

The Program for Global Justice and Human Rights of the University of Los Andes, PRIO and FICHL:

“Land reform and distributive justice in the settlement of internal armed conflicts”

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The power of *de facto* possession of property taken in internal armed conflicts and the limits of the law:
much apology and little utopia

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Some terms used in the presentation

1. Internal armed conflict: protracted armed violence between government forces and organized armed groups or between such groups.
2. Transition from internal armed conflict to peace goes through different stages such as:
 - ceasefire;
 - cessation of armed hostilities;
 - peace settlement or acceptance of *de facto* situation;
 - peace that holds.
3. Distributive justice: just access to basic social and economic need-satisfaction within a state or other political community.

Two injustice clusters in internal armed conflicts

1. (a) Destruction of or damage to property; and (b) plundering or forcible taking-over (seizure or forced abandonment) of property:
 - private land;
 - private businesses or livestock;
 - private homes and belongings;
 - public property.
2. Discriminatory or persecutory measures against members of the targeted group who are not displaced but remain, such as:
 - unequal access to work and health and other public services;
 - exclusion from public security;
 - restrictions in freedom of movement;
 - other violations of fundamental human rights.
3. There are temporary or indefinite effects of the conflict depending, *inter alia*, on (a) the state of the frontline at the time of cessation of hostilities (territorial control) and (b) the new regime itself (whether it allows return of displaced persons and restoration of their rights).

The two clusters in a broader context of *Rechtsgute*

1. We can construct a list and hierarchy of legally protected interests in any legal discipline or system.
2. In international criminal law it includes these interests:
 - the continued existence of the targeted group as such (genocidal acts);
 - individual life (extermination, wilful killing, murder);
 - physical and mental integrity (torture, sexual assault);
 - personal liberty (unlawful detention);
 - freedom of movement (deportation, forcible transfer, restrictions on travel and emigration);
 - *non-discrimination (persecution)*;
 - *protection of property (wanton destruction, plundering)*.

Meaning

1. that such hierarchies of legally protected interests indicate the relative “gravity” of the crime in question;
2. that gravity is the main criterion in the selection and prioritization of alleged international crimes for investigation and prosecution;
3. that property-related acts and “non-physical measures of persecution” are *relatively low in the hierarchy* (which does not reflect their capacity to cause persistent and significant social and economic problems which in turn can threaten the peace);
4. that such conduct alone is rarely prioritised for investigation and prosecution, but sometimes in combination with violations of life and physical integrity;
5. that it may nevertheless be justifiable to single out property-crimes and non-physical persecution for investigation and prosecution on *thematic* grounds.

Primary negative consequences of the two clusters

1. Forcible redistribution of
 - land;
 - private and public property.
2. Restriction in the access to
 - work, professions, markets;
 - health and other public services;
 - other fundamental human rights.
3. The forcible redistribution or restriction can be
 - *de facto* only (actual possession of property or power to impose and maintain the restriction of fundamental rights);
 - accepted by the executive and judiciary without change in the law;
 - cemented by legislative amendment;
 - upheld by the executive and judiciary on the basis of the new law;
 - accepted by a non-state actor with territorial control.

Secondary negative consequences of the two clusters

1. Displacement of persons.
2. Homelessness among the displaced.
3. Poverty among the victims (including an inability to feed and house oneself and family).
4. Inability of victims to transfer skills to other professions (e.g., traditional farmer displaced to urban environment).
5. Physical and mental health problems among victims.
6. Security problems for victims.
7. Resource and administrative problems in the communities that receive large numbers of displaced persons with basic needs.
8. Victims feeling estrangement towards the state for being let down or victimised: can become a threat public order, peace and stability.

The power of *de facto* possession of taken property

1. The *de facto* possessor normally has direct or indirect *physical control* over the land or property forcibly redistributed through the conflict.
2. The possessor can *wait* until there is a physical or legal challenge to his or her control.
3. The possessor can – by use of intimidation or other measures – create *disincentives* to such challenges.
4. Depending on the overall power of the possessor and the public institutions in the area, he or she can *influence* (a) the executive and judiciary in their consideration of any restitution or similar claim; and (b) the legislative branch to prevent the adoption of legislation that will undermine the control.
6. The possession may grant material benefits that strengthen the position of the possessor, enabling him or her to purchase first rate legal, banking and accounting *services to consolidate* the control.
7. If the possessor is a quasi-state (e.g., RS 1992-95) or a non-state actor (such as an armed group), it can use *semi-public instruments* to cement.

The limits of the law

1. When the state lacks territorial control.
2. When there is inadequate will to enforce the law.
3. When there is corruption, intimidation or other reduction in the independence and impartiality of the judiciary and law enforcement.
4. When there is inadequate legislative will to modify the law as required.
5. When there are killings or disappearances of judges or law enforcement personnel.

Some preconditions for law to end the negative consequences of forcible redistribution of property

1. An independent and impartial judiciary.
2. Capacity to enforce the decisions of the judiciary.
3. Judicial review of action or inaction by the executive.
4. Independent, highly professional auditing of the executive and judiciary (substantively autonomous, reporting administratively to the legislator).
5. Access to justice (open access to legal information, legal aid, other legal empowerment).

International law as utopia: some tentative attempts

1. International social and economic rights.
2. The human right to property and restitution.
3. International humanitarian law provisions on damaging and plundering of property.
4. Article 75 of the Statute of the International Criminal Court on reparations.
5. ILO instruments.

Some political strategies to end the negative consequences of forcible redistribution of property

1. Some of the strategies:

- Returning the property to the victim.
- Monetary or in-kind compensation to the victim.
- Conditional return of the property to the victim.
- Unarticulated collective reparation to victims (e.g., EU-funded rebuilding of BiH homes).
- Confiscation from possessor (maybe combined with reparation to victim).
- Taxation to undermine the control of the possessor.
- Progressive inheritance taxation.
- Undermine the appeal of land as safe capital haven (directly, or indirectly by strengthening other options for capital).
- Social security and free access to health and education affecting the perceived need for capital buffer?

2. Selecting suitable strategies is entirely fact-sensitive.

Political will to use strategies

1. All strategies require political will.
2. Some strategies require less political group-will than others, for example:
 - the public use of irony and humour (cartoons, soaps, stand-up comedians);
 - public artistic expression (Vaclav Havel's use of the theatre; use of metaphorical expression such as by Tarkovski in film);
 - informal ways to undermine what may appear as a widespread “feudal appreciation” of land in individual self-representation and identify-formation: is it maybe somewhat passé?

Political will to end negative consequences of forcible redistribution and restriction of fundamental rights

1. No political will.
2. The political will of no political will.
3. Some political will, outweighed by other motivating factors.
4. Political will but inability to act.
5. Political will and ability to act, but not feasible.
6. Political will is constructed through complex processes, involving economic, legal, social and personal factors.

Negative emotive and other motivational factors in the political will-formation process

1. Fear for own security (extent of community expectation).
2. Helplessness (widespread and long-standing problem).
3. Contempt for victims.
4. Sense of superiority (birth-right).
5. Greed (with corruptibility and related factors).
6. Conviction of broader justifying goal or motive (e.g., protect lives and land of own group).
7. Indifference to the suffering of victims.
8. Objectivising the suffering of victims.
9. Wilful blindness toward the suffering of victims.

Positive emotive and other motivational factors in the political will-formation process

1. Sympathy (positive recognition of the victim of the negative consequences).
2. Compassion (when confronted with negative consequences).
3. Empathy (ability to feel with the victim).
4. Sense of solidarity.
5. Sense of justice.
6. Incorruptibility.
7. Sense of social integrity and cohesion.
8. Sense of social unity (society as an integrated whole – in suffering and as partners in action).

Positive emotive and other motivational factors: some points for *knowledge and action* agenda

1. Understanding better the anatomy (cognitive, emotive, volitive) and role of positive motivational factors in the process of political will-formation.
2. Understanding better the reasons for deficits in positive motivational factors.
3. Understanding better preconditions of, and what strengthens, positive motivational factors.
4. Labelling, articulating and highlighting the presence or absence of positive motivational factors in the process of political will-formation.
5. Articulating the individual civic challenge of the recognition that positive motivational factors (such as solidarity) play a role in the process of political will-formation.

Sense of solidarity: some personal challenges

1. Recognizing that the sense of solidarity is a cognitive and emotive condition.
2. Recognizing that solidarity tends to be linked to closed social groups and that the expansion of the scope of the group is not automatic (from family to neighbourhood, local and regional community, national population and, ultimately, humankind).
3. Being aware of and dwelling on the suffering of others.
4. The articulation of reasoned solidarity-based (a) action and (b) political will to act.
5. Courage in the articulation of requisite action and will.
6. Willingness to make personal sacrifices when required (e.g., through taxation; “voluntary taxation”?).

Some markers in the discourse sociology on political will-formation

- A. Actualisation of real conflicts of interest in the socio-political process to address negative consequences of forcible redistribution of property and restriction of fundamental rights.
- B. Concealment strategies in the discourse.
- C. Some key discourse actors.

A. Actualization of real *conflicts of interest*

1. The actualisation of the conflict of interest may *happen at different stages* of the socio-political process:
 - academic or political discussion on the *problems* caused by the negative consequences of forcible redistribution [harmless];
 - academic and political discussion on requisite *action and policy change* [may still be harmless];
 - legislative initiative and process [more problematic].
 - the implementation process by the executive [problematic];
 - dispute settlement in the judiciary [could be acute].
2. Delayed actualisation of the conflict of interest:
 - can seduce actors in the academic and political discourse;
 - can conceal the real parameters of feasibility;
 - can undermine strategic, concerted political action.

B. *Concealment* strategies in the discourse on political will-formation

1. Rhetoric of *complexity* as pure concealment.
2. Manipulating or controlling the access to reliable *factual information* on the negative consequences of forcible redistribution of property.
3. The “Khatami-Khamenei syndrome”: open discourse is granted a considerable space within which there is *no real threat to the power* (some activity is allowed in the media, seminars, academic articles because it is considered unable to challenge the real interests of power).
4. Physical and mental *distance to the daily lives of victims* (insulation).

C. Some *key actors* in the discourse sociology on political will-formation

1. Obvious:

- a. Academics providing reliable facts [accuracy].
- b. Investigating journalists exposing facts to the public [communicability].
- c. Civil society actors exposing, political lobbying, and other activity.

2. Less obvious:

- d. Political will-mobilisers (personal and organizational).
- e. Value-communities around positive motivational factors.
- f. A healthy middle class.

Some conclusions

1. The power of *de facto* possession of property forcibly redistributed through internal armed conflict can be overwhelming.
2. The negative consequences of such forcible redistribution are many and serious.
3. Seen in isolation, law may well serve as an apology for possession of forcibly redistributed property, rather than as an effective tool to end the negative consequences.
4. Ending the negative consequences requires political will.
5. Negative and positive motivation factors in the process of political will-formation should be better understood and articulated.
6. Some of the positive motivation factors seem to combine reason and passion (cognitive, emotive and maybe volitive components).
7. Such factors – for example, solidarity – represent personal challenges.

End

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