

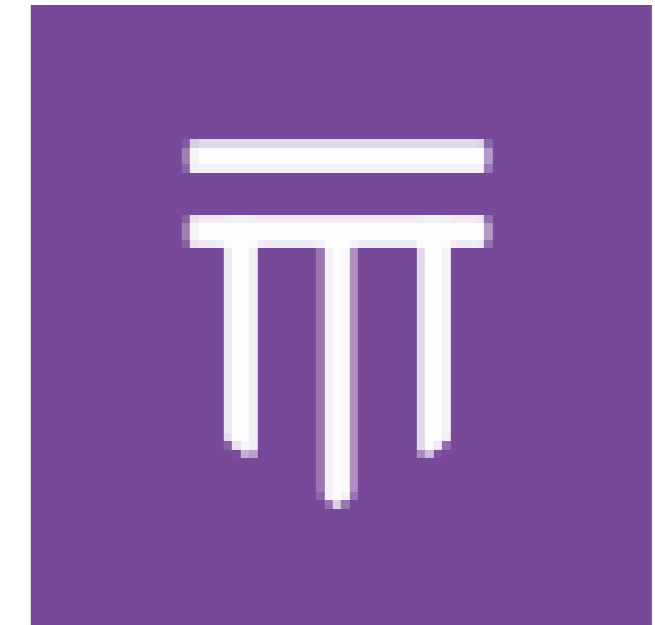
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Transitional justice

Reparations

Democratization

EU



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# Restorative Mechanisms

## Reparations

- a whole set of victim-oriented measures
  - Restitutions
  - Rehabilitations
  - Compensations
  - Satisfactions
- 
- Most common in CE: rehabilitation of political prisoners, and restitutions of property



# Restorative Mechanisms

Rarely tied to ICTs

Mostly addressed by domestic courts or TRCs

A breakthrough decision: ICC of 7 August 2012 Lubanga



# Socialist constitutional law

1. Unity of interests of individual and society
2. Equality in rights and obligations of all
3. Unity of rights, freedoms and obligations
4. Safeguards
5. Socialist humanism



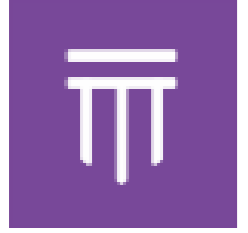
# TJ before domestic courts

1. Lustration and access to files
2. Symbolic condemnation of regimes
3. Reparations and restitutions



# Reparations

- Compensate damages caused by HR violation
- Origin: inter-state exchanges (war reparations)
- ICJ: Greece v Italy
- Today: much broader
- Aim: to seal the grave and systemic violation of HR and humanitarian law
- Orientation on victims



# Reparations

- Theory of reparations
- A collective guilt?



# Reparations

- Symbolic (acknowledgment, apology)
- Material (resources)
- Must be always tied to another TJ mechanism (criminal prosecution, truth seeking, institutional reform)
- Buying the silence of victims?





# Reparations

- Types
  - Restitution = return to the original state
  - Damages = economic resources, can be brought to courts
  - Rehabilitations – medical, psychological, legal
  - Satisfaction = cease of violation, search of disappeared people, burials, sanctions, apologies, memorials
  - Guarantee of non-repetition of crimes = civil control of army, JI, monitoring of conflicts
- (United Nations Basic Principles and Guidelines on the Rights to a Remedy and Reparation for Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law)



# Target group

- Victims who suffered damages – mental, physiological, emotional, economic, or general violation of HR
- Via Acting/non-acting which constitutes grave violation of HR or humanitarian law
- Family members of victims



# Legal regulation

- UN guarantees
- State responsibility
- UDHR, Article 8
- ICCPR article 2
- International agreement on the prevention of all forms of race discrimination – A6
- UN covenant against torture – A14
- Convention on the rights of a child – A 39
- Hague conventions – A3
- Additional protocol to Geneva convention on victims of international armed conflicts – A91
- Rome Statute A 75 and 78



# Examples of reparatory programs

- **Canada: church schools for aboriginal people**
  - Royal Commission on Aboriginal Peoples: Statement of Reconciliation
  - Admitted that schools followed racist model
  - Apology of Benedict XVI, financial help
- **Chile – national TRC – Rettig’s report** – National Corporation for Reparations and Reconciliation – monthly pensions, educational benefits for children of disappeared people, exclusion from obligatory military service, easier access to health care
- **Morocco – the Years of Lead**
  - Governmental campaign of political repressions, executions, torture, violation of civic rights
  - Independent Arbitration Commission – compensation
  - Leads to Equity and Reconciliation Commission for Arabic world



## Problematic aspects

- **Logistics:** definition of aims, processes, distribution
- UN Directive – equality between violation of HR and of civil and political freedoms
  - But what about economic, social and cultural rights?
  - Women in transitional processes?
  - Nairobi Declaration on Women's and Girl's Right to a Remedy and Reparation
  - Gender inequality



# Restitutions

- **A return of what was taken**
- Following the wilful damaging, theft or unjust enrichment
- Problem with return to original state – TIME
- Totalitarian regimes weaken individual property – nationalization
- New regimes: privatisation processes
- Governments accept responsibility and accountability for the acts of the previous government
- Interestingly, even despite the different regime form



# Restitutions

- 1. State is obliged to compensate violations of HR committed by the government**
  - 2. The obligation is carried by the next government**
- Good will, does the new regime accept its own accountability? Why?



# Restitutions

- Next to restoration to previous state, restitution might also include redistribution of the state property
- Tenants typically turn into owners





# Restitutions

- Differences across countries:
  - The strength of individual property before the start of expropriation
  - The degree of injustice caused
  - Willingness of the society to accept the moral responsibility
  - Internal limits of the government (fiscal)
  - External limits of the government (WB, IMF)



# Restitutions

- Design
  1. The form of the benefit
    - Natural restitution
    - Substitutive restitution
    - Question of the property value
  2. Who pays?
    - Not only is the new government accountable, but it must also compensate the totalitarian owners
  3. To Whom?
    - How to deal with several transfers of the property?
  4. Time period



# South Africa

- Part of post-apartheid
- Inter-generational aspect
- Expropriation for almost 2 centuries (black ghettos and reservations since 1913)
- 1950 more displacements
- Urbanization
- All victims have same claim based on same conditions



# South Africa

- Redistribution of the land – the core element of the African National Congress programme
- Redistribution cannot have the form of another confiscation
  - Expropriation of property is possible but only based on law and for a compensation
- Market approach
- Constitution of 1993: Protection of property
- Time aspect: since 19 June 1913
- A lot of legal issues, missing data
- Financial problems of the country



# Hungary

- CC and definition of retroactive justice
- Narrow restitution (no claim for the return of the expropriated land), wide spectrum of subjects
- Everyone should get something, but not what was taken originally
- Expropriation from 1919
- 1949 first forced collectivisation
- 1956 goulash communism – collectivisation, but allows "administration of own property"



# Hungary

- The form stirred a huge debate
- Frozen political decision-making
- Shift of the responsibility to the Constitutional Court: Is it possible that the government differentiates the type of compensation based on the type of the property?
  - The Court answers more than it was asked
  - No
  - Collectivisation of farms: restitution cannot distinguish between who was and original owner and who not
  - **THERE IS NO CLAIM FOR RESTITUTION**



# Hungary

- Claimants
  - Member of the cooperative with joint ownership
  - Legal claim
  - Individual who was expropriated between 1939-1949
  - Individual who was persecuted 1939-1949 on his or her property
- Only 90 days for active application of the claim



# East Germany

- If restitutions – they will be paid by the West Germany
- Principle of Vergangenheitsbewältigung
- Justice looking backwards
- The core deformation of property relationships during the 4 years of the Soviet occupation: nationalization of the property of war criminals and collaborators
- Redistribution in line with communist principles: breaking down bigger lands
- 1949 collectivisation





## East Germany

- Wolfgang Schauble: *“It was and remains a giant task, to overcome and remedy the violations of rights of the past forty-five years, so that in the present and the future there is not great suffering from the losses, and so that old injustices do not become new injustices.”*
- Restitution and acceptance of individual ownership in line with West Germany market economy
- Problematic aspect: multilayered expropriation and nationalization leads to collision of claims
- Soviet occupation: 1/3 of the GDR land
- Claim only to people who lost property using socialism, otherwise, compensations, not restitutions
- WHY?



# East Germany

- Conditions:
  - Claim only if the property 1) does not serve the public interest, 2) was not acquired by fraud
  - Governmental body Treuhand



# Czechia

- Integral part of transition and change of economy (rare)
- Restitution programs lived through the fall of the Federal republic
- Problems
  - High amount of claims
  - Groups
    - Jewish victims of 2WW
    - Post-war displacement of Germans
    - Communist expropriation (state controls almost all land): collectivization and persecutions



# Czechia

- Common problem: TIME and new ownerships
- Transitional justice in intergenerational jump
- Small restitution law and Large restitution law
- Federal Act on Land
- From 25 February 1948
- Fourth restitution act of 1992 regarding ethnic Germans and Hungarians who were not displaced



# Czechia

- Requirement of citizenship and permanent residency in CR
- X expatriated victims of communist regime
- Constitutional Court finds this unconstitutional
- According to the purpose of the property: restitution or compensation
- Most restitutions done by 1993 – approx. 10% of all immovable property



# Czechia

- Sudeten Germans
  - Restitutions perceived as a means of their return
  - Ethno-political problems
  - Havel: historical injustice but also group accountability
  - CC rejects land claims based on Beneš's degrees



# Pincova and Pinc v Czechia

- Formative ECtHR case on restitution programs in CEE, but also on the right to own property (A1 Protocol 1)
- Judgment of 5 November 2002
- A hunting lodge bought from a state company
  - The state owns it from 1948 with no damages paid to previous owners
  - Price: 14 704 CZK (approx. 500 EUR)
- Land Act 229/1991 Col.
- Restitution claim because of 120 EUR
- Bought under the threat of displacement?
- Restitution claim v property claim



# Pincova and Pinc v Czechia

- Public interest = repairing the injustice caused by the previous regime
- Was the compensation appropriate?
  
- Three norms
  - Respect of property
  - Conditions of expropriation
  - Regulation of the use in line with public interest





# Reintegration programs

- DDR = Disarmament, Demobilization and Reintegration
- Stability and security
- Actors:
  - International (UN)
  - Regional (ECOWAS, AU)
  - Governmental, NGO
- Transport of combatants
- Reintegration – social, economic, political

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Thank you for your  
attention