

# Restitution and Land Markets

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## SUMMARY

Restitution is the process by which land and other property that was forcibly removed from its owners is restored or compensation of equivalent value provided. Land may have been forcibly removed from its owners in a variety of circumstances. Collectivist governments expropriate land so that individual ownership is replaced by ownership by the state. Colonisation can result in land possessed or controlled by native peoples being granted to colonists, for example, as farms. Wars and internal conflicts can result in peoples being driven off their land, for example, through ethnic cleansing, or the ownership of land, formerly possessed by the vanquished, being granted to the victors. None of these processes are new and have been going on throughout human history. What is relatively new is that during the past two decades some governments have adopted restitution policies to reverse past expropriations. This study is concerned with the means by which restitution is achieved, its consequences, and the circumstances in which restitution has not been successful. In particular, it seeks answers to the question whether restitution has achieved the objectives set for it.

Restitution as a phenomenon is important for two main reasons. Firstly, from an economic point of view, it has significant implications for the functioning of the property markets in the countries where it occurs, including an impact on foreign investors, who have invested in real estate. It means that owners, who previously thought they had good title to a property, no longer enjoy this. The wealth of the previous owner is destroyed or, at least, reduced. Restitution is therefore associated with the redistribution of wealth. Often the owner, who had previously enjoyed good title, is the state and the new owner is a private individual. Restitution is therefore one of the means by which private property markets and individual decision-making over real estate has been created in transitional economies.

Secondly, restitution can have important socio-political consequences. Expropriation involves the denial of human rights and is often associated with other violations of these. Restitution can be used as a means of achieving closure to conflicts. Their settlement can involve the restoration of property to those who have been dispossessed. Restitution can enable refugees and internally displaced persons to return home. Without restitution, they may have no home to return to. Restitution is one means by which the perpetrators of human rights abuses can make reparation and undo some of the harm that has been done. The key issue in such circumstances is how to achieve a sufficient measure of support from all those involved so that the conflict can be resolved.

The present study examines how restitution can be used by governments under different circumstances. It seeks to discover what lessons about the effectiveness of the policy can be learned from restitutions that have happened. It also looks at the technical problems associated with restitution.

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## 1. THE CONCEPT OF RESTITUTION

The equitable principle in contracts and quasi contracts is that one party shall not unjustly enrich itself at the expense of another. The party that has unjustly enriched itself may be obliged to make restitution to the other party. In principle, the party who has been unjustly enriched could be either the vendor or the purchaser. However, in situations in which governments have adopted restitution policies, it is normally the "vendor" who is compensated on the grounds that it was his property that was unjustly expropriated through an enforced transfer. The key to the notion that restitution is an appropriate response is that the enrichment of one party has been *unjust*.

The enrichment of one party to a transaction is not by itself reason for restitution. In an efficient property market, transactions are voluntary between willing buyers and willing sellers. Each party in its own estimation judges the transaction to be in its own best interest, otherwise what is a voluntary act will not take place. Each expects to be enriched by the transaction. Of course, the expectations of one party may not subsequently be realised but, unless the reason for this is fraud, negligence, or misrepresentation, there is no reason for there to be restitution. Bad judgement does not necessitate compensation of the sharing of another party's profit. The enrichment of the other party in such instances cannot be said to be unjust.

Efficient markets require the activities of arbitrageurs. They buy at one price in anticipation of selling at a higher price or sell in the expectation of a price fall. Their activities serve to equalise prices between different parts of a market so that a single market-clearing price prevails. They can trade profitably only if they have access to information that is not available to the other parties with whom they deal. In buying and selling, they cause demand and supply to change, which alters the market price. In this way, they are obliged to share their knowledge with the market as a whole so what was private information becomes public knowledge. For example, a housing developer may purchase land from a farmer at its agricultural value in the hope that in the future a new town plan will rezone the land as development land, thus causing its price to increase. The developer is relying upon his experience to enable him to judge the probability of gaining town planning consent for a change of land use more accurately than the farmer. He is also likely to have a portfolio of several pieces of land around a number of different towns so that his profit is not dependent on the probability of gaining consent for a change of use on a single piece of land, but rather on the probability that consent for change of use can be obtained on a proportion of his portfolio.

Buying and selling at a profit or selling ahead of a price fall cannot be regarded as unjust enrichment providing that the transactions are voluntary. Governments may be obliged to police markets to ensure that they are fair to both buyers and sellers and to market insiders

and outsiders. Unjust enrichment can still take place in an efficient market, but this is likely to be the result of fraud, negligence, malfeasance, duress, undue influence, or misrepresentation, for which there ought to be appropriate legal remedies for those individuals affected. Vendors and purchasers have only themselves to blame if they fail to take appropriate professional advice or if they fail to acquire the necessary information, for example, by not commissioning a survey of a property or searches of title. One cannot argue that there has been unjust enrichment if enrichment has come about because of one's failure to act prudently.

This paper is not concerned with individual claims for restitution that may, for example, be based on one party to a voluntary transaction claiming misrepresentation by the other party, or failure of consideration, or breach of contract. It is a function of government to ensure market efficiency by putting in place the legal infrastructure to deal with such cases. Rather, it is concerned with the policy of providing restitution to those whose real estate was forcibly removed without their receiving adequate compensation. It is concerned with situations in which one group has unjustly enriched itself at the expense of other groups or individuals through the forcible removal of property from its owners.

The forcible removal of property and the resulting unjust enrichment of a group can happen in a variety of ways, including:

- Collectivisation so that individual property is expropriated and replaced by ownership or control by the state or collective organisation;
- Forced sales at below market prices;
- The dispossession of the vanquished in a war, civil war or internal conflict by the victors;
- The dispossession of those branded as the enemies of the state or of society;
- Ethnic cleansing in which a social group is driven from its property;
- Colonisation;
- Treaties in which land transfer was not the result of informed consent as one party had different concepts of land rights from the other.

Restitution policies are concerned with:

- rectifying expropriations where no, or inadequate, compensation was paid;
- situations where the expropriation was discriminatory, and;
- situations where the expropriation was unjust.

Individuals or groups can be deprived legitimately of their property if this came into their possession as a result of criminal or illegal activities. Such expropriations can be regarded as reversing unjust enrichment. Those who cause wars or other conflicts can be obliged to make reparations to those who have suffered as a result. Not all expropriations can be regarded as unjust or to require restitution. The central question behind restitution policies is whether they are necessary and/or appropriate to correct past injustices. This means determining whether the past enrichment of a group has been unjust. Specifically, it means determining whether past expropriations were legitimate or whether they were discriminatory or unjust. Expropriation can be argued to be unjust if it is done in a manner that violates the human rights of those who were dispossessed of their property.

## 2. RESTITUTION IN HUMAN RIGHTS LAW

The concept of restitution is enshrined in Human Rights Law. Its provision is of particular relevance to the latter because of the connection that exists between unjust enrichment and the violation of human rights. Indeed, the violation of human rights is frequently carried out in order to unjustly enrich individuals and groups. Even if the violation of human rights was originally commenced for other ideological reasons, such as nationalism or in pursuit of a political objective, the result is frequently the enrichment of the perpetrators and their supporters.

At a global level, an obligation is placed on each State to protect the individual rights of its citizens, each State's *raison d'être* being to exist for the benefit of the human being and not the other way around. These obligations have long been prescribed in Declarations like the American Declaration of Independence of 1776 and the Declaration of the Rights of Man and of the Citizen of 1789 (in France). After the creation of the United Nations, more specific instruments have been created in the form of Conventions, like the United Nations Convention Against Torture, which states:

*The principal objective of human rights is to provide a set of rules for the relationship between the individual and the government, bearing in mind their fundamental inequality of power. These rules bring out the belief that this relationship must not only be characterised by rights of the government and corresponding duties of the individual, but must also be based upon rights of the individual which entail obligations on the part of the government (Burgers & Danelius 1988).*

Geo-political differences account for regional variations, amongst them, the Convention for the Protection of Human Rights and Fundamental Freedoms (signed in Rome in 1950), the American Convention on Human Rights (signed in San Jose, Costa Rica in 1969), and the African Charter on Human and People's Rights (signed in Nairobi in 1981). Domestic law incorporates these various global and regional instruments to different degrees by means of ratifications or accessions. Breaches of these fundamental rights have occurred throughout history thereby placing a responsibility on the International Community to create a supervisory body<sup>1</sup> mandated to safeguard the individual rights and freedoms of citizens where these are violated. Increasingly, as has been the case particularly during the last decade, the International Community has intervened with a view to minimise abuses and/or to restore order<sup>2</sup>. Nevertheless, the world has been witness to abuses of human rights on a significant scale and individuals have been subjected to extreme forms of privation, which call for mechanisms of effective redress.

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<sup>1</sup> The Committee Against Torture, created as a result of provisions made in Articles 17 and 18 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which submits a report to the State Parties and to the United Nations General Assembly (Article 24).

<sup>2</sup> For example, Resolution 678 (1990) of the United Nations Security Council which authorised Member States to take "any necessary means" to implement UN Resolutions, and Resolutions 1268 and 1273 which created a systemic and international regime for co-ordinating legal responses to terrorism by all Member States.

One such mechanism is contained in Article 14 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which states that:

- Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an *enforceable right to fair and adequate compensation*, including the means for as full rehabilitation as possible. *In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation* (emphasis added).
- Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.

Furthermore, Article 8 of the United Nations Declaration of Human Rights entitles victims of human rights abuses to compensation for their loss and suffering.

However, victims of human rights violations regard the notion of compensation with disdain and rejection. Bamber (1994) relates that the issue of compensation was regarded by Chilean victims to be “insulting and humiliating, too easy a way for the State to dispose of its responsibility”. A similar feeling was expressed by victims in Argentina (Mignone 1992). Wise (1962) also related the distress and protests that were provoked in Israel as a response to a Conference on Material Claims, when victims regarded compensation as “blood money”.

The term *reparation* forms an active part of the lexicon of victims of gross human rights violations. Its use, in preference of the term restitution, accounts for the fact that the injustice, the loss, and the damage may be of such magnitude to the victim that no restitution may be possible or morally appropriate. On the other hand, for a victim, the act of reparation may be evidence that some form of justice has taken place. As both terms are included in specific legal guidelines, it is interesting to note that while the legal and political framework (Van Boven 1997) favours the term restitution, the victims reject it in favour of the term reparation.

In 1989, the United Nations commissioned a study on the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms. In 1995, the issue of reparation was given the specific attention of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, when it requested that the Special Rapporteur (on the right to restitution, compensation and rehabilitation of gross violations of human rights and fundamental freedoms) submit a revised set of proposed basic principles and guidelines on the subject in the light of existing relevant international instruments. The Sub-Commission is part of the Commission of Human Rights of the United Nations. The preparation of the revised set of principles and guidelines was informed by a broad input of experts who, in 1996, assembled at a workshop organised by the International Commission of Jurists and the Maastricht Centre for Human Rights of the University of Limburg, Geneva. The resulting document, which was produced by Mr Theo van Boven, the Special Rapporteur, is known as *van Boven's Draft Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law* (van Boven 1997).

The following provisions, relevant to this paper, are contained in van Boven's Basic Principles and Guidelines (van Boven 1997) and apply to a range of scenarios covered in this paper. Limited reference is made to some of the most salient provisions including:

- provisions for individual and collective claims by the victim or those connected with the victim;
- that, in accordance with international law, States adopt special measures to permit expeditious and fully effective reparations;
- that these reparative measures shall be proportionate to the gravity of the violation and the resulting damage and that they should include *restitution* and *compensation* amongst others;
- that every State makes known both at home and abroad the available procedure for reparation;
- that statutes of limitation shall not apply in respect of periods during which no effective remedies exist for violations of human rights and humanitarian law;
- that civil claims are not subject to statutes of limitations;
- that decisions relating to reparation shall be implemented in a diligent and prompt manner.

The above principles and guidelines relate to provision for:

- the re-establishment of the situation that existed prior to the violation of human rights and humanitarian law, requiring *inter alia*, restoration of liberty, family life, citizenship, return to one's place of residence, employment or property;
- that *compensation* is provided for any economically assessable damage resulting from such violations, like physical or mental harm, *material damages*, *loss of earnings* including loss of *earning potential*.

At issue is whether the expropriation of property should be regarded as a breach of human rights. If the answer is yes, then the response ought to be to institute appropriate reparation. Expropriation or dispossession does not always result in the unjust enrichment of one group at the expense of another. One might argue that the State should be empowered to raise revenue for socially-valuable purposes through fair taxation and to expropriate property for socially necessary activities. Expropriation may therefore not inevitably involve a breach of human rights or give rise to reparation. The European Convention for the Protection of Human Rights and Fundamental Freedoms provides guidance as to when expropriation can be said to breach human rights. Article 1, Protocol 1 states:

*Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law (Council of Europe 1952).*

Specifically, Article 1 goes on to add that:

*The preceding provisions shall not.....impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties (Council of Europe 1952).*

However, Article 14 of the Convention provides for the enjoyment of rights and freedoms without discrimination. This would seem to outlaw discriminatory taxes or controls over the use of property.

The adoption of the Convention into UK law through the Human Rights Act 1998<sup>3</sup> resulted in case law to determine the extent to which expropriation is possible under the Convention. For example, in *Parochial Church Council of the Parish of Aston Cantlow and Wilmcote with Billesley, Warwickshire v Wallbank and another* in 2001 (*Estates Gazette* 21 May 2001), it was held that a tax imposed for the repair of a derelict church on a particular landowner, rather than landowners in the area in general, was unjustifiably discriminatory notwithstanding the fact that there had been an historical obligation on the owners of this land to meet the costs of repairing the church (Dear 2001). Compulsory purchase also does not infringe the Convention providing that the expropriation has been carried out in a manner that is fair and not discriminatory and that proper compensation is paid. It cannot be said to be unjust enrichment for a government to use compulsory purchase powers to expropriate private land needed for infrastructure or other schemes that benefit society, providing the owners are put in the situation that they are no worse off as a result of the expropriation than they were before the act took place and that the decision to expropriate property should not be exercised in an arbitrary manner. The key is that the expropriation should be necessary to benefit society and that no one should be made worse off as a result.

The above legal exposition presents a useful backdrop for the consideration of various case studies, which form the subject of this paper. As stated, universal provisions are designed to affect all human beings. Nevertheless, different scenarios have been highlighted in this paper, giving rise to various forms of reparation. It is also the case that, in one country alone, different forms of reparation may be called for, and not just restitution. In addition, it must be noted that victims, who have suffered material loss through unjust enrichment perpetrated as a result of gross violations of human rights, face challenges in their search for reparation which are not similar to those faced by other victims. It must be pointed out that different as well as competing ideological positions also affect the effectiveness of restitution. Also relevant is whether the global socio-political climate is conducive towards validating the human rights of those who claim restitution.

What follows are brief expositions of restitution and reparation in selected countries. These expositions highlight the complex historical sets of events that have produced a range of

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<sup>3</sup> The UK had previously ratified the Convention. However, those seeking to bring a case under the Convention prior to the Human Rights Act were obliged to seek redress from the European Court of Human Rights in Strasbourg but only when all legal processes in the UK had been exhausted. The Human Rights Act means that UK courts must pay regard to the Convention in their decisions and that UK law must be compatible with the Convention.



different circumstances requiring restitution and reparation. They illustrate the different policy solutions that have been adopted.

### **3. RESTITUTION AFTER COLLECTIVISATION IN EASTERN EUROPE**

Many of the countries in Central and Eastern Europe have adopted policies for the restitution of property that had been expropriated during the period of Communist rule. The extent to which Communist governments expropriated real estate varied. To a greater or lesser extent, these governments followed the lead of the USSR, which had made all land the property of the state and whose 1936 constitution placed an absolute prohibition on civil transactions relating to land. The private ownership of land was restricted to small rural plots and some residential property (Vondracek 1975). In practice, there were variations between the countries in the region. Some governments pursued a policy of collectivisation, whilst others distributed land from large estates to smallholders. For example, the proportion of agricultural land in individual tenure in 1990 was 77% in Poland and 92% in Slovenia, compared with 5% in Slovakia and Latvia, 6% in Estonia and Hungary, and 9% in Lithuania (Lerman 1999). In 1985 only 15% of Bulgarian housing was in state or municipal ownership with most families purchasing their own housing (Hoffman & Koleva 1993).

Restitution, together with privatisation, has been the main way in which private property markets have been created in the region since 1990 (Grover et al 2002). Not all countries within the region have restitution policies. For example, in the Russian Federation restitution has largely been confined to church property. In Poland there have been delays in adopting the Law on Reprivatisation (Martindale-Hubbell 2003, POL-30) though the claims of the Roman Catholic Church were recognised in 1989. The incentive to complete the reforms may have been reduced in this case by the survival of private property.

Restitution policies in the region can be argued to be a response to the gross violations of human rights that took place between the coming to power of the Nazi Party in Germany in 1933 and the collapse of the Communist governments in 1989. The policy of restitution has been made complex by the successive waves of persecutions, expropriations, deportations, and exterminations that the region has experienced. They include the violations of human rights carried out by the Nazis and the Communists. There have also been deportations of those considered by the governments of the occupied countries after 1944 to be enemy collaborators and the movements of populations as a result of the frontier changes brought about by the Ribbentrop-Molotov Pact of 1939 and the Yalta Conference of 1945.

The history of the Isaak Jakubowicz Synagogue in Kazimierz, Krakow, Poland illustrates the twists and turns of successive expropriations. The Synagogue was founded in 1638 and consecrated in 1644. It was desecrated by the Nazis and used during the war years as a storage warehouse for theatrical props and decorations. After 1945 it was temporarily used by Jewish refugees from the USSR and ceased to be under the ownership of the Jewish Community. There were various plans to convert the building to other uses before it passed into the hands of the Artists' Union in the 1950s, who used it as a sculptor's workshop until 1969. Later on, it was used as a theatre. In 1983 the Krakow Monuments Preservation Studio began renovation work to turn it into a musical instrument workshop for the conservation of

church organs. In 1989 the Jewish Community regained possession of it. It now houses exhibitions about Jewish life in pre-war Krakow and the Holocaust (Duda 2003 and information from the Isaak Synagogue Project).

Restitution can be argued to comprise a number of stages.

- Determining the policy for restitution, including which property rights may be restored, to which claimants, and in what form compensation is to take place, for example, the specific recovery of the property or compensation.
- The verification of claims.
- The recovery of the physical property or the receipt of compensation.
- Taking over the management of the restored property or that property which has been provided in compensation by the owners or their heirs and successors in title.

The process cannot be said to be complete until all four stages have taken place. Verification of the legality of a claim can frequently be time-consuming. The third stage may also be a lengthy process and can require surveys to establish boundaries and the legal registration of title and transfers. The final stage may involve resolving the rival claims of heirs and successors, the fragmentation of the property, and securing agreement as to the management policies to be pursued. For example, in Bulgaria, where 98% of the land claimed had been restituted by July 2002, the fragmentation of farmland between heirs has been a feature with subdivision of units or informal intra-family tenancy arrangements (Kopeva et al 2002). In 1996 28% of cultivatable land was untilled, possibly because half of all owners of restituted cultivatable land were urban dwellers (Giovarelli 1999). Restitution is therefore unlikely to be completed quickly. The European Union has been concerned at the rate at which restitution is being completed in some of the Accession Countries, including Lithuania, and the effect that this may have on the development of efficient land markets (Commission of the European Communities 2002).

The date selected for claiming restitution is of considerable importance. The choice of date has the effect of crystallizing claims to properties. In effect, rights that have come into existence based upon later claims to title are downgraded in priority. Earlier claims are rejected. Problems can arise in situations in which there have been successive waves of expropriation, resulting in a number of claimants who believe that they have good title to a property and have in turn been dispossessed. The question then is which of the claimants is deserving of compensation. There is an issue of how to deal with those in actual possession, whose occupancy was in good faith under the former legal structures. Limits may have to be placed on the specific recovery of property that is not vacant. The current occupiers may have undertaken improvements to the property, for which they ought to receive compensation.

The choice of date for restitution can have considerable political, ideological, and social significance. For example, restitution in the Czech Republic is for those who were citizens or legal entities on or after 25 February 1948 (Martindale-Hubbell 2003, CzR-16). By implication, Czech restitution law accepts the Košice Programme adopted by the post-war coalition government. The Košice Programme provided for the punishment of traitors and the confiscation of their property. Germans and Hungarians, unless proven anti-Fascists, were

stripped of their citizenship and property (Fowles 1995). For Latvia restitution laws apply to real property objects constructed prior to 21 July 1940, its annexation by the USSR (Martindale-Hubbell 2003, LAT-14). Estonia and Lithuania have also adopted the date of Soviet annexation for restitution. The implication is that citizens who went into exile during the Soviet period can seek the restitution of their property, whilst the claims of subsequent occupiers, including Russian immigrants, are weakened. The Unification Treaty that reunited the Federal and Democratic German Republics in 1990 contained provision for the reprivatization of property expropriated by the government of the GDR between its creation in 1949 and 1990. However, it excluded expropriations made by the Communist government of the Soviet zone of occupation between 1945 and the creation of the GDR and this has subsequently been upheld by the Supreme Court, in spite of the apparent unfairness involved (Martindale-Hubbell 2003, GER-21). The reason for the latter was that such confiscated property was often given to private individuals, who were themselves refugees from the lands lost to Germany and ethnic Germans in the east.

Whilst in principle there should never be a point in time at which those who have unjustly enriched themselves should be able safely to enjoy their ill-gotten gains, in practice restitution can blight a market and make normal market activities difficult because of uncertainty over who has what rights. Faced with this, legislators have responded by placing time limits on claims. For example, claims for restitution of real estate in the former German Democratic Republic had to be filed by 31 December 1992. There had been previous deadlines of 13 October 1990 and 31 March 1991. Claims lodged by these dates prevented the sale of the property or the conclusion of long-term contracts. It is estimated that over a million claims have been made for restitution, principally of real estate and that the claims will take years to resolve (Martindale-Hubbell, GER-21).

Restitution in Eastern Europe has often taken place more than forty years after the original expropriation. This raises the question as to what is being returned and the relationship of the value of what is returned to that which was taken. More than a generation has elapsed in many cases between expropriation and restitution and property markets can change fundamentally during such a period. Restituted parcels of agricultural land may reflect the agrarian structures of the 1940s. Changes in markets, infrastructure, and agricultural production methods since then may have changed what constitutes economically viable units (Riddell 2000). Physical changes may have taken place to boundaries and access, the land unit may no longer be identifiable having been absorbed into a larger unit, or permitted land use may have fundamentally changed (Ossoko 2003). The conditions under which restituted land can be worked may have changed fundamentally since its expropriation. For example, in Latvia the Gauja National Park was created during the 1970s, primarily for conservation and scientific research, rather than for public recreation. Land use within its borders and in its vicinity is regulated but parcels of land in the Park have been restored to their previous owners under restitution policies. The land restituted is subject to legal restrictions and obligations that may not have existed at the time of expropriation (Walsh & Taff 2002).

A policy decision has to be made as to whether restitution is to involve the specific recovery of the actual real estate expropriated or whether compensation is to be offered as an alternative. Compensation may be attractive to heirs and successors in title of those whose

property was expropriated. For example, the property may be farmland and the heirs in the intervening years have become urban dwellers and industrial workers, no longer having a connection with the land. Different countries have adopted different solutions. Bulgaria has tried to restore the original location with updated boundaries. Hungary has instituted vouchers that can be used in privatisations, for example of housing. Whilst Estonia and Latvia have sought to return to the former owners exactly the land that had been lost, Lithuania has had a more general right to receive land or compensation equivalent to what had been lost. This might involve the land owned in 1940, if it remained substantially unchanged in character, or another parcel in the same or another district where land was available, or vouchers, that could be used to acquire ownership of an apartment or shares in an enterprise (Valetta 2000). Where restitution accompanies privatisation, there is scope for different forms of compensation through the ability to acquire other assets that the state is disposing of as an alternative to that which had been expropriated.

Compensation can take the form of cash, vouchers that may be used to purchase state property being offered for privatisation, or property of equivalent value to that which was expropriated. A problem is the weakness of the compensation mechanisms throughout the region. The systems of compulsory purchase and compensation that have developed since 1990 do not seem to incorporate procedures of reverse compulsory purchase by which an owner of property, that has been blighted by the development plans of public bodies, or property, which is subject to such restricted use that it is incapable of beneficial occupation, can require the state to acquire his property at fair compensation (Grover et al 1999). In these situations, the vendor compels the state to purchase the property in order to compensate him for the losses incurred as a result of state action. The development of a valuation profession has been slow and comparable evidence of market value limited due to the restricted growth of land markets, which serve to make the determination of the value of compensation problematic (Adlington et al 2000).

#### **4. RESTITUTION AND REPARATION IN CHILE**

Chile's complex history arose in early 1520 after the discovery of the Magellan Strait. The strategic geo-political location of the country presented an ideal post for those who traded by sea and its vast mineral resources made it a prime target for colonisation and economic exploitation (Contreras 1983). In addition, the geography of Chile allowed for a wide range of climatic conditions making the country rich in natural resources (Derbyshire and Derbyshire 1999). During that time Chile was under Inca rule and became part of the Spanish Empire twenty one years later. Importantly, several tribes of indigenous peoples, which had high levels of sophisticated skills, inhabited the extreme latitudes. Amongst them were the Mapuche, long renowned for their resilience and their resistance to the influence of the first Europeans who colonised Chile (Contreras 1983). History tells us that it was as a direct result of the clashes between the seafarers and the Mapuche, that the latter were relocated away from the strategic shipping routes to lands where they could be contained by the colonisers (Barros et al 1983). Legendary battles between the Mapuche and the Spanish conquistadores ensued resulting in considerable losses by the latter (Contreras 1983). In 1818 Chile won its independence from Spain and later became renowned for her long parliamentary tradition, its advanced social welfare system, its European-influenced culture and for having one of the

most advanced education systems in Latin America (WUS/CCHR 1982). It should be noted that, since those early turbulent times, Chileans resulted from a mixture between the Spaniards and the indigenous Indians (mainly the Mapuche) (Latin American Bureau 1983). In spite of that fact, Chile has throughout remained highly bound and divided by class differences (Derbyshire and Derbyshire 1999).

From the above it can be argued that dispossession of real estate started when the conquistadores and the first colonisers arrived in the country. In the first instance, the indigenous peoples were dispossessed of their land, their lifestyle and of the prospect of perpetuating their culture for future generations. The result of such a deprivation has meant that some of Chile's indigenous peoples (such as the Onas) have become extinct. In spite of recent legislation designed to benefit the Indigenous Peoples of Chile, poverty and exclusion have kept the Mapuche at marginal levels of socio-economic subsistence and at the periphery of educational attainment (Gacitúa-Marió 2001). Foreign ownership of natural economic resources (such as copper, nitrate, iron, timber and arable land) stripped the native population of the benefits that could have resulted from partaking in their exploitation and management. Indeed, in the early nineteenth century, significant social discontent by the dispossessed forced successive governments to consider the issue of social and economic reform. Various political factions put forward electoral proposals designed to redress the deteriorating conditions of the peasants and the indigenous minorities and, although popular with the minorities and the liberal intellectuals, were resolutely quashed by military force. It must be noted at this point that the military have always been the traditional preserve of the middle classes. They have had connections with foreign powers, with strong interests in the political and economic control of their newly acquired investments (WUS/CCHR 1982).

A programme of agrarian reform was commenced in 1964 by the Christian Democrats. These reforms were slow and ineffective. Thus, it was not until the election of Salvador Allende in 1970 that a radical programme of social and agrarian reform was put into effect. The programme received Congressional approval and included the nationalisation of foreign-owned industries (like copper) and the expropriation of vast amounts of arable land from rich owners (mainly German) to be redistributed amongst co-operatives of land workers who, until then, had long worked in semi-feudal conditions (WUS/CCHR 1982). In addition, a social housing programme was created. Until the Allende housing programme was put into effect, Chile's dispossessed had followed in the tradition of spontaneous land take-over much in evidence in countries of the (then) Third World. The programme of agrarian reform permitted the possession of a maximum of 350 hectares of arable land by a single owner.

When the nationalisation of foreign-owned industry took place, the Allende Government compensated American corporations for the return of the copper mines to Chilean ownership. Extensive foreign intervention resulted. On 11<sup>th</sup> September 1973, a brutal military coup d'état suspended Congress, banned political parties and trade unions, and replaced civilian law with military law. Nationalised industries were privatised, their managers and employees lost their jobs, and anyone who professed sympathy towards the ideological programmes of the Allende Government (even if not a supporter) was tortured, taken to concentration camps, charged with offences under military law, disappeared, or was killed, or sent or forced into

exile. In addition, the Mapuche were dispossessed of any land that had been restituted to them under the Allende Government ( Lillo R, NorAlinea, personal communication 2003).

Since the official end of military rule and a slow transition into democracy was started, various attempts have been made by the victims and their relatives to secure reparation and restitution. These attempts were informed and initiated by the findings of investigations carried out as part as the Chilean National Commission on Truth and Reconciliation (1993) which recommended a series of proposals for reparation. Importantly, while the crimes of the perpetrators were identified in what became known as the Rettig Report, the perpetrators themselves have been protected by an amnesty law (Flores-Bórquez 2000). There have been international attempts to secure reparation and restitution, as for example, when in 1998 General Pinochet was arrested in London and lengthy legal efforts for his extradition were made by several European countries (JUSTICIA 1999-2001). On the other hand, the torture victims and their relatives, the relatives of the disappeared and killed, as well as those who were charged under military rule, and those who were sent into exile have been excluded from making claims for reparation and restitution. Equally, returning refugees have faced difficulties in recovering their real estate and a significant number have had to resume life in exile. All these run counter to the van Boven Principles.

Those who during the military rule of General Pinochet benefited from unjust enrichment have continued to enjoy the proceeds from their unjust acquisition of various forms of real estate. Restitution has been partial and only affected a very few individuals who have previously had the status of a *cause celebre*. Moreover, the award of partial restitution has prevented the recipients from pursuing other forms of reparation recommended in the van Boven Principles. In addition, those who in the early 1990s were sent into exile by Presidential Decree, still cannot return legally to Chile or be eligible for claims for reparation.

## 5. CONCLUSIONS

The paper has argued that restitution should be seen as a response to human rights violations that have resulted in the unjust enrichment of the perpetrators or their supporters and allies. Restitution is therefore a form of delivery of justice to the victims. The van Boven Principles provide a yardstick against which restitution policies can be measured. As restitution policies are designed to provide compensation for the violation of human rights, the extent to which they are effective in doing so can be judged by reference to the van Boven Principles. Moreover, a combination of reparative measures may be important for the needs of the victims. It is suggested that efficient forms of reparative measures should include the involvement of the victims in the decision making process. It is proposed that involving the victims in the process should occur because they are best placed to know and ascertain the extent of the wrong to which they have been subjected, its effects on them, and the needs that it has left them with. It must be kept in mind that the obligation of the State is to uphold the individual rights of its citizens and that when these rights are violated, the State acquires liabilities.

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