the state

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resources vital for the realisation of the plan, and part to hierarchical equals who could reciprocate by providing tools for the production, so such practice improved his standing and consequently the cooperative's standing within the system. *Ibid.* 62–68.

64 *Ibid.* 41.

65 *Ibid.* 73.

66 *Ibid.* 74.

67 *Ibid.* 75.

68 With state property at the top, followed by cooperatives, and individuals/households at the bottom.

resources and from their control of administrative rights over (former) socialist estates of production.<sup>69</sup> Moreover, this ranked hierarchy of property forms was also characterised by the huge gap between the *law in the books* and *law in action* specific to socialist societies.<sup>70</sup> Therefore, in such a socialist hierarchy of property forms, it was arguably more important to understand first and foremost the unwritten operational rules of the societal subsystems which law governed than to understand the formal law. The written law could only provide an inherently limited understanding of categories such as 'socialist property.'

### 3 Law and Communist Property

With respect to the socialist 'formal law', several observations should be made. First, it should be noted the communist regimes never abolished 'private property' from the 'law in the books.' Thus, in the communist era, private property was a well-defined category, kept more or less in line with the concept of property of the pre-communist era codes. What changed in the formal law of private property during the communist era, in comparison with the pre-communist times, was therefore not the *definition* of property, which was very much the same, but the restrictions placed on possessing various objects in private property.<sup>71</sup> It was the *ownership* of such objects which was drastically curtailed by various regulations during communism,<sup>72</sup> not the private ownership as such. As a consequence of such restrictions, the acquisition of private property and the right of disposal of objects of property (i.e. what could constitute 'private property', or how the property could be alienated, contracted, given by testament, etc.) were drastically curtailed. However, this curtailment was not

69 Verdery, *The Vanishing Hectare* (n 32) 76.

70 I refer to the distinction introduced by Roscoe Pound. See Roscoe Pound, 'Law in the Books and Law in Action', *American Law Review* 44 (1910) 12. For the excruciating problems posed by such differences to the students of 'socialist law', see e.g. Maimon Schwarzschild, 'Review. Variations on an Enigma: Law in Practice and Law on the Books in the USSR', *Harvard Law Review* 99 (1986) 685.

71 For example, the so-called 'means of production' could not constitute the object of 'private property' during communist times.

72 Such regulations could be found in the 'first generation' communist decrees of the late 1940s, for example, which nationalised all the 'means of production', and in the myriad of administrative acts which implemented such decrees during the same period, some in excess of or contrary to these given decrees. Afterwards, they could be contained in the laws, decrees and administrative decisions issued by the communist authorities.

necessarily realised directly, by a change in the formal definitions of private property in the civil codes; it was realised mostly indirectly, by constitutional and administrative regulations which could touch civil law matters such as inheritance,<sup>73</sup> contracts,<sup>74</sup> and so on. With all these formal restrictions placed on the object of private property, and this point should be stressed again, the communist regime however never entirely abolished private property.<sup>75</sup> Moreover, it has seen 'personal property' as complementary to the establishment of a socialist society.<sup>76</sup> As the noted American legal scholar and specialist in socialist law John N. Hazard observed:

[A]s Marx and Engels stated specifically in their Communist Manifesto 'The Distinguishing feature of communism is not the abolition of property generally, but the abolition of bourgeois property.' The revolutionaries in Russia, as well as their fellows in Hungary, Germany and ultimately China, remembered the teachings of Marx and Engels when they had a chance to seize power after the last war ... The formula was compara-

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- 73 See e.g. Inga Markovits, 'Hedgehogs or Foxes? A Review of Westen's and Schleider's *Zivilrecht im Systemvergleich*', *American Journal of Comparative Law* 34 (1986) 113, for the point that inheritance law served different purposes in the socialist countries in comparison with the 'Western' ones. But see John Quigley, 'Socialist Law and the Civil Law Tradition', *American Journal of Comparative Law* 37(4) (1989) 781 at 801, for the continuity with civil law tradition on these matters in socialist times.
- 74 See W.J. Wagner, 'The Law of Contracts in Communist Countries (Russia, Bulgaria, Czechoslovakia and Hungary)', *St Louis University Law Journal* 7 (1962–1963) 292 at 295.
- 75 Article 10 of the 1936 USSR Constitution confirms the right of Soviet citizens to 'personal property' (it is no longer called private, as it was under the 1922 RSFSR Civil Code of 1922, copied after a French model. The comparative legal literature on this point is too voluminous to be cited extensively here. Suffice it to say that there is a consensus with respect to the existence of private property in socialist countries, and to mention, by way of example: John N. Hazard, 'Soviet Property Law', *Cornell Law Quarterly* 30 (1945) 466; John N. Hazard, 'Soviet Property Law and Social Change', *British Journal of Sociology* 4(1) (1953) 1; Samuel Kucherov, 'Property in the Soviet Union', *American Journal of Comparative Law* 11(3) (1962) 376; Paul Betts, 'Private Property and Public Culture: A Forgotten Chapter of East European Communist Life', *Histoire@Politique: Politique, culture, société*, no. 7, January–April 2009, <http://www.histoire-politique.fr/index.php?numero=07&rub=dossier&item=71>; William Partlett, 'Reclassifying Russian Law: Mechanisms, Outcomes, and Solutions for an Overly Politicized Field', *Columbia Journal of Eastern European Law* 2(1) (2008) 1.
- 76 Verdery, *The Vanishing Hectare* (n 32). For the various changes in soviet policy related to 'personal property', until it became firmly embedded and accepted in the Soviet legal doctrine, see Hazard, 'Soviet Property Law', *Cornell Law Quarterly* 30 (1945) 466.

tively simple – destroy private ownership in the means of production, but do not eliminate private ownership in consumer's goods.<sup>77</sup>

Therefore, albeit the private property was delegated to an inferior rank in the socialist 'hierarchies of estates', if it was an estate at all,<sup>78</sup> it never ceased to exist in legal form. Furthermore, the pre-communist civil codes which regulated this property subsisted long in the socialist period before being replaced by 'socialist codes.' Moreover, these socialist codes borrowed heavily from the same pre-communist codes.<sup>79</sup> For example, Czechoslovakia was the only CEE socialist country which adopted entirely new socialist codes in the 1960s.<sup>80</sup> The former GDR was unable to adopt a socialist code until the 1970s.<sup>81</sup> Both countries used until the adoption of such codes amended versions of pre-communist civil legislation. And, in the rather exceptional case of Romania, the pre-communist civil or commercial codes were never replaced.<sup>82</sup> Moreover, the drafters of communist laws were borrowing heavily from the continental civil law notion of *patrimony* when defining the state dominium, placed at the top of the hierarchy of socialist estates. But patrimony in the civil law tradition is a concept which rests on the idea of private property.

77 *Ibid.* 467.

78 For a discussion on the continuity of recognition of private property during socialist times, see Kazimierz Grzybowski, 'Continuity of Law in Eastern Europe', *American Journal of Comparative Law* 6 (1957) 44.

79 For such an argument related to the borrowing in the case of Hungary, whose 1959 'socialist' civil code was strongly influenced by the pre-WWII civil code drafts, especially the 1928 draft, see András Kisfaludi, 'The Influence of Harmonization of Private Law on the Development of the Civil Law in Hungary', *Juridica International* 14 (2008) 130 at 131. For the earlier Hungarian and Polish 'socialist' civil codes, see Kazimierz Grzybowski, 'Reform of Civil Law in Hungary, Poland, and the Soviet Union', *American Journal of Comparative Law* 10 (1961) 253.

80 See e.g. George E. Glos, 'The Czechoslovak Civil Code of 1964 and its 1982 Amendment within the Framework of Czechoslovak Civil Law', *New York Law School Journal of International and Comparative Law* 6 (1985–1986) 232.

81 See e.g. Inga S. Markovits, 'Civil Law in East Germany – Its Development and Relation to Soviet Legal History and Ideology', *Yale Law Journal* 78 (1968–1969) 1 (for an excellent history of the intellectual ideas of the German and Soviet civil codes). See also A.K.R. Kiralfy, 'Legislation: The Civil Code of the German Democratic Republic (Das ZGB der DDR)', *Review of Socialist Law* 5 (1979) 79 (for a brief description of the main characteristics of the Eastern Germany Civil Code).

82 See e.g. V.D. Zlatescu and I. Moroianu-Zlatescu, 'Le droit roumain dans le système romano-germanique' (Romanian law in the Romano-German system), *Revue internationale de droit comparé* 43(4) (1991) 829–836.

In addition to a degree of statutory continuity in civil law matters, there was continuity with the legal thought of the pre-war period. At least after the Stalinist period, the learned scholars of the communist countries looked beyond the communist statutory rules to the interwar period scholarship, in order to find more permanent legal thought 'formants' in which the socialist categories could be explained.<sup>83</sup>

Furthermore, this continuity was not limited to civil law. The pre-communist commercial codes, other possible formal sources dealing with private property relations, had an 'afterlife' in the communist CEE.<sup>84</sup> For example, these codes could never be formally repealed during the socialist period, even if they were indirectly amended and not in widespread use, as in the case of Romania and Hungary.<sup>85</sup> Or, the socialist codes could directly import major concepts from the pre-communist commercial codes, as was the case of the Eastern German, Polish and Czechoslovak laws regulating international trade. For instance, while discussing the Czechoslovak economic code of 1964 in relation to the old Czechoslovak commercial code, Gloss notes that 'although the Czechoslovak communist regime preserved many provisions of the commercial code in the code of international trade, a commercial code *stricto sensu* was never enacted.'<sup>86</sup> Equally, Gloss observes that 'many provisions of the commercial codes – supplemented by those of the civil code dealing especially with businessmen, contracts in general, sales, insurance, banking, warehouses, the carriage of goods, etc. – survived in the code of international trade, enacted in 1963, and in the 1988 Law on Joint Ventures.'<sup>87</sup> And a similar example of

83 See e.g. Gianmaria F. Ajani, 'The Supremacy of Statutory Law in Socialist Countries: Scholarly Opinions and Operative Rules', *Review of Socialist Law* 11 (1985) 123. See also John Quigley, 'Socialist Law and the Civil Law Tradition' (n 73) 802–808 (for an ample review of the 'socialist' legal scholars sustaining the continuity); Rudolfo Sacco, 'The Romanist Substratum in the Civil Law of the Socialist Countries', *Review of Socialist Law* 14 (1988) 65; and Mihaly, 'The Role of Civil Law Institutions in the Management of Communist Economies: The Hungarian Experience', *American Journal of Comparative Law* 8 (1959) 310.

84 For a discussion of the commercial law in CEE and the USSR at it stood in 1989, see e.g. Hubert Izdebski, 'A Revival of Commercial Law in the Soviet Union and Other European Socialist Countries', *Review of Socialist Law* 15 (1989) 365.

85 For Hungary, see e.g. Tamás Sárközy, 'The Law of the Institutional System of Market Economy in Hungary and the European Union', *Begegnungen Schriftenreihe des Europa Institutes Budapest* 25 (2005) 31 at 35.

86 George E. Glos, 'The New Czechoslovak Commercial Code', *Review of Central and Eastern European Law* 18 (1992) 555.

87 *Ibid.* For the massive borrowing of Western concepts and the total lack of 'socialist imagination' in the Czechoslovak Code of International Trade, see George E. Glos,

'socialist' borrowing from the pre-war codification work in the field of private international law could be found in Poland.<sup>88</sup>

Evidently the borrowing was not limited to the law regulating international trade or to the field of private international law. It extended to many substantive fields, such as those related to joint ventures<sup>89</sup> or the laws allowing for the formation of commercial and private enterprises.<sup>90</sup> Hungary, for example, which was also a 'champion' of socialist economic reforms, introduced joint ventures in its domestic 'socialist' legislation as early as 1972<sup>91</sup> and amended this legislation in 1977.<sup>92</sup> This legislation, and the alternative model to that of Soviet law on which it was based, further spread to other socialist countries and to the former USSR in the 1980s.<sup>93</sup> Its influence on the elaboration of similar laws in socialist countries could be seen as an example of a broader trend of the period in which the sovietisation of the law of the CEE countries, characteristic of an earlier period, was reversed, and models alternative to the

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'The Czechoslovak Law of Sale', *Review of Socialist Law* 4 (1978) 106 at 143. For a very descriptive account of the ways in which the Czechoslovak socialist revamping of the former codes by enacting a new 'socialist' Civil Code, the Economic Code and the Code of International Trade made necessary the post-communist enacting of a new Commercial Code, see Josef Bejcek, 'The New Commercial Code of the Czech Republic', *John Marshall Law Review* 30 (1996-1997) 699.

88 Dominik Lasok, 'The Polish System of Private International Law', *American Journal of Comparative Law* 15 (1966-1967) 330 at 331.

89 Which were also a product of late communism, introduced first by Yugoslavia in 1967, followed by Romania in 1971, Hungary in 1972, Poland in 1976, 1979 and 1982, Bulgaria in 1980, and Czechoslovakia in 1988. The USSR also adopted a law on joint ventures in 1987.

90 For example, the Romanian Law on Commercial Societies No. 31 of 1991, which used as a major source of inspiration the drafts of the Civil and Commercial Codes made before WWII, in the reign of King Carol II, but never enacted as formal law. The drafters of the pre-war codes were heavily influenced by the German and Italian commercial law doctrines, the most progressive at the time.

91 Decree of the Minister of Finance No. 281, 1972 (X,3), amended in 1977, by Decree of the Minister of Finance No. 7/1977 (V,6).

92 See e.g. George G. Lorinzi, 'U.S.-Hungarian Joint Ventures', *International Business Law* 10 (1982) 113.

93 See e.g. Petru Buzescu, 'Joint-Ventures in Eastern Europe', *American Journal of Comparative Law* 32 (1984) 407, for a discussion of 'joint ventures' in CEE socialist law. For the American origins of the joint ventures transplant, and for its applications in the Asian and socialist countries, see M. Dornarajah, *Law of International Joint Ventures* (Singapore: Longman, 1992). The joint ventures received a great deal of attention in the legal literature in the 1970s and '80s; therefore we cannot cite here all the relevant literature on the subject.



Soviet law were affirmed through the CEE and eventually were adopted in the former USSR.<sup>94</sup>

Therefore, in spite of the perversion of the spirit of civil codes, or the limited use of commercial codes during communist times,<sup>95</sup> the formal dispositions of such codes regulating private property were similar to those of pre-socialist times and, arguably, an important part of the 'law on the books' when communism imploded in CEE. Moreover, important groundwork on civil law matters had already been done in the interwar period in almost all the CEE countries even when new codes were not enacted. The proposals for new Romanian civil and commercial codes during Carol II's reign in the late 1930s, never enacted because of Carol's forced abdication and Romania's subsequent entry into the war, exemplify such groundwork. Similarly, the Czechoslovak work on civil and commercial reform in the 1930s, not enacted because of Anschluss,<sup>96</sup> and the Polish proposals for unification and reformation of the civil and commercial legislation in the interwar period, not enacted because of Poland's entry into the war, show that the interwar groundwork on civil and commercial law matters was not limited to Romania. In addition, there is evidence that, at least partially, this interwar groundwork influenced the reflection of socialist era lawmakers.<sup>97</sup> This interwar work was also an important source of local inspiration, available for outright enactment at the onset of the post-communist period.<sup>98</sup> Although there is debate in the scholarship as to the utility of such

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94 Gianmaria Ajani, 'La circulation de modèles juridiques dans le droit post-socialiste', *Revue internationale de droit comparé* 46(4) (1994) 1087 at 1090.

95 The residual dispositions of the commercial codes surviving the initial communist waves of abrogation were never used openly or widely in 'real existing socialism', but were put to discrete use by the various corporate entities controlled by the political police involved in the foreign trade dealings of the communist states.

96 Glos, 'The New Czechoslovak Commercial Code' (n 86).

97 See e.g. Kazimierz Grzybowski, 'Reform and Codification of Polish Laws', *American Journal of Comparative Law* 7 (1958) 393, for a discussion of the conscious effort of late 1950s Polish drafters of the socialist codes to continue the interwar legal tradition. A similar influence is discernable in the work on the Romanian 'socialist civil code' commission in the late 1960s, although the proposed civil code was not enacted, the Romanian authorities preferring to keep in force the Civil Code of 1865. Interestingly enough, where the Romanian authorities decided to replace portions of this code with 'socialist laws', as in the case of 'physical or juridical persons', family, etc., the interwar work on the civil code informed the choices of the socialist lawmakers.

98 For a well-documented study of the subtle intellectual and institutional path-dependency of post-communist policy and legislative developments in the case of social security and general welfare covering Poland, Hungary and the former Czechoslovakia, see Tomasz Ingłot, *Welfare States in East Central Europe 1919–2004* (Cambridge University

work and the need to completely replace the socialist era civil and commercial regulations with new codes,<sup>99</sup> it is beyond doubt that the interwar groundwork inspired local choices after the implosion of the socialist system.<sup>100</sup> Moreover, the legal transformations and experiments with more 'liberal' property and companies' regimes began in the USSR and in CEE communist countries, such as Hungary and Poland, at least several years before the post-1989 momentum and constrained the post-communist choices.<sup>101</sup>

Finally, the legal boundaries of a state enterprise were also more or less clear post-1989, at least in the formal law, as the communist era legal drafters, when modifying the socialist civil codes, borrowed heavily from the pre-socialist legal imagery. Therefore, almost all the necessary legal foundations of a

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Press, 2008). The *longue durée* focus of Ingot's study allows for the identification of the complex pre-communist and communist era intellectual inspiration of various policies and also for the identification of the path-dependent institutional development of such post-communist policies. Nevertheless, there are no similar single-country or comparative studies which could document the interplay of the pre-communist and communist era ideas and institutions related to civil and commercial law, the only study which comes close to that of Ingot's with respect to breadth and historical coverage being that of István Pogány related to restitution (Pogány, *Righting Wrongs in Eastern Europe* (n 1)), which nevertheless is singular in the field.

- 99 See e. g. Thomas Waelde and James Gunderson, 'Legislative Reform in Transition Economies: Western Transplants – A Shortcut to Social Market Economy Status?', *International and Comparative Law Quarterly* 43 (1994) 347, for an argument related to the need for more than cosmetic changes in socialist codes in the post-communist period. For a review of the arguments in favour of new codification as a method of preventing unsystematic reception, see Pierre Legrand, 'Strange Power of Words: Codification Situated', *Tulane European and Civil Law Forum* 9 (1995) 1.
- 100 See e.g. Gianmaria Ajani and Ugo Mattei, 'Codifying Property Law in the Process of Transition: Some Suggestions from Comparative Law and Economics', *Hastings International and Comparative Law Review* 19 (1995–1996) 117, for the initial perception of socialist codes as adequate for post-communist transformations and for a moderated argument related to the lowering of information costs which consolidated codes would provide.
- 101 See e.g. Marshall I. Goldman, *The Privatization of Russia: Russian Reform Goes Awry* (London and New York: Routledge, 2003) 74–75, for a discussion on how Russia's privatisation was shaped by regulations passed during the Gorbachev era. See also Wladimir Andreff, 'Transition through Different Corporate Governance Structures in Postsocialist Economies: Which Convergence?', in: Henk Overbeek, Bastiaan van Apeldoorn and Andreas Nölke (eds), *The Transnational Politics of Corporate Governance Regulation* (London and New York: Routledge, 2007) 155 at 158, for the point that the legal transformations of corporate structures and governance in the last years of communism led to a virtual takeover by insiders, managers and/or employees in nearly all the CEE countries.

Western conception of property, even if not all, existed already in the socialist era codes, or otherwise were easily to be found in pre-socialist proposals for civil or commercial codes and borrowed from there. Moreover, if formal property law was somehow missing or otherwise could not be borrowed from previous indigenous legislative proposals, plenty of Western sources of inspiration were readily available for expeditious import.

#### 4 Communist Property Transformation(S): Formal Law and Operational Rules

Yet, with all these characteristics of the formal law of property, when communism imploded in CEE and the communist property started to be transformed into private property, nobody could escape the apocalyptic feelings described by Verdery.<sup>102</sup> If the people could attach to such transformation of property apocalyptic imagery, there might arguably be more out there than the simple problem of the formal law of property in the transition to post-socialist property regimes. What contributed to this feeling becomes clearer if we consider some fundamental differences between the socialist and the Western organisation of property. For example, the organisation of socialist property in hierarchies of estates implied the allocation of socialist property to socialist enterprises for direct administration. These socialist enterprises were regulated under formal law similarly to the ways in which the Western corporations were regulated under Western law.<sup>103</sup> However, what differed a great deal in socialism was what these socialist enterprises, organised as corporate entities, could do with socialist property. Thus, such socialist corporate entities directly administered socialist property which was fuzzy, but, more importantly, the socialist administrators could move items of socialist property almost at will between various corporate entities.<sup>104</sup> By contrast, the Western corporations could move private property objects among corporate entities only as a result of contracts or formal acts. Unlike the socialist property which had fuzzy boundaries, the Western property was clearly delimited. Therefore, if we take into consideration these differences, it becomes evident that if

<sup>102</sup> Verdery, *The Vanishing Hectare* (n 32).

<sup>103</sup> As the communist lawmakers preserved in the 'socialist' legislation the pre-socialist codes, legal categories and distinctions related to juridical persons, even if the 'socialist enterprise' had a different social role to accomplish from that of the Western corporation.

<sup>104</sup> This move at will of objects of socialist property was made possible by the porous boundaries of such socialist hierarchical estates and by the operational rules of socialist property.

one considers the transformation of socialist property as the first priority of post-communism transitions, one will have to address first and foremost the problem of moving property freely between socialist estates (socialist corporate entities). Consequently, one has to address the change of the operational rules which make the moving possible in the first place, since the change of the formal law would not by itself solve the former socialist administrators' behaviour.

How a change in the formal law would lead to a change in the operational rules is unclear. However, monitoring the former socialist administrators' activity during the transformation of communist state property into private property<sup>105</sup> and addressing the agency problems would become paramount in the dismantling of the socialist hierarchies of estates. The enactment of formal rules related to property would be thus a secondary activity, as these rules were already in place or otherwise easily imported.<sup>106</sup>

Moreover, the private property rules would only be a small part, even if an important one, of the huge legal infrastructure which would be needed for an effective functioning of a commercial, market-based economy.<sup>107</sup> In the absence of effective regulations dealing with the myriad of possible commercial transactions, investment devices, banks, tax, environmental considerations, zoning, antitrust and consumer protection, to mention just a few of the directions in which a modern economy expands legal regulation, the simple regulation and possession of private property would be worthless. No one would be able to engage their property in meaningful transactions, given the huge transactional and informational costs resulting from the absence of legal regulations and effective monitoring of the implementation.<sup>108</sup>

105 The administrators were largely left in their places after communism imploded in 1989.

106 The reunified Germany seems to be the only 'country' dealing with specific problems of such transitions which acknowledged early on the need of monitoring. See John Borneman, *Settling Accounts: Violence, Justice and Accountability in Postsocialist Europe* (Princeton University Press, 1997).

107 See e.g. Paul H. Brietzke, 'Designing the Legal Frameworks for Markets in Eastern Europe', *Transnational Law* 7 (1994) 35 (discussing the fallacious assumptions of the neoliberal ideology with respect to what was to be done to transform the command economies of socialist CEE states into market economies). See also Carol M. Rose, 'Economic Claims and the Challenges of New Property', in: Verdery and Humphrey (eds), *Property in Question* (n 31) 275.

108 See e.g. Kathryn Hanley, 'How Russian Enterprises Cope with Payment Problems', *Post-Soviet Affairs* 15(3) (1999) 201; and Kathryn Hendley, Peter Murrell and Randi Ryterman, 'Law, Relationships and Private Enforcement: Transactional Strategies of Russian Enterprises', *Europe-Asia Studies* 52(4) (2000) 627 (for the impact of absence of trust and the incomplete commercial legal infrastructure in the strategies for the contracts' conclusion and execution adopted by the 'post-communist' Russian enterprises).

Nonetheless, in the post-communist CEE the priorities were turned upside down,<sup>109</sup> and priority was given to formal enactments of rules regarding property, with a complete ignorance of the monitoring and agency problems.<sup>110</sup> Thus, the difficult conceptual and practical legal problems posed by this transformation of the hierarchies of socialist estates into distinct corporate entities functioning according to the Western or pre-communist legal ideas were left unaddressed in the early years of post-communist CEE transitions. Consequently the hierarchies of socialist estates that blurred the traditional corporate and private/public law boundaries<sup>111</sup> continued to exist in fact for a number of years after 1989. The socialist property organised in hierarchies of socialist estates and entrusted for direct administration to socialist corporate forms could not be transformed into private property by simple enactment of formal law. Moreover, socialist corporate forms did not transform into distinct corporate entities which could be treated equally before the law or have relationships with the objects of property similar to those which persons, physical or juridical, could have with the objects of property in the *civil-continental* or *common law* traditions.

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- 109 Based on the simplistic assumption that once the property rights were distributed, the market would magically follow and take care of the rest, and the new private owners' drive for profits and efficiency would also magically solve the communist countries' stagnation. See e.g. Robert B. Seidman, Ann Seidman and Neva Makgetla, 'Big Bangs and Decision-Making: What Went Wrong', *Boston University International Law Journal* 13 (1995) 435 at 451.
- 110 See e.g. Paul H. Rubin, 'Growing a Legal System in the Post-Communist Economies', *Cornell International Law Journal* 27 (1994) 1 at 2 (for the point that much of the economic literature on the first years of post-communist transitions focused on property while ignoring the problems posed by the society based on the market), and Paul H. Brietzke, 'Designing the Legal Frameworks' (n 107). The problems of agency and corporate governance were also ignored, albeit after the failed voucher privatisation in Russia and the Czech Republic they become more salient in the legal scholarship under the heading of corporate governance. See e.g. Jeffrey M. Jordan, 'Patronage and Corruption in the Czech Republic', *SAS Review* 12(2) (2002) 19; John C. Coffee, 'Privatization and Corporate Governance: The Lessons from Securities Market Failure', *Journal of Corporation Law* 25 (1999) 1; Bernard Black, Reinier Kraakman and Anna Tarassova, 'Russian Privatization and Corporate Governance: What Went Wrong?', *Stanford Law Review* 52 (2000) 1731.
- 111 See e.g. Mark Freedland and Jean-Bernard Auby (eds), *The Public Law/Private Law Divide: Une entente assez cordiale? La distinction du droit public et du droit privé: regards français et britanniques* (Oxford : Hart Publishing, 2006); Curtis J. Milhaupt and Katharina Pistor, *Law and Capitalism: What Corporate Crises Reveal about Legal Systems and Economic Development around the World* (University of Chicago Press, 2008) 4–10.

Seen from a traditional civil law perspective, the socialist estate and the socialist firm which administers this estate present several difficult conceptual problems, which reflects on the conceptual difficulties posed by privatisation of socialist enterprises. For example, because the *patrimony* of a socialist enterprise is fuzzy and has in practice no clear boundaries delimited by law, it is difficult to delimitate clearly what is lawful and unlawful in the process of transfer of a socialist enterprise patrimony to a newly formed 'capitalist' corporation. In the past, any appropriation by the former socialist managers of objects belonging to the socialist estate would be, at least in theory, unlawful and susceptible of severe punishment. But with the passage of new corporate and privatisation laws the boundaries of what was legal and what was illegal were further blurred. Thus, the enactment of corporate and privatisation laws made the fictional transformation of the *socialist* corporations into *capitalist* corporate structures not only possible but also mandatory. Similarly the new laws made the transfer of the patrimony of the old socialist corporations to the newly created corporate entities mandatory. What these new laws did not address, however, was the deep level at which socialist organisation of property operated, a level which created the possibility for socialist managers to hoard labour and materials provided by the state. In theory, the capitalist corporations still owned property of the state and it was illegal for such property to be appropriated by private actors. However, there was an abrupt disappearance of the communist state's institutions which monitored the activity of managers of socialist estates.<sup>112</sup> Therefore, the sole 'arbitrators' of the legality of the transfer of property from state to private forms were the former socialist managers, already accustomed to appropriation of state property and transactions on the grey market in the last decades of communism. In other words, corporate socialist forms characterised by fuzzy legal boundaries were almost overnight transformed into capitalist corporate forms. These forms were endowed with property left to be administered by the former socialist managers, accustomed to act on the margins of socialist legality, which itself was different from capitalist legality, dominated by formal law. The enormous monitoring problems posed by such transformation were totally ignored by the post-communist lawmakers, with little exception. In such a context, the degree of outright appropriation of state property by the former socialist

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112 For a good example of such communist institutions and of the speed with which these institutions were dismantled by the communist technocratic surviving the Bulgarian post-communist transition, see Ganev, *Preying on the State* (n 59). One should note that such monitoring institutions as those described by Ganev existed in all CEE countries and in the USSR.

managers that was seen in post-communist CEE and in the former USSR is not surprising. The literature describing such appropriations is too wide and otherwise impossible to cite extensively here, but the details and wide arrays of methods of appropriation are well documented in Russia and the former CIS countries, Poland, Hungary and the Czech Republic, as well as in Romania, Bulgaria and the Balkan countries.<sup>113</sup>

Besides the problems posed by the fuzzy boundaries of socialist estates and by the absence of instruments for monitoring the former socialist managers' illicit activities, the problems associated with the quest for the best structure of corporate governance and the multiple difficulties faced by the post-communist countries engaged in such quest were not trivial at all.<sup>114</sup> In the light of Enron and the waves of corporate scandals of the first decade of the new millennium, the whole corporate model preached by powerful international actors to Eastern Europe and to the CIS (where it was adopted) came under closer scrutiny.<sup>115</sup> However, this examination, and the reconsideration of principal-agent issues created by this corporate model, came a little late. At that moment, the rather simplistic assumptions underlying this Western corporate model which inspired the corporate and 'privatisation laws in CEE and the former USSR were already damaged by the unforeseen and unintended

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113 See e.g. Verdery, *The Vanishing Hectare* (n 32); Ganev, *Preying on the State* (n 59); Maria Łoś and Andrzej Zybortowicz, *Privatizing the Police-State: The Case of Poland* (Palgrave Macmillan, 2000). For an example of the conceptual difficulties presented by post-communist transfers of property, see *Nazym Khikmet* case, [1996] 2 Lloyd's Law Reports 362 (Sir Thomas Bingham, Evans LJ, and Thorpe LJ) and a commentary on the case in Emily Haslam, 'The Odessa File: Post Socialist Property Rights in English Courts', *The Modern Law Review* 60(5) (1997) 710.

114 See e.g. Andrei A. Baev, 'The Transformation of the Role of the State in Monitoring Large Firms in Russia: From the State's Supervision to the State's Fiduciary Duties', *Transnational Law* 8 (1995) 247, for an interesting discussion on the conceptual difficulties encountered by civil and socialist lawyers in designing an optimal post-communist corporate governance structure, in the context of Russian privatisations. See also John C. Coffee, 'Starting from Scratch: The Legal and Institutional Steps to Viable Securities Markets in Transitions Economies', *Review of Central and East European Law* 27 (2001) 7, for a more detailed discussion of what was missing in the Czech and Russian voucher privatisations.

115 See e.g. Milhaupt and Pistor (n 111), and Kent Greenfield, *Failure of Corporate Law: Fundamental Flaws and Progressive Possibilities* (The University of Chicago Press, 2006). See also Bernard S. Black, 'Is Corporate Law Trivial? A Political and Economic Analysis', *Northwestern University Law Review* 84 (1990) 542 (for the re-examination of several tenets of corporate theory in the light of Russia's privatisation failures).

consequences of the post-communist privatisations.<sup>116</sup> Because of these consequences, large swaths of populations in CEE and the former USSR have been assessing for some time the privatisation laws as an outright 'theft.'

The examples outlined above were not the only instances when ignorance of the particularities of communist property led to unintended consequences of privatisation laws. The enormous differences between the social arrangements of property in the real existing socialism and in capitalism, and the conceptual lines in which they diverge, are nicely captured for example by Catherine Alexander in her analysis of privatisation in Kazakhstan.<sup>117</sup> As Alexander notes:

In particular, the process of privatisation . . . problematises the very definitions of 'person,' 'thing,' and 'relation,' bringing to the fore the polyvalent nature of value implicit in any property relation.<sup>118</sup>

In addition to 'person,' 'thing,' 'relation' and 'values,' which constitute the conceptual building blocks of property relations described by Alexander, in the dynamic of post-socialist transformations appears another element, namely the state. Again in the words of Alexander:

The state too appears as a crucial element in the way people talk about the reconfiguring of persons, things, and relations. A sense of abandonment by an overarching structure that had meshed persons and objects together appeared repeatedly in informants' accounts under the rubric 'theft.' In the conclusion, I return to the notion of theft as relational absence, the dark mirror of property relations.<sup>119</sup>

In sum, as a result of the post-communist privatisation policies' ignorance of the particularities of the socialist organisation of property, the post-communist societies learned two facts the hard way. First, that the socialist estates reflected a socio-legal reality and a mode of social governance different from those reflected by the Western and pre-socialist civil law concepts

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116 See e.g. Wladimir Andreff, 'Transition through Different Corporate Governance Structures' (n 101) 156.

117 Catherine Alexander, 'Value, Relations, and Changing Bodies: Privatisation and Property Rights in Kazakhstan', in Verdery and Humphrey (eds), *Property in Question* (n 31) 251.

118 *Ibid.* 252

119 *Ibid.*



such as 'juridical person' and 'patrimony'.<sup>120</sup> A simple change of formal law that left intact the social governance and the networks of administrators who ran the socialist estates would have plenty of unintended and perverse consequences. And second, that the enactment of formal law alone, followed by the move of assets from state to private corporate actors, would not do the trick of transforming overnight a complex system named generically a 'socialist' economy into another complex system called a 'market' economy.

The ineptitude of the neoliberal project of privatisation in post-communist CEE is even clearer if, in addition to the above considerations related to the formal law of property, the political economy of property in communist CEE is taken in consideration. In this respect, it should be noted that the former Soviet CEE satellites tolerated significant pockets of such private property.<sup>121</sup> As was shown above, Poland reversed the collectivisation course in the 1960s and had the rural sector dominated by private property. For its part, Hungary, during the 1970s and '80s, took important steps in experimenting with private property, and in 1989 had an important share of its GDP produced by the

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120 The civil law concept of patrimony, albeit kept in the communist (and post-communist) legal vocabulary, covers eventually only the mass of property objects of which a physical or juridical person could dispose. It covers only imperfectly the 'administration rights' enjoyed by the socialist enterprise, especially since the state property administered by socialist enterprises was in principle inalienable and could not be disposed of by contract, as it could be the private property forming the patrimony of a private enterprise. In addition, while the civil law physical/juridical person distinctions were kept in the communist legal vocabulary, there was not equal standing among these persons, *vis a vis* property or social ordering. As has been shown, from a property's perspective there is a radical departure in communist law from the civil law concept of equality of persons, the communists organising complex hierarchies of persons with respect to property holdings. Moreover, the communist generic 'right of direct administration', while accomplishing somehow in the ordering of communist property functions similar to those accomplished in the civil law of property by the dismemberments of property, *usus, fructus* and *abusus* (the rights to use, to collect the fruits of the thing, and to dispose of the thing, which form the substance of ownership), it was nevertheless something conceptually different from the civil law dismemberments of property. Overall the communist generic 'right of administration' fell short of the qualities of ownership in civil law.

121 I used the term 'Soviet satellites' to suggest the legal operational overhaul of the civil codes in force in these countries, by a series of various decrees of Soviet inspiration, which were introduced almost simultaneously during the communist coups in the late 1940s, in all the countries concerned. Although legal differences persisted in all the CEE communist countries, 'Soviet law' is a useful conceptual shorthand for referring to communist law in these countries.

private sector.<sup>122</sup> By contrast, the most 'étatised' socialist countries' economies, for example Czechoslovakia's, had less than 10 per cent of the GDP share produced by the private sector at the time.

Furthermore, important stocks of private residential property considered 'personal property' existed all over CEE communist space. For example, in Bulgaria 84 per cent of the housing stock was in private hands in the late 1980s, in Romania close to 75 per cent of this stock was in private hands, and in Hungary and Slovenia close to 70 per cent of the housing stock was privately owned, while in Czechoslovakia and Poland only 40 per cent of the dwelling units were privately owned.<sup>123</sup>

Moreover, even in respect to the ideologically untouchable communist 'means of production', there were experiments with a more liberalised regime of industrial and agricultural property in communist Europe.<sup>124</sup> Hungary, for example, pioneered in the late 1980s legislation which would allow for the transfer of state property, and implemented at the end of 1988 and in early 1989 Acts allowing for the formation of business entities independent of state control. Thus Act VI of 1988 on Economic Associations was enacted by the Hungarian parliament (then dominated by the communist party) in October 1988, modifying the corporate law chapter of the 1875 Merchant Code, as well as the 1930 Act on Limited liability companies, the laws governing state enterprises, cooperatives, and enterprises which included foreign persons. In November 1988 the Hungarian parliament passed Act XXIV of 1988 on Foreign Investment, and at the end of May 1989, the same parliament passed Act XIII of 1989 on the Transformation of Business Organizations and Associations. The later act would eventually allow for "nomenklatura privatisations," offering a preview of the scandals which would rock the former communist CEE countries, when they would pursue similar legislative paths. Hungary's Act would eventually become an embarrassment to the Hungarian Parliament, as

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122 Respectively 30 per cent of the GDP for Poland (EBRD report, 1999, 252) and approximately 25 per cent in 1990 for Hungary (EBRD report, 1999, 228) following two decades of experimentation with the so-called New Economic Mechanism (NEP).

123 See e.g. Kiril Stanilov, 'Housing trends in Central and Eastern European Cities' (n 6) 177. See also Hegedüs, Tosics and Mayo, 'Transition of the Housing Sector' (n 6) 103; and for Poland and Czechoslovakia, R. Struyk, 'Housing Privatisation in the Former Soviet Bloc to 1995', in Andruzs, Harloe and Szelenyi (eds), *Cities after Socialism* (n 6) 192.

124 In Hungary under the 'Goulash communism' of Kadar and in Poland in the late years of military regime nomenklatura privatisations flourished. These countries are 'showcases' of the unintended consequences of such experiments with privatisation. Polish and Hungarian departures from the Soviet model of agriculture also explain why 'restitution' of agricultural land was important in some places but not in all.

it was obvious that this legislation could not safeguard against the undervalued sale of equity in Hungarian state-owned enterprises.<sup>125</sup> These lessons were not learned by post-communist governments which enacted similar legislation, of neoliberal inspiration, a few years after. Nevertheless, the point is that, besides the legal transformations which it initiated during the late 1980s, Hungary was a frontrunner of liberalised regimes of industrial and agricultural property from the early 1970s, and it was followed by Poland and the USSR in the 1980s. Thus, in 1989 considerable variation existed in communist CEE with respect to the share of private property in the national economy. Czechoslovakia, the former GDR and Romania were all leaning towards the end of a spectrum where socialist property completely dominated the economy, while Hungary and Poland were at the opposite end of the spectrum. Nevertheless, and in spite of this variation, in all the 'socialist' countries private property represented a social and legal category fully accepted by the communist state.<sup>126</sup> Moreover, this regulation of private property by the communist state did not diverge fundamentally, at least in its formal, legal, characteristics, from the Western notions of property.

Therefore, if one wants to see what made the transformation of socialist property into private property such a protracted and intractable issue during (at least) the first decade of post-communist property transformations, one has to look beyond the mere law in the books and the formal definitional aspects of property, to the ways in which law operated. Ultimately, one has to look to the assumptions on which the post-communist economic transformations were based. In this respect, I cannot attempt to provide in this article a full and authoritative account of what went wrong in the transformations, given their magnitude and multiple dimensions. What this article can provide is only a brief overview of some of the scholarly attempts to conceptualise these transformations, and the outline of an argument which considers the 'justice' dimensions of such transformations. In order to provide the latter, it

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125 See e.g. George Gluck, 'Foreign Investment in Hungary: An Overview of Recent Legislation', *Whittier Law Review* 12 (1991) 166, noting that the 'window of opportunity' for such privatisations was foreclosed as a result of the nomenklatura privatisation scandals in March 1990, by Act VII of 1990 on the State property agency and on the management and development of related property, and by Act VIII of 1990 on the protection of state property entrusted to enterprises. As far as I know, there are no empirical studies documenting how the agency was capable of monitoring the managers' activity, although a particularity of the Hungarian scheme was that it was designed to attract foreign investment.

126 Even if curtailed more by some of these communist states than by the frontrunners, Hungary, Poland, the USSR and Yugoslavia.

should be restated that the communist property, far from being a 'non-existent' category or a regression from pre-socialist times, was in reality a very complex category.<sup>127</sup> Thus, the organisation of the 'real socialist' property was an administrative matter more than a legal one. In such a system, administrative discretion was far more important than legal procedures aiming at regularity and certainty. Furthermore, hierarchical relations of property forms introduced by socialism produced a hierarchy of estates of administration,<sup>128</sup> where the entities lower on the hierarchy than the state were granted sorts of 'administrative rights' on the estate assigned by the state to the respective entities. These administration rights were very different in their nature from the *usus* and *usufruct* of the civil and Western law. Further, in such estates, the socialist managers had *sui generis* administrative rights to move items of socialist property at will, in huge trade networks made by similar socialist administrators of state enterprises. In theory, nevertheless, the patrimony of the state, out of which such administrative estates were carved, was considered inalienable. The fiction of the inalienability of state patrimony, and the idea that since all the administrative estates belonged to the inalienable patrimony of the state it was fine to move items among administrative estates, made such movement possible. However, the movement of socialist items of property by socialist managers transformed the socialist landscape (and, in my view, all the patrimonies of socialist corporate entities) into one with elastic qualities, as described by Verdery.<sup>129</sup> Although Verdery drew this inspiring characterisation out of an analysis of post-communist transformations in land ownership, her description could be extended to the whole notion of the patrimony of former socialist estates which were transformed into private enterprises after the fall of communism. In theory these patrimonies of the newly created private enterprises consisted, according to the civil law definitions, in

127 See Roman Frydman and Andrzej Rapaczynski, *Privatisation in Eastern Europe: Is the State Withering Away?* (Budapest: CEU Press, 1994), cited by Verdery in *The Vanishing Hectare* (n 32) 41: '[T]he socialist economies of Eastern Europe did not have any property system ... governing their productive activities.'

128 Verdery, *The Vanishing Hectare* (n 32).

129 *Ibid.* The post-socialist 'elastic qualities' of land and the post-communist tendency to hide land described by Verdery present striking similarities to the post-tsarist Russia period, even if in Russia the peasants, and not the administrators of the land, utilised such tactics. For a detailed account of the struggles between the early Soviet power and the peasants after the October Revolution, see generally James C. Scott, *Seeing like a State: How Certain Schemes to Improve the Human Condition Have Failed* (New Haven and London: Yale University Press, 1998), especially Chapter 6, 'The Soviet Collectivization on the Capitalist Dreams.'

the totality of debts, credits and physical objects 'owned' by a juridical person according to the formal law. In practice, the (former) communist managers were left to administer such entities as they knew best, and the *operational rules* of communist property were left untouched by the post-communist changes in *formal law*. Thus, every item belonging to the patrimony of these new corporate entities continued in fact to be removed at sole will by (former) socialist managers, and vanished or reappeared in this patrimony according to the socialist administrators' desires. This movement of items at the will of former socialist administrators made the patrimony of newly created 'private' enterprises a very elastic one and the formal law regulating the creation of such entities meaningless.

## 5 Transforming Communist Property Into Private Property: Some Normative Problems

Admitting, *arguendo*, that post-communist privatisation was necessary, if one really wants to transform communist property into private property, one has to change, as has been shown, the operational rules according to which communist property functions. Consequently, the established networks of socialist managers have to be disrupted somehow, for example by removing such managers from the positions held. Because neither of these two conditions was fully met in the early phase of post-communist transition, the operating rules of socialist estates continued to produce effects. In the early post-communist years for example, the former administrators of the socialist estates were left untouched by the change of regime in CEE.<sup>130</sup> They could move, almost at will, items belonging to the former socialist estates, thereby further reducing the former socialist property subjected to privatisation or restitution. These characteristics of the transitional period posed several problems which would reflect on the legitimacy of the whole process of post-communist property transformations. First, they allowed for the creation of the phenomenon that Stark observed in Hungary and described as 'recombinant' socialist property.<sup>131</sup> Accordingly to Stark, the 'recombination' of socialist property consisted in the reorganisation of the debts of the former socialist enterprises under the umbrella of empty corporate shells. It also consisted in the 'privatisation',

130 With the former GDR as a notable exception as a result of its unification with Western Germany.

131 See David Stark, 'Recombinant Property in East European Capitalism', *The American Journal of Sociology* 101(4) (1996) 993.

boarding, or hiding of the assets, organised under myriad corporate shells, all under the control of the former socialist administrators and their cronies.<sup>132</sup> In the words of Stark:

Recombinant property is a form of organizational hedging in which actors respond to uncertainty by diversifying assets, redefining and recombining resources. It is an attempt to hold resources that can be justified by more than one legitimating principle. Property transformation in postsocialist Hungary involves the decentralized reorganization of assets and the centralized management of liabilities. Together they blur the boundaries of public and private, the boundaries of enterprises, and the boundedness of justificatory principles.<sup>133</sup>

Another scholar of post-socialist transformations, Ganev, analysing the phenomenon of transformation of state property in Bulgaria, described the process as '*preying* on the state.'<sup>134</sup> In Poland, the phenomenon was described by the Polish sociologists as political capitalism,<sup>135</sup> or the privatisation of the police state.<sup>136</sup> In other words, the persistence of communist property's operational rules long after the demise of the socialist system in CEE, coupled with the insistence to privatise communist property in the blurred state-private divide characteristic of post-communist societies,<sup>137</sup> allowed shadow transfers of property from the state entities to various private entities. These shadow transfers went far beyond what was permissible under the formal law. Thus, the post-socialist 'law in the books', which left untouched the operational rules of communist property, did not impede in any way the (former) socialist administrators to move at will items among the communist hierarchies of estates, formally transformed into capitalist corporations. And this post-socialist law in the books could not hinder the (former) socialist

132 *Ibid.* In the light of later corporate scandals such as Enron, it is however questionable whether such phenomenon was particular to pathologies of capitalism as developed in the early stages of transformation of the transitional countries or has more to do with the way in which law and corporations are conceptualised and work.

133 Stark, *Recombinant Property* (n 131) 993.

134 See Ganev, *Preying on the State* (n 59).

135 See Jadwiga Staniszkis, "'Political Capitalism" in Poland', *East European Politics and Societies* 5(1) (1991) 127.

136 See Maria Łoś and Andrzej Zybortowicz, *Privatizing the Police-State* (n 113).

137 Janine R. Wedel, 'Blurring the State-Private Divide: Flex Organisations and the Decline of Accountability', in: Max Spoor (ed.), *Globalisation, Poverty and Conflict* (Springer Netherlands, 2005) 217.

administrators from moving items at will from such estates to the administrators' 'pockets'.<sup>138</sup> Moreover, the former socialist administrators were generally left in their former positions after the regime change or were confirmed as managers of 'post-socialist' entities. Thus, lustration, or the administrative removal of cadres associated with the communist regimes from public positions in the new political regimes, became a bitter theme in post-socialist CEE, while non-existent as a transitional justice issue in other countries traversing democratisation processes. Lustration was a bitter theme because it targeted, among other ex-communist cadres, the former administrators of the socialist hierarchical estates, who were running post-socialist corporate entities.<sup>139</sup> Thus, lustration had the potential to dramatically upset the maintenance of the former socialist estates functioning within empty, Western-type corporate shells imposed by privatisation laws. And, by targeting the administrators of the socialist 'estates of production' for removal, lustration would also contribute to the dismantling of the socialist networks that survived the fall of communism. Nevertheless, as lustration laws were not enacted in the region by the post-1989 CEE legislatures,<sup>140</sup> this dismantling of the socialist networks did not happen across the region in the first post-communist years.<sup>141</sup> Therefore, socialist property transformation and lustration, albeit distinct concepts analysed individually and separately in the transitional justice literature, could also be seen as interrelated in the context of post-communist transformations. Seen as interrelated with property transformations, lustration would support, nevertheless, the socialist estates' transformations into juristic or civil persons which use the former socialist objects of property in conformity to the civil law rules.

Curiously enough, the issues of *nomenklatura privatisations* and accumulation of property by the former socialist technocratic elites, theorised quite vigorously in the sociological and anthropological literature in the first decade of

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138 And led to the so-called *nomenklatura* 'privatisation' taking place in the countries which 'liberalised' the corporate regimes.

139 Transformed into various corporative forms.

140 With the exception of the former GDR and Czechoslovakia. The Czechoslovak law, however, did not target for removal former administrators of 'socialist' estates or enterprises.

141 For an exemplification of the power of the networks, social capital of the former 'socialist estates' administrators, in the post-communist transformations of Romania, see Verdery, *The Vanishing Hectare* (n 32). There are numerous other individual case studies in other post-communist CEE countries, whose enumeration will be beyond the scope of this study.

transformations,<sup>142</sup> were dealt with less systematically in the legal scholarship. Also lacking in legal scholarship is the theorisation of another dimension of justice of the post-communist property transformations, namely the inequalities originating in communist times but amplified by the dismantling of the communist era industrial and agricultural conglomerates.<sup>143</sup> Yet, a typical communist industrial or agricultural enterprise was not only a building block of communist development but also the place where the communist social redistribution was taking place.<sup>144</sup> Catherine Alexander aptly captures in the anthropological literature the dimension of the social infrastructure developed around the mammoth communist conglomerates, in her

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142 The sociological discussion on the nomenklatura privatisation in post-communism is too wide to be cited here otherwise than selectively and just by way of example. Moreover, there is no agreement among diverse authors with respect to the social implications of market transformations, and there is justified criticism for the abandonment by the sociologists of the analysis of social inequalities (generated by communism and perpetuated or amplified by the new regimes) in favour of rather vague categories such as markets and social networking. By way of example, see Victor Nee, 'A Theory of Market Transition: From Redistribution to Markets in State Socialism', *American Sociological Review* 54 (1989) 663; Victor Nee, 'Social Inequalities in Reforming State Socialism: Between Redistribution and Markets in China', *American Sociological Review* 56 (1991) 267; Elemer Hankiss, *East European Alternatives* (Oxford: Clarendon Press, 1990); Andrew Walder, 'Property Rights and Stratification in Socialist Redistributive Economies', *American Sociological Review* 57 (1992) 524; Chris Hann, 'From Production to Property: Decollectivization and the Family-Land Relationship in Contemporary Hungary', *Man* 28(3) (1993) 299; Ákos Róna-Tas, 'The First Shall Be Last? Entrepreneurship and Communist Cadres in the Transition from Socialism', *American Journal of Sociology* 100(1) (1994) 40; David Stark and Lazlo Bruszt, *Postsocialist Pathways: Transforming Politics and Property in East Central Europe* (Cambridge University Press, 1998); Eric Hanley, 'Cadre Capitalism in Hungary and Poland: Property Accumulation among Communist-era Elites', *East European Politics and Societies* 14 (1999) 143; Andrew G. Walder, 'Elite Opportunity in Transitional Economies', *American Sociological Review* 68(6) (2003) 899; Michael Burawoy, 'Neoclassical Sociology: From the End of Communism to the End of Classes', *American Journal of Sociology* 106(4) (2001) 1099. For reviews of the literature on the market transition debate, see for example Iván Széleányi and Eric Kostello, 'The Market Transition Debate: Toward a Synthesis?', *American Journal of Sociology*, 101(4) (1996) 1082, and Yang Cao and Victor G. Nee, 'Comment. Controversies and Evidence in the Market Transition Debate', *American Journal of Sociology* 105(4) (2000) 1175.

143 But see Kerry Rittich, *Recharacterizing Restructuring* (n 19), for a theorisation in legal scholarship of the normative implications of social and gender inequalities brought by post-communist privatisations.

144 Alexander, 'Value, Relations, and Changing Bodies' (n 117).



description of the Textile Kombinat of Almaty in Kazakhstan. Accordingly to Alexander:

The supporting social infrastructure was breathtaking. More than 9,000 people were housed in factory hostels and apartment blocks built for workers. There were kindergartens, holiday resorts, hospitals, pioneer camps, and a colossal Palace of Culture.<sup>145</sup>

She further captures what happened with the huge social infrastructure built around these conglomerates as a result of 'privatisation':

The Kombinat was privatized in the mid-1990s. The immediate consequence was the rapid divestment of the social facilities and the gradual closure of one department after another . . . No social facilities remained; the hospitals, apartment blocks, and pioneer camps were either sold or handed over to the city council.<sup>146</sup>

The development of such immense industrial conglomerates around the USSR and the CEE communist states varied widely, depending on the industrial and agricultural policies pursued by different communist countries at different moments. Nonetheless, the industrial conglomerates represented an ideal of development during the communist times across the whole communist region. These industrial conglomerates reproduced, on a larger scale than the individual enterprises, the social redistribution operated by any industrial enterprise in socialism. Analytically speaking, they are useful units for analyses of privatisation and deindustrialisation and for analyses of inequalities generated by the politics of post-communist privatisations. The social implications of the privatisation of these conglomerates and of the subsequent dismantling of the redistribution they operated are enormous, yet are barely discussed in the legal literature,<sup>147</sup> in spite of more extensive discussions in the anthropological, geographic, economic and political theory literature. Some political scientists, for example, point to the fact that the post-communist CEE regimes were quicker than those in the former USSR to adopt at least some social policies capable of alleviating some costs of the economic transition and

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145 *Ibid.* 260

146 *Ibid.*

147 See e.g. Kent Klautt, 'Hungary after the Revolution: Privatisation, Economic Ideology and the False Promise of the Free Market', *Law and Inequality* (1995) 303 (for a general discussion on the case of Hungary).

of buffering the official income, which was plummeting in the early phase of post-communist transition.<sup>148</sup> But these measures were adopted mainly because of political calculus and for strategic reasons, and not because the politicians believed that distributive justice principles demanded such measures.<sup>149</sup> A similar argument, this time related to the transformation of communist property into private property via restitution, was made by social scientists who observed that the post-communist restitution laws were shaped by all sorts of 'arbitrary interests, privileges and resentments', under the umbrella of 'lofty principles of justice.'<sup>150</sup> Moreover, more recent studies show

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- 148 See e.g. Jon Elster, Claus Offe and Ulrich K. Preuss (eds), *Institutional Design in Post-communist Societies: Rebuilding the Ship at Sea* (Cambridge University Press, 1998), for an argument that the weak elites, which emerged from communism implosion in the region could not have the necessary legitimacy to impose a clearly dominant plan or project of transformation or be selective and sequential in the agenda setting, but had to satisfy multiple constituencies, eventually by social protective measures. See also Anna Grzymala-Busse, *Rebuilding Leviathan: Party Competition and State Exploitation in Post-Communist Democracies* (Cambridge University Press, 2007) (for a more recent political theory description of various strategies, including privatisation strategies, adopted by political post-communist elites) and Pieter Vanhuyse, *Divide and Pacify: Strategic Social Policies and Political Protests in Post-Communist Democracies* (Central European University Press, 2006), for a comprehensive discussion of the policies of early retirement and division of labour practised by the post-communist governments in CEE, as buffers for economic distress (with the notable exception of the Czech Republic, up to a point). For a more comprehensive discussion of the earlier social stratification data from the region see Henryk Domanski, *On the Verge of Convergence: Social Stratification in Eastern Europe* (Central European University Press, 2000). For Russia, see e.g. Boris Kagarlitsky, *Russia under Yeltsin and Putin: Neo-liberal Autocracy* (London and Sterling, VA: Pluto Press, 2002) 134 ff. For a discussion on the hidden economies of post-communist countries, see Mária Lackó, 'Hidden Economy – an Unknown Quantity? Comparative Analysis of Hidden Economies in Transition Countries, 1989–95', *Economics of Transition* 8(1) (2000) 117.
- 149 Vanhuyse, *Divide and Pacify* (n 148); Alfio Cerami and Pieter Vanhuyse (eds), *Post-Communist Welfare Pathways: Theorizing Social Policy Transformations in Central and Eastern Europe* (Palgrave Macmillan, 2009).
- 150 Claus Offe and Frank Bönker, 'A Forum on Restitution: Essays on the Efficiency and Justice of Returning Property to its Former Owners', *East European Constitutional Review* 2 (1993) 30 at 31. The argument is repeated in Frank Bönker, Ulrich K. Preuss and Claus Offe, *Efficiency and Justice of Property Restitution in East Europe* (Zentrum für Europäische Rechtspolitik, Universität Bremen, ZERP-Diskussionspapier, Vol. 5: Papers on East European Constitution Building, ZERP, 1993), and in Claus Offe and Frank Bönker, 'The Morality of Restitution: Reflections on Some Normative Questions Raised by the Transition to Private Economy', in Claus Offe, *Varieties of Transition: The East European and East German Experience* (Polity Press, 1996) 105.

the link between privatisation and the levels of perceived corruption<sup>151</sup> and reveal other negative social consequences of privatisation, including correlations between speedy mass privatisation and increases in rates of mortality.<sup>152</sup> Such scholarship totally undermines the neoliberal consequentialist claim that privatisation improves the overall well-being of the citizens of the countries adopting such policies. It also undermines the neoliberal claim that privatisation and marketisation could advance the democratic processes in post-communist countries.<sup>153</sup> From a normative, distributive justice perspective, this scholarship strengthens the idea that the neoliberal privatisation policies on the scale advocated in post-communist Europe are normatively inconsistent and deserve to be reconsidered as such in legal scholarship. Such reconsideration may be timely, especially since the idea that dismantling the socialist enterprises and conglomerates by 'privatisation' would imply a drastic reduction in the social redistribution operated by communism was not discussed in any depth in the legal literature. Moreover, the policies which operated this reduction could and should be assessed normatively, and from a distributive justice perspective, in legal scholarship. Similarly, the idea that the communist social redistribution should be replaced by 'capitalist' modes of

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- 151 See G. Gulsun Arikan, 'How Privatizations Affect the Level of Perceived Corruption', *Public Finance Review* 36 (2008) 706. For a rebuttal of simplistic neoliberal conceptualization of post-communist corruption, see also András Sajó, 'From Corruption to Extortion: Conceptualization of Post-communist Corruption', *Crime, Law and Social Change* 40(2-3) (2003) 171.
- 152 See e.g. D. Stuckler, L. King and M. McKee, 'Mass Privatization and the Post-Communist Mortality Crisis: A Cross-National Analysis', *Lancet* 373(9661) (2009) 399. See also David Stuckler, Lawrence King and Martin McKee, 'Response to Michael Gentile "Mass Privatisation, Unemployment and Mortality"', *Europe-Asia Studies* 64(5) (2012) 949, for a review of the literature on the subject; Julian Wucherpfennig and Franziska Deutsch, 'Modernization and Democracy: Theories and Evidence Revisited', *Living Reviews in Democracy*, 1 (2009) (<http://www.livingreviews.org/lrd-2009-4>), arguing that that socio-economic development of the kind impeded by large privatisation policies tends to bring about stable democracy; Lawrence King and David Stuckler, 'Mass Privatization and the Post-communist Mortality Crisis', in: Lane (ed.), *The Transformation of State Socialism* (n 25) 197.
- 153 For a contestation of the neoliberal idea of a link between 'democratisation' and major economic changes in post-communist societies, particularly for the inimical relation between the two ideas in the political theory literature, see e.g. Ellen Comisso, 'Property Rights, Liberalism, and the Transition from "Actually Existing" Socialism', *East European Politics and Societies* 5(1) (1991) 162 at 162. For a call for reconsideration of such neoliberal claims in legal scholarship, see e.g. Amy Chua, 'The Paradox of Free Market Democracy: Rethinking Development Policy', *Harvard International Law Journal* 41 (2000) 287.

social reproduction, in order to soften the undesirable normative consequences of privatisation, was not discussed in the legal scholarship. Thus, the legal scholarship aided by such absences the politicians of the region's unilateral 'sale' to the peoples of CEE and the former USSR of one side of the 'privatisation' process, consisting in the wide distribution of shares in the privatised enterprises. But the people were not told the darker side of the privatisation bargain. There was no explanation that privatisation would consist in major reduction and elimination of the redistribution operated by communism via the socialist enterprises, without an immediate replacement of the socialist modes of distribution by new ones. The people were not told that privatisation might imply a distribution of 'rights' which might prove in the end worthless, since the securities market on which these rights could be traded did not exist, and anything of value was already appropriated by the former socialist managers or by those involved in 'privatisation' processes. If 'rights' associated with 'redistribution' could be conceptualised as a *sui generis* 'new property'<sup>154</sup> (even if in communism redistribution was not a matter of rights), then the people of post-communist CEE countries traded in the process of privatisation the new property rights associated with social redistribution for illusory property rights associated with shares in the privatised enterprises. This trade and an analysis of factors which made it possible should be the objective of any future theorisation of post-communist CEE privatisation, as they are missing subjects in legal scholarship.

After more than two decades, and with the economies of former communist countries totally dominated by the private sector, the process of privatisation in CEE and its accompanying 'nomenklatura privatisation' could be thought of as long foreclosed, and therefore more of historical than contemporary interest. For example, the former socialist-managers' drive to accumulate property accompanied a first phase of privatisation across the whole region. This phase, corresponding to the first years of post-communist transition, was characterised by the priority given to the so-called small-scale privatisation in a process dominated by the local people. Analytically, this phase is somehow distinguishable from a second phase, closer in time to the accession of the countries in the region to the EU. In this phase, big enterprises were privatised or liquidated, and global players and investors started to invest in the region.<sup>155</sup>

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154 Charles Reich, 'The New Property', *Yale Law Journal* 73 (1964) 733.

155 For a discussion of these distinct phases' impact on the real estate development of post-socialist cities, see generally Stanilov, *The Post-Socialist City* (n 6), and for examples of the impact of these phases on the industrial development see Berend, *From the Soviet Bloc to the European Union* (n 24) 134.

Moreover, there are major differences in the privatisation strategies followed by different countries in the region even in the first phase of privatisation, even if there is a general commonality between the countries in the region regarding the impossibility of immediately privatising big industrial conglomerates or converting them into viable, private enterprises. Hungary, for example, gave priority to direct sales to foreign investors while Romania, at the opposite end of the spectrum, preferred privatisation by insiders. Irrespective of these preferences, both privatisation phases may appear now to be foreclosed in all countries of the region, and mostly of historical interest.

However, the study of the transformations of property, arguably, still presents more than mere academic interest for several reasons. One major reason is that private property presents problems of justification from a moral standpoint in any individualistic account,<sup>156</sup> even if the restrained versions of such justification could be defensible. Even if we admit, for the sake of the argument, that a degree of property appropriation in post-communism could be fully justified from a Lockean perspective or in a Nozickian account, we can see that an appropriation of property which would break the *Lockean proviso* (leave enough property to be appropriated for others) or the *Nozickian proviso* of justice in transactions would have major problems of justification even under a classical or modern liberal account. So it is very doubtful that such accumulations of property by 'grab' and 'plunder' by the former agents of the communist regimes could be justified in any classical liberal theory. Russia and the CIS countries represent, without doubt, pathologies of privatisation in relation to the countries of the CEE space, the Yeltsin regime's 'loans and shares' programme, for example, being unique across the post-communist space. Nevertheless, it is instructive and, to a point, representative for the whole ex-communist space to recount, in the context of the discussion about the grab and plunder, Igor Baranovsky's characterisation of the Russian nomenklatura privatisations:

To become a millionaire in our country it is not at all necessary to have a good head and specialized knowledge. Often it is enough to have active support in the government, the parliament, local power structures and law enforcement agencies. One fine day your insignificant bank is authorized, for instance, to conduct operations with budgetary funds. Or

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156 See e.g. Becker, 'Review: Too Much Property' (n 13); Carter, *The Philosophical Foundations of Property* (n 13).

quotas are generously allotted for the export of oil, timber, and gas. In other words, you are appointed a millionaire.<sup>157</sup>

Arguably such grab and plunder needs no moral justification of any sort and could be declared to be state policy by the new post-communist governments, with the renunciation of any pretension of justification. Unfortunately, this did not happen, and in the post-communist property transformations moral justifications played an important role. It was not only that the communist property relations were declared morally bankrupt from a moral-utilitarian point of view, as they allegedly promoted inefficiency and waste, or that the communist property relations were declared morally vicious, since they were based on the violent and abusive initial takeover of the late 1940s. It was also proclaimed that the arrangements of property promoted under the banner of neoliberalism were morally superior to those on which the socialist ones rested. Because this moral superiority was asserted substantially on the basis of a utilitarian-consequential framework, it encountered major justificatory problems when the consequences were, if not dire, in any case not those 'predicted' by the social engineers of the transformations. As it was later observed by theorists of the post-communist transitions:

None of the transition countries has successfully accomplished the rapid privatisation of the state sector. A general survey of post communist privatisation in the 1990s concludes that at best results have been mixed.<sup>158</sup>

While the privatisation project was unsuccessful in achieving its declared goals in the 1990s, it was nevertheless successful in creating a new *class* of owners, formed, in no small measure, by the 'morally suspect' category of former communist managers of state-owned enterprises.<sup>159</sup> With the passing of time, one might expect, however, that the problems with the initial acquisitions of property would vanish, especially as third parties, such as foreign investors, acquired the titles of property that was initially tainted.<sup>160</sup> Moreover, if the conse-

157 Igor Baranovsky, cited by Black, Kraakman and Tarassova in 'Russian Privatisation and Corporate Governance' (n 110) 1744.

158 Bönker, Müller and Pickel, 'Cross-disciplinary Approaches to Postcommunist Transformation' (n 5) 17; *The European Bank of Reconstruction and Development Transition Report 1999* 32.

159 A. Tucker, A.M. Ruibal, J. Cahill and F. Brown, 'The New Politics of Property Rights', *Critical Review* 16(4) (2004) 377.

160 See Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective* (Cambridge University Press, 2004) 216, for the theorisation of emotions' decay with the passing of

quences improve with the passing of time, one could also expect the passions provoked by initial appropriation of property by former communist agents to decay. Nonetheless, two decades later, despite some progress,<sup>161</sup> it is still unclear in what measure the countries of the region have broken with the previous cycles of underdevelopment and backwardness.<sup>162</sup> It is also unclear whether someone could indeed speak of economic convergence with an idealised West.<sup>163</sup> Yet, only such a convergence would render the repugnant ways of acquiring property in post-communism less relevant for the post-communist regimes' legitimacy.

That the legitimacy problems posed by nomenklatura privatisations to post-communist societies could not be relegated to the past is shown, for example, by the recent Euromaidan unrest and the subsequent dramatic international developments in Ukraine.<sup>164</sup> Evidently there are major differences between Ukraine, or the CIS republics, on one hand, and the more successful CEE countries which are now in the EU, on the other hand.<sup>165</sup> In the former countries,

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time in the context of transitional justice. But see also Elster for a circumvention of the cases where emotions do not decay, as for example where there is 'a daily reminder of the past injustice', *ibid.* 247, and where emotions related to property acquisition by new elites did not decay even after the passing of a century, because of the so-called *biens nationaux* expropriated in France during the Revolutions and given away to the new revolutionary elites, *ibid.* 30–44. See also Thomas J.F. Riha, 'The Origins of Private Property and Wealth in Post-Communist Society', *International Journal of Social Economics* 23(4–6) (1996), 245 at 245, stating that the way properties have been acquired and the injustice of the process would impact on economic developments and on the moral health and socio-political stability of the post-communist societies for generations to come.

161 Berend, *From the Soviet Bloc to the European Union* (n 24) 135.

162 The backwardness and underdevelopment thesis. See for example Daniel Chirot (ed.), *Origins of Backwardness in Eastern Europe* (University of California Press, 1989), and Berend, *From the Soviet Bloc to the European Union* (n 24).

163 See e.g. Berend, *From the Soviet Bloc to the European Union* (n 24), arguing that the countries of the region, despite some progress, failed to develop an intensive R&I business model which would allow them to catch up with the Western model of intensive development.

164 See e.g. Anastasiya Ryabchuk, 'Right Revolution? Hopes and Perils of the Euromaidan Protests in Ukraine', *Debatte: Journal of Contemporary Central and Eastern Europe* 22(1) (2014), retrieved July 2014, <http://dx.doi.org/10.1080/0965156X.2013.877268>, linking the Ukrainian Euromaidan to the 2013 Bulgarian protesters' portrayal of the political and economic elites as 'communists', as most of them 'belonged to the old Communist party nomenklatura that took advantage of the transition for their own private gain', *ibid.* 3.

165 But see e.g. Jacques Rupnik, 'From Democracy Fatigue to Populist Backlash', *Journal of Democracy* 18(4) (2007) 17; Béla Greskovits, 'Economic Woes and Political Disaffection',

even the neoliberal orthodoxy acknowledges now that the post-communist transition did not produce any meaningful convergence with a Western democratic model, in spite of waves of 'privatisation.' However, it would be mistaken to believe that the more successful CEE countries would be able to avoid completely the problems of legitimacy posed by the post-communist privatisations, so evident in Ukraine. After all, the ideology inspiring privatisation in both CEE and the former USSR was similar, and the CEE transformation is far from over, as convincingly suggested in the scholarship.<sup>166</sup>

## 6 Conclusions

As has been shown in this paper, the neoliberal orthodoxy that inspired the large post-communist privatisation programmes was based on weak theoretical and philosophical bases. The broad normative statements in favour of privatisation made by scholars who supported this orthodoxy were invalidated by subsequent social and economic developments in the post-communist world. However, this was not the only weakness of the early neoliberal project which pressed for privatisation and marketisation in post-communist Europe. For reasons discussed above, and in an otherwise extensive literature, law became increasingly important as a vehicle for modernisation and development in the early 1990s. In this context, it is not surprising that law was marshalled in

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*Journal of Democracy* 18(4) (2007) 40; Ivan Krastev, 'Is East Central Europe Backsliding? The Strange Death of the Liberal Consensus', *Journal of Democracy* 18(4) (2007) 56, for some democratisation woes of successful countries just before the advent of the great economic crisis. To the contrary, see e.g. Grigore Pop Eletches and Philip Levitz, 'Why No Backsliding? The EU's Impact on Democracy and Governance Before and After Accession', *Comparative Political Studies* 43 (2010) 457. For more recent studies, see Paul Blokker, *New Democracies in Crisis? A Comparative Constitutional Study of the Czech Republic, Hungary, Poland, Romania and Slovakia* (Routledge, 2013); Kristina Mikulova, "'Potemkin Europeanisation'? Dynamics of Party Competition in Poland and Hungary in 1998–2004', *East European Politics and Societies* (30 July 2013); Attila Ágh, 'The Triple Crisis in Hungary: The "Backsliding" of Hungarian Democracy after Twenty Years', *Romanian Journal of Political Sciences* 13(1) (2013) 25; Dalibor Rohac, 'Hungary's Goulash Authoritarianism', *The Wall Street Journal*, 27 February 2014.

<sup>166</sup> See e.g. Attila Ágh, 'Report on Democracy, Liberty and Freedom in Central and Eastern Europe' (Foundation for European Progressive Studies, Brussels, 2012); Attila Ágh, 'Post-Accession Crisis in the New Member States: Progressing or Backsliding in the EU?', *Studies of Transition States and Societies* 2(1) (2010) 74; Attila Ágh, 'Politics and Policy in East-Central Europe in the Early 21st Century: Synergies and Conflicts between Policy Regimes and Political Systems', *NISPAcee Journal of Public Administration and Policy* 2(1) (2009) 25.



support of privatisation schemes adopted in post-communist countries. However, this marshalling of law in support of privatisation in the early post-communist transformational phase led to an ideological overstatement of privatisation and restitution as *rights constitutive processes*. Moreover, the neoliberal-inspired characterisation of privatisation as a rights constitutive process spread beyond the ideological overstatement of this legal instrument as 'rights constitutive'. In this respect, several key findings also emerge from this study.

First, the particularities of the communist legal arrangements concerning property were so great in relation to those assumed by the neoliberal designers of large privatisation programmes in the former communist space that, on closer scrutiny, all these privatisation policies appear to be flawed. For example, the neoliberal privatisation dogma falsely assumed that communist societies were characterised by an absence of private property. Hence, the state owned the means of production. The bulk of this state property was to be found in the possession of the socialist enterprise, or similar collective associative forms allowed by the communist states. Furthermore, this dogma falsely assumed that, since the socialist enterprise held the communist property, the socialist corporate law regulating the socialist enterprise should by definition be different from Western corporate law. On the basis of these false assumptions, the neoliberal orthodoxy recommended simple policy prescriptions. For example, neoliberal scholars recommended that property held by the communist state should be transferred to private owners via privatisation. As the socialist enterprise and similar collective associative forms 'owned' communist property, these corporate forms were to be transformed into Western-like corporations. This transformation was regarded as a purely technical matter. Thus, if the post-communist draftsmen lacked adequate legal imagination, Western corporate models were readily available for transplantation into post-communist legal systems. Later, these newly established corporations had to be 'privatised', in another purely technical move. However, and as shown in this article, these assumptions were fatally flawed. Contrary to the neoliberal claims, private property existed under communism, and the accumulation of private property was even encouraged by different communist regimes in diverse periods. In addition, 'socialist' corporate law regulating the socialist enterprise was not fundamentally different from Western corporate law, as had been assumed by the neoliberal orthodoxy. Moreover, socialist law operated with the same juristic concepts as Western law in corporate matters. And, contrary to the neoliberal claims, what made the socialist enterprise so distinctive in comparison with the Western corporation was not the formal law but the operational rules on the basis of which the socialist enterprise functioned.

These operational rules, largely created by communist administrative fiat rather than enacted as formal law, allowed communist managers to move 'communist' property freely between various socialist corporate entities, or to directly appropriate such property. Since these rules did not operate at the level of formal law but at deeper societal levels, the whole neoliberal project for post-communist privatisation appears to ignore in totality the socio-legal reality it wants to transform. Thus, on the one hand, the neoliberal project has claimed that for successful post-communist privatisation it is necessary to adopt formal Western corporate law, even though socialist law already operated with Western juristic concepts in corporate law matters. On the other hand, the neoliberal project has considered it sufficient to enact formal privatisation laws, even though the distinctiveness of 'communist' ownership resided in operational rules that were not created in the form of formal laws. Moreover, neoliberal thinking, generally, accepted that the former communist managers could be left in place to run the enterprises that were to be privatised, even if the managers had manipulated the operational rules of socialist ownership. Crucially, neoliberal commentators advocated that the role of the state should be reduced, even if a strong state apparatus was needed to control the misappropriation of state property by the former communist managers. The policy prescriptions of the neoliberal privatisation project therefore became incoherent. They focused on the enactment of formal laws that were unnecessary, while failing to address the deeper operational rules that needed to be altered if privatisation was to accomplish its stated goals.

Second, because the initial neoliberal privatisation project was based on false assumptions and on mischaracterisations of the socialist legal regime of ownership and corporate law, it failed to achieve its declared goals, at least with reasonable promptness. While the privatisation project was unsuccessful in achieving its declared goals in the 1990s, it was, nevertheless, successful in creating a new class of owners. This class was formed, in no small measure, by the former communist managers of state-owned enterprises, who ended up in many cases as the owners of the privatised companies. But the formation of this 'class' further illegitimatises the post-communist regime that contributed to its creation. It also renders illegitimate the transformation of socialist property into private property via privatisation, and it casts doubts over the success of any further proposals to continue to 'reform' sectors of the economies of these countries by privatisation or marketisation.