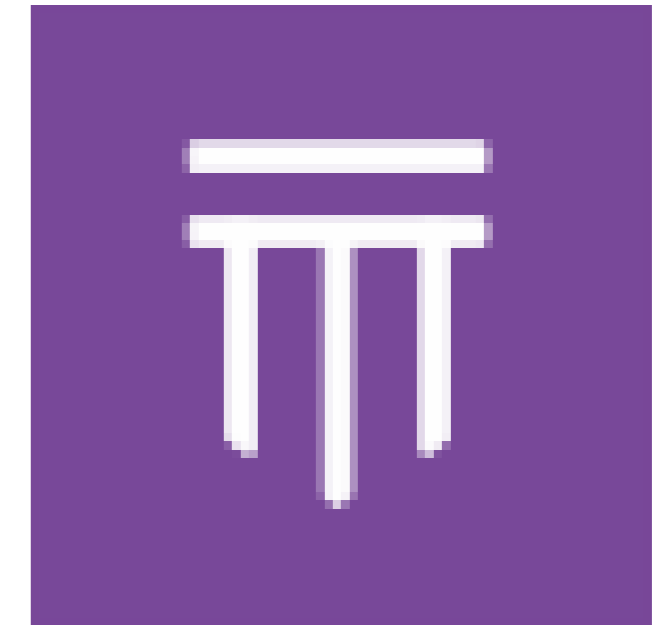


Brno, 28 November 2023

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# Transitional justice

## Reparations and restorative processes



JUSTIN  
Judicial Studies Institute  
Masaryk University

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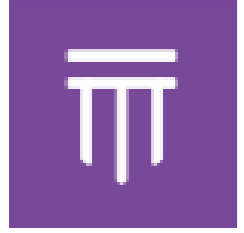
Katarína Šipulová



# 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

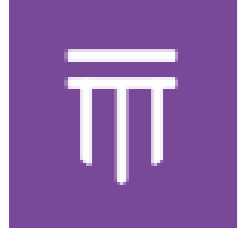
Mostly addressed by domestic courts or TRCs

A breakthrough decision: ICC of 7 August 2012 Lubanga



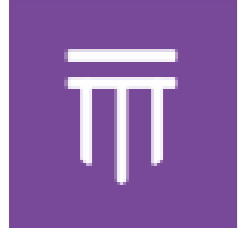
# TJ before domestic courts

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:
  - Germany vs Italy  
Italy vs Germany 2008 (civil claims for reparations for violations of IHumL by Third Reich – question of jurisdictional immunity)
  - Italy had violated its obligation to respect Germany's immunity from enforcement
  - Today: much broader
- Aim: to seal the grave and systemic violation of HR and humanitarian law
- Orientation on victims



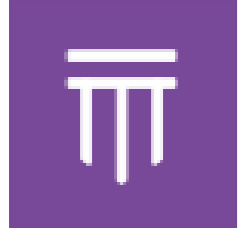
# Reparations

- Theory of reparations
- A collective guilt?



# Reparations

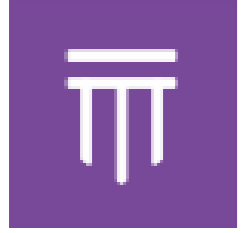
- Symbolic (acknowledgment, apology)
- Material (resources)
- Must be always tied to another TJ mechanism (criminal prosecution, truth seeking, institutional reform)
- Buying the silence of victims?



# 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)





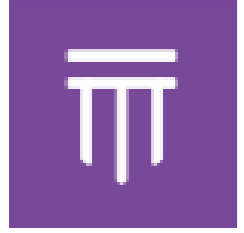
# Target group

- 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



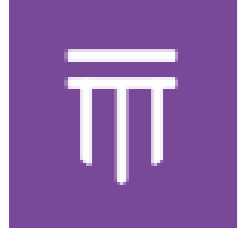
# Examples of reparatory programs

- **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



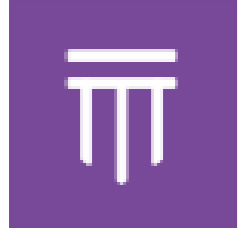
## Problematic aspects

- **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



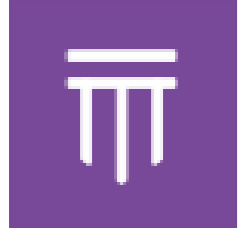
# Restitutions

- 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

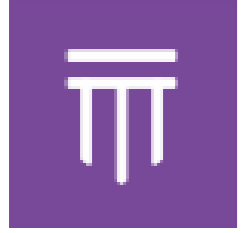
- Next to restoration to previous state, restitution might also include redistribution of the state property
- Tenants typically turn into owners



# 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)





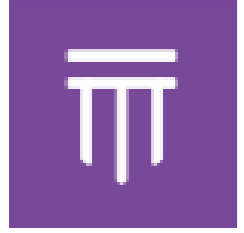
# Restitutions

- 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



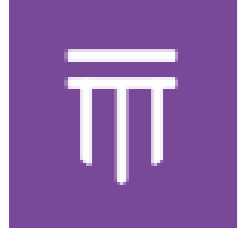
# South Africa

- 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



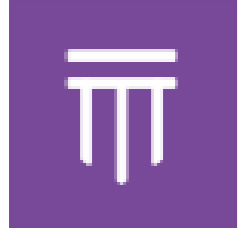
# Hungary

- 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 an original owner and who not
  - **THERE IS NO CLAIM FOR RESTITUTION**



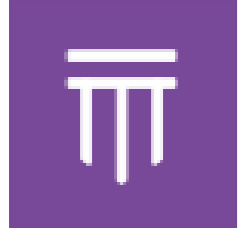
# Hungary

- 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

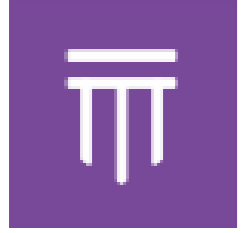
- If restitutions – they will be paid by the West Germany
- Principle of Vergangenheitsbewältigung
- Justice looking backwards
- The core deformation of property relationships during the 4 years of the Soviet occupation: nationalization of the property of war criminals and collaborators
- Redistribution 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 during socialism, otherwise, compensations, not restitutions
- WHY?





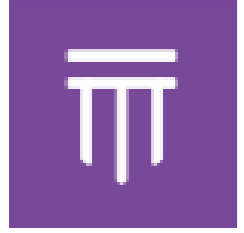
# East Germany

- 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



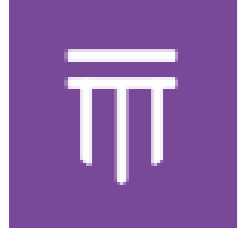
# Czechia

- 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



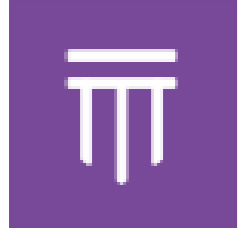
# Czechia

- 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



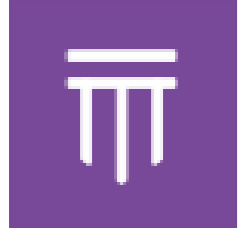
# Pincova and Pinc v Czechia

- 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