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ROUND-TABLE:
PROPERTY RESTITUTION/COMPENSATION: GENERAL MEASURES TO COMPLY WITH THE EUROPEAN COURT'S JUDGMENTS

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The views expressed are those of the author only

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Germany's Legislation Regarding Restitution and Compensation of Property Abusively Taken Over by the State in the Light and the Jurisdiction of the European Court of Human Rights

Two historic events in the cause of the 20th century, i.e. the fall of the Nazi regime in Germany at the end of the Second Wold War on the one hand and the fall of the communist regime in the former German Democratic Republic in 1989 and the reunification of West- and East Germany in 1990 on the other hand raised complex unresolved property issues which demanded detailed provisions concerning the restitution and compensation of property abusively taken over by the State. Together with other transitional processes, property restitution and compensation are the means by which Germany atones for and takes responsibility for past misdeeds. However, neither the German Constitution (i.e. The Basic Law) nor the European Convention on Human Rights impose a general obligation on the Federal Republic of Germany to provide redress for wrongs inflicted in the past under the general cover of State authority.[1]

In this context the Federal Constitutional Court has repeatedly emphasised the breadth of the legislature's discretion to make its own assessments and to legislate in compliance with the principles of social justice, the rule of law, and the prohibition of arbitrariness.[2]

Similarly, the European Court of Human Rights held that the Convention imposes no general obligation on the Federal Republic of Germany in respect of wrongs or damage caused by the German Reich[3] or the former German Democratic Republic.[4] In respect of compensation payments for such damage, the Federal Republic of Germany had a wide margin of appreciation and could take into account other expenditure and budgetary requirements.[5]

Article 1 of Protocol No. 1 does not restrict the freedom to choose the conditions under which property rights are restored to dispossessed persons or indemnification or compensation is granted, unless the relevant conditions are manifestly arbitrary or blatantly inconsistent with the fundamental principles of the Convention.[6] Due to this significant discretion in determining the beneficiaries and the modalities of any compensation scheme, in principle,

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[1] ECHR, *Woś v. Poland* (dec.), no. 22860/02, § 72; BVerfGE 102, 254
[2] BVerfGE 13, 31 (36); 13, 39 (42-43); 27, 253 (284-285); 102, 254 (298)
[3] ECHR, *Associazione Nazionale Reduci Dalla Prigionia dall'Internamento e dalla Guerra di Liberazione (A.N.R.P.) v. Germany* (dec.), no. 45563/04, 4 September 2007; and Ernewein and Others v. Germany (dec.), no. 14849/08, 2 May 2009
[4] cf. ECHR, *Von Maltzan and Others v. Germany* (dec.) [GC], nos. 71916/01, 71917/01 and 10260/02, §§ 74, 77
[5] ibidem
[6] ECHR, *Woś v. Poland*, cited above, § 72

no challenge to the eligibility conditions as such may be allowed.[7] However, once a Contracting State enacts legislation providing restoration of property confiscated under a previous regime, such legislation may be regarded as generating new property rights protected by Article 1 of Protocol No. 1 for persons satisfying the requirements for entitlement. [8]

Restitution and Compensation for confiscations during the time of the Nazi regime

Compensation for crimes committed by the Nazi regime began soon after the Second World War when the occupation powers, with the exception of the Soviet Union, enacted laws in their individual occupational zones restoring property confiscated by the Nazis to the original owners. The first of these laws was the American Military Government Law No. 59[9], which went into effect in November 1947. Germany's restitution laws ensured the unconditional return of all property (goods and rights) which were taken from persons who had been subjected to discrimination and persecution by the Nazi regime in the period from 30 January 1933 to 8 May 1945. They are based on regulations issued by the victorious allied powers between 1947 and 1949. All property which had been located in or brought to the territory of the three western zones had to be returned. There was no protection for property which had been purchased in good faith by third parties. Where property had been lost, destroyed or damaged, claims for compensation, also covering loss of use, could be filed under the allied regulations, which were based on the provisions of the German Civil Code (BGB). Title to property which had been confiscated from people who had been subjected to racial persecution but who could not claim it back because they had been killed or died or who had not been able to submit their claims for other reasons within the prescribed time-limit (i.e. heirless and unclaimed property) was transferred to and pursued by successor organizations established for this purpose.

By contrast, no comprehensive rehabilitation was ever envisaged in the former Soviet occupational zone and the German Democratic Republic for victims of National Socialism and in particular no restitution of property, which had been lost as a consequence of persecution in the period between1933 and1945, had been undertaken.[10]

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[7] ECHR, *Von Maltzan and Others v. Germany*, cited above, § 77
[8] ECHR, *Von Maltzan and Others v. Germany*, cited above, § 74
[9] Law No. 59 Restitution of Identifiable Property, Military Government-Germany, United States Area of Control; Law Gazette of the Military Government-Germany, United States Area of Control, vol. G, p. 1
[10] G. Fieberg, Legislation and Judicial Practice in Germany: Landmarks and Central Issues in the Property Question in M.R. Rwelamira & G. Werle (eds.) Confronting the Past – Approaches to Amnesty, Punishment, Reparation and Restitution in South Africa and Germany, Durban, Butterworths, (1996) at 82

The reunification of West- and East Germany in 1990 gave the opportunity to fill this loophole in the restitution and compensation legislation with regard to the territory of the former German Democratic Republic. *The Resolution of Outstanding Property Issues Act – Property Act* of 1990[11] had been enacted by the parliament of the German Democratic Republic (*Volkskammer*) and became federal legislation under the Unification Treaty. Spirit and purpose of those provisions covering property losses during the time of the Nazi regime intend to assign former owners a legal position which is comparable to former owners who had been eligible for restitution or compensation in the territory of the former western occupational zones and the Federal Republic of Germany prior the reunification[12]. The *Property Act* endeavours to ensure equal treatment to persons persecuted by the Nazi regime and residing formerly in the new federal states with regard to their restitution claims, taking account of the time that had passed since 1945 and the resulting circumstances. Therefore, the *Property Act* adopted general principles of substantive law which already governed the restitutions laws of the western allied powers. These include amongst others a refutable legal presumption for the benefit of Jewish victims of Nazi persecution.

Restitution and Compensation for confiscations in the territory of the former Soviet-occupied zone of Germany between 1945 and 1949

Confiscations between 1945 and 1949 in the territory of the former Soviet-occupied zone of Germany before the establishment of the German Democratic Republic were not repealed after German Reunification. Federal legislation arranges for monetary compensation for these property losses, but the respective amounts are far lower than the commercial value of the properties. By contrast, in respect of confiscations under the communist regime in the German Democratic Republic precedence is given to restitution. The basis for this discriminatory treatment, i.e. the establishment of the German Democratic Republic was an arrangement between the two German governments in June 1990 (“Joint Declaration”), a few months before the accession of the German Democratic Republic to the (West-) German State. This arrangement was motivated by a Soviet request as a precondition for its consent to reunification.

In this context the European Court of Human Rights acknowledged the enormous task faced by the German legislature in dealing with all the complex issues which inevitably arose at the time of transition from a communist regime to a democratic market-economy system.[13] By choosing to make good injustices or damage resulting from acts committed at the instigation

[11] Gesetz zur Regelung offener Vermögensfragen (Vermögensgesetz - VermG), neugefasst durch Bek. v. 9.2.2005, BGBl. I, S. 205, zuletzt geändert durch Art. 4 G v. 3.7.2009, BGBl. I, S. 1688
[12] BVerfGE 102, 254, 343
[13] ECHR, *Von Maltzan and Others v. Germany*, cited above, §§ 110

of a foreign occupying force or by another sovereign State, the German legislature had to make certain choices in the light of the public interest. In that connection, by enacting legislation governing issues of property and rehabilitation after German reunification, it had regard, among other things, to the concepts of "socially acceptable balance between conflicting interests", "legal certainty and clarity", "right of ownership" and "legal peace" contained in the Joint Declaration. Similarly, in examining the compatibility of that legislation with the Basic Law, the Federal Constitutional Court referred to the principles of "social justice and the rule of law" and that of the "prohibition of arbitrariness".[14] The exceptional context of German reunification served also as justification for the length of proceedings before the Federal Constitutional Court.[15]

Restitution and compensation legislation regarding property losses under the communist regime in the former German Democratic Republic

The framework of the resolution of unresolved property issues which arose at the time of the German reunification was set out in the Joint Declaration of the East- and West-German government. This Joint Declaration was incorporated in the Unification Treaty and obtained binding legal force. On these foundations the *Property Act* of 1990 was built.[16]

The *Property Act* does not intend to repeal all property measure taken during the 40 years of the German Democratic Republic's existence. In addition to expropriations for political or discriminatory reasons, private property had been nationalized extensively for public purposes and due to the consciously subordinated, artificially reduced meaning of private property in the socio-economic system, compensation payments provided for in this nationalisation program were extremely low.[17] The *Property Act* does not intend to correct the results of a 40 year old failed socialist economic and property policy, but is rather a rehabilitation law, which only covers cases of political disadvantage or other discrimination. Therefore, the expropriations of property for public purposes in the German Democratic Republic are not subject to review.[18]

Restitution in rem, i.e. the return of the confiscated assets is given precedence over rehabilitation in money. However, this principle does not apply where property was acquired by a third party in good faith between 1949 and 1989 or where restitution is impossible, impractical or inequitable. Beyond, the restitution principle is also limited by the priority given to investments. This limitation seeks to strike the necessary balance between maintaining the

[14] ibidem
[15] ibidem at § 136
[16] G. Fieberg, cited above, at 83
[17] ibidem
[18] ibidem

sovereignty of individual ownership of the former owner and the need to attract investments, create employment opportunities and reduce subsidies in the eastern part of Germany.[19]

National restitution and compensation practice

Restitution claims had to be registered at local branches of property offices in Germany. Once a restitution claim had been lodged, the person with the power of disposition over the property could not dispose of the land, except in very limited circumstances. The deadline for lodging restitution claims was set at 31 December 1992. Property not claimed by that date would belong to the person with *de facto* power of disposal over it.[20] Over 1.2 million applications were lodged, the majority concerning landownership and affecting over one-third of the land area of the former German Democratic Republic.[21] After a restitution claim had been lodged, the relevant property office has to analyze the substance and feasibility of the claim. The property offices carry out necessary investigations on their own motion. Once a claim has been sufficiently clarified, the office would make a provisional decision, either to reject or uphold the claim, or find that the applicant is only entitled to compensation, and not to restitution.[22] If the claim for restitution is endorsed, an application can be brought to the local Land Registry for the entry of the correct particulars of the proprietor. If a claim is rejected by the Property Office, an appeal can be lodged. After exhausting internal appeals, the applicant can appeal to the Administrative Court.[23] The legislature deliberately chose to give the administrative courts jurisdiction for the interpretation of the *Property Act* in order to avoid direct confrontation between former owners and new owners in civil courts.

Germany's restitution and compensation legislation had been challenged in numerous lawsuits before national courts, including the Federal Constitutional Court. Beyond, claimants submitted complaints to the European Court of Human Rights:

Dömel v. Germany

In *Dömel v. Germany*[24] the applicants complained under Article 1 of Protocol No. 1 that they had had a legitimate expectation of obtaining compensation by real estate of comparable value, which they lost due to the abrogation of section 9 of the *Property Act*. Before a

[19] Hanri Mostert: The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Land and Landownership in South Africa and Germany, Berlin/Heidelberg/New York 2002, 559
[20] Hanri Mostert: Lost Information and Competing Interests in Restoring Germany's Dispossessed Property – The Recent Decision of the German Federal Administrative Court, German Law Journal, vol. 5, no. 1 [2004], p. 4
[21] ibidem, p. 5
[22] ibidem
[23] ibidem
[24] ECHR, *Dömel v. Germany*, no. 31828/03

revision of the *Property Act* in September 2000, section 9 of the *Property Act* provided claimants the opportunity to request alternative indemnification by real estate of comparable value. Furthermore, the applicants complained that the delayed processing of their case also accounted for the loss of their claim. The national Administrative Court supported this view and noted that it had been arbitrary for the property office to await the abrogation of section 9 of the Property Act instead of transferring equivalent real estate pursuant to that provision as long as it was still in force.

After the applicants and the German Government reached a friendly settlement the application had been struck out of the list of pending cases pursuant to Article 37 § 1 (b) of the Convention.

Jahn and others v. Germany

In the case *Jahn and others v. Germany*[25] the reassignment of land parcels to the detriment of a certain group of heirs (of so-called "new farmers") had been reviewed. The Grand Chamber of the Court dismissed the application as ill-founded. Given the unique context of German unification, the second Property Rights Amendment Act which formed the basis of the property reassignment complied with the principle of striking a fair balance between the protection of property and the requirements of the general interest, despite the lack of a regulation to provide compensation. This decision revised the Chamber's earlier decision to the contrary. The exeptional circumstances of the German reunification served as a justification for an expropriation of land without compensation by legislative measures which - in essence - intended to correct incomplete legislation of the former East-German state enacted short before the reunification.

Von Maltzan v. Germany

In *von Maltzan v. Germany*[26] the key issues was Germany's compliance with its obligation under Art. 1 of Protocol No. 1 on account of the confiscations in the territory of the former Soviet-occupied zone of Germany before the establishment of the German Democratic Republic. According to the Court, the Federal Republic of Germany was responsible for the acts of neither the Soviet occupying forces nor the German Democratic Republic. Rather, when a state decides to redress the consequences of acts it has not committed, it has a wide margin of appreciation in implementing that policy. Thereby the Court accepted the context-

[25] ECHR, *Jahn and others v. Germany*, no. 72203/01
[26] ECHR, *Von Maltzan and others v. Germany*, no. 71916/01

dependency of any reparation scheme and rejected any rigidity in handling situations where a national community has to face up to the ruins left behind by a repressive regime.[27]

Pending complaints at the ECHR

In a pending proceeding before the European Court of Human Rights the loss of property resulting from the restitution of parcels of land to the former Jewish owner to the detriment of the current private owner has been challenged.[28] Another pending case before the Court concerns a German-American Agreement on the Compensation of Jewish Victims and its consequences.[29]

National jurisdiction

Under the German administrative law German authorities can be held liable for failure to act. This corresponds with an obligation which derives from the European Convention on Human Rights and imposes on the Contracting States the duty to organise their judicial systems in such a way that their courts can meet each of its requirements, including the obligation to hear cases within a reasonable time.[30]
Due to the quantity of restitution claims lodged after the enactment of the *Property Act* and the delayed processing of individual applications claimants brought actions for failure to act before the (national) administrative courts. Thereby, the handling and processing of the large quantity of applications became relevant; the competent authorities issued so-called priority-lists[31] which described the criteria used to determine the sequence of operations.

Internationally acknowledged best practices and guidelines

As a result of an international Conference on Holocaust Era Assets held in Prague in 2009[32] 43 participating states agreed upon guidelines and best practices concerning restitution and compensation of immovable property confiscated during the Holocaust era between 1933 and 1945.[33] According to these guidelines and best practices the property restitution and compensation processes, including the filing of claims, should be accessible, transparent, simple, expeditious, non-discriminatory, *inter alia* by encouraging solutions to overcome

[27] Christian Tomuschat, Reparations in Favour of Individual Victims of Gross Violations of Human Rights and International Humanitarian Law, in: Marcelo Kohen (ed.), Promoting Justice, Human Rights and Conflict Resolution Through International Law, Liber amicorum Lucius Caflisch, Leiden 2007, p. 588
[28] ECHR, *Göbel v. Germany*, no. 35023/04
[29] ECHR, *Althoff and others v. Germany*, no. 5631/05
[30] ECHR, *Süßmann v. Germany,* judgment of 16 September 1996, ECHR 1996-IV
[31] OV spezial 10/1992, p. 4-5; OV spezial 9/1993, p. 9; OV spezial 11/1995, p.172-173
[32] http://www.holocausteraassets.eu/
[33] cf. Julius Berman: The Holocaust-Era Assets Conference in Prague and Its Outcome, Israel Journal of Foreign Affairs, IV [2010], p. 2

citizenship and residency requirements, and uniform throughout any given country. Restitution and compensation procedures should not be subject to burdensome or discriminatory costs for claimants. [34]

With reference to the international Human Rights Law in 2006 the General Assembly of the United Nation adopted a resolution on best practices and guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law. Among others these guidelines cover areas such as access to justice, access to relevant information and reparation of harm suffered.

Germany considers its restitution and compensation legislation as in accordance with these best practices and guidelines.

[34] cf. Ahron Mor and Avraham Weber: Holocaust Restitution: The End Game?, Israel Journal of Foreign Affairs, V:1 [2011], p. 101-109