Articles

Between Individual Justice and Mass Claims Proceedings: Property Restitution for Victims of Nazi Persecution in Post-Reunification Germany

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A. Introduction

German history of the twentieth century offers a rich resource of precedent for property restitution and compensation programs. The Federal Republic of Germany instituted different mass claims proceedings shaped to "reverse" or mitigate violations of property rights that took place as part of (a) the persecutions by the Nazi regime from 1933 to 1945, (b) the Land Reform (*Bodenreform*) during the Soviet occupation of East German territories from 1945 to 1949, and (c) the nationalization activities of the German Democratic Republic (GDR) from 1949 to 1990. Except for cases under the Land Reform in the Soviet zone, restitution preceded compensation as the main means of redress. All reparation schemes involved specific compensation arrangements including elaborate property evaluation systems.

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International research on property restitution[1] and compensation so far has largely not focused on these cases, although Germany instituted the most prominent reparation effort in size and scope undertaken after World War II.[2] Following the fall of the Berlin Wall, Germany also undertook the most extensive re-privatization program involving significant property restitution and compensation of all formerly socialist countries of Central and Eastern Europe. Furthermore, compensation for property losses was also one component of the German forced laborer reparation scheme introduced after the political settlement of a U.S. class action lawsuit against German companies.[3]

The present article focuses on the restitution and compensation of Jewish property "aryanized"[4] or confiscated during the Third Reich in the territory of the former East Germany. The term "aryanization" is used to denote the transfer of Jewish-owned independent economic enterprises to "Aryan" German ownership throughout the Third Reich and the countries it occupied. Unlike the Federal Republic of Germany, the socialist GDR did not return or compensate for property taken or lost as a consequence of Nazi persecution.[5] While a number of English-language articles have been written on the West German restitution and compensation systems initiated by the Allies after 1945, there are virtually none on the modification of these systems in former East Germany after German

[1] The term "reparations" will be used throughout this article to refer to "things done or given as an attempt to deal with the consequences of political violence" and will comprise both restitution and compensation. The term "restitution" will be used throughout this article to refer "to those measures that seek to reestablish a victim's *status quo ante*," whereas "compensation" is being referred to mean "those measures that make up for the harms suffered through the quantification of harms." *See* THE HANDBOOK OF REPARATIONS 456, 564 (Pablo de Greiff, ed., 2006).

[2] *Cf.* Richard M. Buxbaum, *A Legal History of International Reparations*, 23 BERKELEY J. OF INT'L L. 314 (2005).

[3] The settlement included the establishment of the "Remembrance, Responsibility and Future" foundation whose primary purpose was to pay compensation for slave labor and forced labor during the Nazi regime. The program included the amount of 200 million Deutschmark (or 102 million EUR) set aside to compensate for property losses in territories occupied by the German Reich suffered as a result of racial persecution or other Nazi wrong, provided the loss occurred with the "direct, essential and harm-causing participation of a German Enterprise" and had not been covered by any of the previous German Reparation schemes. For details, see Richard M. Buxbaum, *Deutsche Industrie, Wiedergutmachung und Völkerrecht*, *in* PROFITEURE DES NS-SYSTEMS?: DEUTSCHE UNTERNEHMEN UND DAS "DRITTE REICH" (Jürgen Lillteicher ed., 2006); INTERNATIONAL ORGANIZATION FOR MIGRATION (IOM), PROPERTY RESTITUTION AND COMPENSATION: PRACTICES AND EXPERIENCES OF CLAIMS PROGRAMS 31–33 (2008) [hereinafter *IOM*]; Pierre A. Karrer, *Innovation to Speed Mass Claims: The Work of the Property Claims Commission of the German Foundation "Remembrance, Responsibility and Future*," 5 J. WORLD INVESTMENT & TRADE 57 et seq. (2004).

[4] Avraham Barkai, *Arisierung*, *in* 1 ENCYCLOPEDIA OF THE HOLOCAUST 84 (Israel Gutman ed., 1990).

[5] Hanri Mostert, *Lost Information and Competing Interests in Restoring Germany's Dispossessed Property – the Recent Decision of the German Federal Administrative Court*, 5 GERMAN L. J. 2–6 (2004).

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reunification in 1990.[6] This article seeks to fill this gap by outlining and analyzing the post-unification German restitution and compensation efforts for lost or taken Jewish property.

Reparations are part of the history of the twentieth-century world politics. Reparation claims have gained considerable strength over the years, as is made obvious by the new wave of reparations starting in the 1990s.[7] This development of new claims owes a great deal to German reparations after World War II, which set a precedent for—and constitute a turning point in—victims' rights.[8]

Research on international mass claims proceedings usually names the establishment of the Iran-United States Claims Tribunal in 1981 to settle claims (including property claims) resulting from the Iranian hostage taking in 1979 as the key event that led to the surge of mass claims processes at the end of the last century.[9] Mass claims processes intend to provide effective remedies for thousands of individuals who suffered losses, damage, or injuries as a result of an armed conflict or a similar event causing widespread damage. Modern claims programs are expected to accomplish this task in a shorter period of time and at a lower cost than ordinary dispute resolution systems.[10] To achieve this goal, most mass claims processes apply innovative ways to cope with the plentiful evidentiary challenges that usually exist in post-conflict situations or after passage of a considerable period of time—such as the unavailability and destruction of evidence, the passing away of potential witnesses, or the lack of first-hand information, since claimants are often descendants of the originally damaged party/owner. Such challenges are often addressed by the use of presumption and "relaxed" standards of proof for relevant facts such as ethnic discrimination.[11] Mass claims programs also tend to limit oral proceedings and

[6] On West German restitution and compensation, see, for example, NORMAN BENTWICH, THE UNITED RESTITUTION ORGANIZATION 1948-1968 (1969); Kurt Schwerin, *German Compensation for Victims of Nazi Persecution*, 67 NW. U. L. R. 479 (1972). For a recent overview of the West German reparations effort (without focus on property restitution), see Ariel Colonomos & Andrea Armstrong, *German Reparations to the Jews After World War II: A Turning Point in the History of Reparations*, *in* HANDBOOK OF REPARATIONS 390 et seq. (Pablo de Greiff ed., 2006).

[7] ELAZAR BARKAN, THE GUILT OF NATIONS: RESTITUTION AND NEGOTIATING HISTORICAL INJUSTICES xxiv-xxviii, 318 (2000).

[8] Colonomos & Armstrong, *supra* note 6, at 411.

[9] *See, e.g.*, John R. Crook, *Mass Claims Process: Lessons Learned Over Twenty-Five Years*, *in* REDRESSING INJUSTICES THROUGH MASS CLAIMS PROCESSES 41 (Int'l Bureau of the Permanent Court of Arbitration ed., 2006). For listings of the main mass claims programs, see INTERNATIONAL MASS CLAIMS PROCESSES: LEGAL AND PRACTICAL PERSPECTIVES 13 (Howard M. Holtzmann & Edda Kristjansdottir eds., 2007); IOM, *supra* note 3.

[10] Hans Das, *The Concept of Mass Claims and the Specificity of Mass Claims Resolution*, *in* REDRESSING INJUSTICES THROUGH MASS CLAIMS PROCESSES 6 (International Bureau of the Permanent Court of Arbitration ed., 2006).

[11] IOM, *supra* note 3, at 4. *See also* Jacomijn J. van Haersolte-van Hof, *Innovations to Speed Mass Claims: New Standards of Proof*, *in* REDRESSING INJUSTICES THROUGH MASS CLAIMS PROCESSES 13 (Int'l Bureau of the Permanent Court of Arbitration ed., 2006).

appeals processes, and develop standardized and often computerized modes for accelerated claims processing, including unified claim forms, the grouping of claims, statistical modeling and sampling, computerized matching, and standardized valuation and verification methodologies.[12]

Many mass claims programs are directed at the restitution or compensation of properties lost, taken under duress, or confiscated in the course of armed conflict, discriminatory systems, or forced migration.[13] In particular, in the direct aftermath of wars or humanitarian crises, corresponding programs tend to favor restitution over compensation, often due to financial constraints.[14] However, as stipulated in the *Principles on Housing and Property Restitution for Refugees and Displaced Persons* by the former U.N. Sub-Commission for the Promotion and Protection of Human Rights, compensation is seen as an integral component of a property restitution process and should be used "when the remedy of restitution is not factually possible, or when the injured party knowingly and voluntarily accepts compensation in lieu of restitution, or when the terms of a negotiated peace settlement provide for a combination of restitution and compensation."[15]

Even if the German restitution and compensation schemes, like the Iran-United States Claims Tribunal,[16] do not fulfill all criteria of a modern mass claims process, they are nevertheless an important and early case of such proceedings that deserve more attention in pertinent historical accounts. The Western Allies' policy to make (West) Germany return or compensate Jewish property constituted a novelty in international law, as no precedent existed in 1945 for the international protection of property rights of a persecuted national

[12] *See* Holtzmann & Kristjansdottir, *supra* note 9, at 232, 237, 243, 290.

[13] IOM, *supra* note 3, at 1. *See also* Norbert Wühler, *Claims for Restitution and Compensation*, *in* INTERNATIONAL MIGRATION REVIEW: DEVELOPING PARADIGMS AND KEY CHALLENGES 204 (Ryszard Cholewinski, Richard Perruchoud & Euan Macdonald eds., 2007).

[14] For example, the compensation fund foreseen under Article VII of the Dayton Peace Agreement was never established due to a lack of funding; restitution and confirmation of rights were the only available options for claimants. Scott Leckie, *New Directions in Housing and Property Restitution*, *in* RETURNING HOME: HOUSING AND PROPERTY RESTITUTION RIGHTS OF REFUGEES AND DISPLACED PERSONS 38 (Scott Leckie ed., 2003).

[15] Principles on Housing and Property Restitution for Refugees and Displaced Persons ("Pinheiro-Principles"), art. 21.2, UN Doc. E/CN.4/Sub.2/2005/17 (June 28, 2005), http://www.ohchr.org/Documents/Publications/pinheiro_principles.pdf. *See also* Agnès Hurwitz, Kaysie Studdard, & Rhodri Williams, *Housing, Land, Property and Conflict Management: Identifying Policy Options for Rule of Law Programming* 20 (International Peace Academy, Policy Report, October 2005).

[16] The Tribunal differed from later mass claims proceedings mainly in that it operated with traditional arbitral procedures and failed to provide timely justice for many claimants. *Cf.* Crook, *supra* note 9, at 44.

minority.[17] The right of the individual persons to reclaim their property as part of the German reparation effort was another major step in the progressive development of international law. With the exception of a few mixed claims commissions established after World War I, international legal practice at the time only allowed states access and standing before international claims processes.[18] Therefore, Buxbaum observed that "German reparations have . . . been at the center of the single most critical and controversial evolution of public international law in the past century; namely, the movement from state-centered to societal- and individual-centered rights and obligations."[19] The German case is also an early precedent for the introduction of a claimant-friendly presumption of proof that the property in question was indeed taken as a result of persecution by the Nazis.

This article focuses on the measures and procedures established by post-reunified Germany for the restitution and compensation of victims of Nazi persecution. As the post-1990 legislation in part refers back to the reparation legislation by the Western Allies, this article will first give a brief historical overview of the Nazi persecution of the Jews from 1933 to 1945 and then shortly outline the post-war restitution and compensation measures in West Germany. A brief description of the treatment of Jewish properties in the Soviet-occupied zone and after 1949 in the GDR will follow. The subsequent sections will describe the legislative history and core provisions of the relevant post-reunification legislation, particularly the Law on the Regulation of Unresolved Property Issues (*Vermögensgesetz*, hereinafter the Property Act), i.e. the central piece of legislation relating to the resolution of property issues in the post-socialist East German territories,[20] as well as on the Law on the Compensation of Victims of Nazi Persecution (*NS-Verfolgtenentschädigungsgesetz,* hereinafter referred to as the Nazi Compensation Act).[21] Special emphasis will be put on the claimant-friendly presumption of proof and on the applied standards of compensation for properties impossible to return. The article will also

[17] This was noted by the British Foreign Office, which unsuccessfully tried to find historical precedents. *See* FOREIGN OFFICE RESEARCH DEPARTMENT, REPORT ON HISTORICAL PRECEDENTS RELEVANT TO THE QUESTION OF THE COMPENSATION OF GERMAN NATIONALS (Feb. 28, 1956) (available in the Secretariat of the Chief of Staff British Zone, Advanced Headquarters Berlin, Public Record Office, FO 1046/901). *See also* Leopold von Carlowitz, *The Human Right to Property for Refugees and Displaced Persons?: On the Progressive Development of Customary Law by the International Administrations in the Balkans*, 1 IRISH Y.B. INT'L L. 227 (2006).

[18] Rudolf Dolzer, *Mixed Claims Commissions*, *in* 3 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 438 (Rudolf Bernhardt ed., 1997).

[19] Buxbaum, *supra* note 2, at 314.

[20] GRUNDGESETZ FÜR BUNDERSREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], July 22, 1992, BGBl. I at 1257 (Ger.) (Property Act art. 1(VI), sentence 2).

[21] GRUNDGESETZ FÜR BUNDERSREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], Sept. 27 1994, BGBl. I at 2632 (Ger.) (Law on the Compensation of Victims of NS Persecution).

analyze the claims process and describe the main claims constellations. The concluding remarks will draw some lessons learned for modern mass claims proceedings and pose the question whether the restitution and compensation process contributed to the reconciliation between Jews and (non-Jewish) Germans.

B. Nazi Persecution and West-German Property Restitution and Compensation

A typical example: A Jewish doctor owned an apartment house in Leipzig, which had a market value of 500,000 Reichsmark in 1935. Following the Nuremburg laws, he was unable to continue treating his "Aryan" patients and earn enough to support his family. Following the *Reichskristallnacht* and mounting pressure by the Nazis in 1938, the proprietor decided to emigrate. In order to finance the family's departure, he had to sell the house. The Aryan purchaser paid 100,000 Reichsmark, of which over 90% was kept by the Reich for the Tax on Fleeing the Reich (*Reichsfluchtsteuer*) and the Jewish property tax.

A special example: The Wertheim family was one of the most famous Jewish department store owners in Germany. In 1885, Georg Wertheim opened his first textile business in Berlin-Mitte, and in 1892, the first department store on Leipziger Strasse. The banker Emil Georg von Staus, who was a member of the Nazi Party as of 1931, played an important role in the aryanization of the Wertheim business. In 1932, he was representative of Goering as vice president of the Reichstag. For the construction of Hitler's new Reich Chancellery, a plot of the Wertheim department store group was needed. Georg Wertheim trusted von Staus as his banker. Following his advice, Wertheim sold the shares and also land in Berlin-Mitte. Gradually, Wertheim was ousted from management and forced to transfer the remaining business capital to his "Aryan" wife. In return, he received confirmation of being a "German business," which meant the department store group was considered "aryanized" and was able to continue. Von Staus further convinced Wertheim to have his mixed marriage annulled so that he could continue to live unmolested in Berlin.[22]

I. Nazi Persecution of Jews from 1933 to 1945

The discrimination and persecution of Jewish citizens in Nazi Germany was based on approximately 430 laws, regulations, directives, and decrees introduced over time, which extended to all parts of Jewish life, including the deprivation of all Jewish private property.[23] Immediately following the seizure of power on 30 January 1933, the Nazi government introduced discriminatory measures against persons considered to be racially or politically inferior. The year 1935 marked the first peak of legal persecution with the

[22] For a comprehensive overview, see SIMONE LATWIG-WINTERS, WERTHEIM-EIN WARENHAUSUNTERNEHMEN UND SEINE EIGENTÜMER: EIN BEISPIEL DER ENTWICKLUNG DER BERLINER WARENHÄUSER BIS ZUR 'ARISIERUNG' (1997).

[23] BRUNO BLAU, DAS AUSNAHMERECHT FÜR DIE JUDEN IN DEUTSCHLAND 1933 – 1945 7 (3d ed. 1954).

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adoption of the German Citizen Act (*Reichsbürgergesetz)* and the Law on the Protection of German Blood and Honor (*Gesetz zum Schutze des deutschen Blutes und der deutschen Ehre).* These so-called "Nuremberg Laws" distinguished between "pure" Germans and Jews and deprived the latter of their citizen rights. Consequently, many Jewish citizens felt pressed to sell their property to finance the costs for their emigration, as in the typical example above. They were regularly exploited by buyers and forced to accept inappropriately low prices. Often, Jewish property was confiscated on legal grounds for the benefit of the state. Moreover, the persecuted were subjected to special taxes and fees, which they were only able to meet through the sale of their property or the handover of stocks and bonds.

The next peak of Jewish persecution took place in 1938. In April, German authorities issued a Regulation on the Declaration of Jewish Assets (*Verordnung über die Anmeldung des Vermögens von Juden)* that stipulated that all Jews had to declare and evaluate all of their domestic and international property, including the property of non-Jewish spouses.[24] The Regulation provided that an inventory of assets had to be produced and submitted to the municipal administration by 30 June 1938; non-compliance was sanctioned with prison sentences. In July 1938, the Trade Law was amended so that Jewish citizens and companies were *de facto* precluded from carrying out a trade and prevented from engaging in real estate business.[25] Of course, the amendments did not foresee any compensation for personal or economic losses that were suffered as a consequence of the implementation of this law.

On 12 November 1938—3 days after the *Reichskristallnacht*, a pogrom in the course of which many Jewish businesses, community buildings, and synagogues were burnt or destroyed—the Government adopted the Regulation Regarding the Elimination of All Jews from German Economic Life (*Verordnung zur Ausschaltung der Juden aus dem deutschen Wirtschaftsleben).* [26] It banned Jewish citizens from running retail and mail-order businesses as of 1 January 1939 and prohibited any Jewish self-employed craftsmanship. Moreover, the law prohibited Jews from visiting fairs and markets and from working in leading business positions. A few days later, an implementing regulation required that any Jewish-owned business would have to be closed and liquidated, or if in the public interest,

[24] GRUNDGESETZ FÜR BUNDERSREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW] 1992 BGBl. I at 414 (Ger.) (Regulation on the Declaration of Jewish Assets, art. 1).

[25] Gesetz zur Änderung der Gewerbeordnung für das Deutsche Reich [Law Amending the German Reich Trade Law], art. 34(b) GERMAN REICH OFFICIAL GAZETTE, July 6, 1938, RGBl. I at 823 (Ger.).

[26] Regulation on the Exclusion of Jews from German Economic Life, GERMAN REICH OFFICIAL GAZETTE, Nov. 12, 1938, RGBl. I at 1580 (Ger.).

transferred into non-Jewish ownership.[27] Additional legislation determined that the government could set particular deadlines for Jewish owners to liquidate or sell their businesses, including agricultural and forestry enterprises and real estate.[28] All Jewish-owned shares, bonds, and other fix-income securities had to be deposited with an exchange control bank.

While an initial mass deportation of Jews was carried out in the fall of 1938, further deportations remained sporadic for some time.[29] However, as of 1941, the Jewish population was deported to concentration camps as a general policy, with Hitler declaring in September 1941 that Germany be cleared of Jews by the end of the year and that the Gestapo should seize their property in favor of the German Reich.[30] The law required that Jews whose deportation was imminent had to submit the aforementioned inventory of assets to the Gestapo.[31] Overall, the aryanization and confiscation of Jewish property during thirteen years of Nazi rule belong to the most extensive property transfers in German history. It comprised movable and immovable property including real estate, businesses, securities, bank accounts, insurance policies, works of art, and other valuables.

II. Restitution of Identifiable Property

Following Germany's unconditional surrender on 8 May 1945, the Allied Powers took over executive and legislative powers. The German territory was subdivided into four occupied zones with each occupying power issuing its own legislation.[32] In November 1947, the United States was the first to issue restitution legislation, the Military Government Law No.

[27] Verordnung zur Durchführung der Verordnung zur Ausschaltung der Juden aus dem deutschen Wirtschaftsleben [Regulation Implementing the Regulation on the Exclusion of Jews from German Economic Life], GERMAN REICH OFFICIAL GAZETTE, Nov. 23, 1938, RGBl. I at 1642 (Ger.).

[28] Verordnung über den Einsatz des jüdischen Vermögens [Regulation on the Use of Jewish Property], GERMAN REICH OFFICIAL GAZETTE, Dec. 3, 1938, RGBl. I at 1709 (Ger.).

[29] Christopher R. Browning, *Deportations*, *in* 1 ENCYCLOPEDIA OF THE HOLOCAUST 365 (Israel Gutman ed., 1990).

[30] *Id.* at 367.

[31] Letter from German Reich Minister of Finance, Schnellbrief (Nov. 4, 1941), *reprinted in* 6 BUNDESAMT ZUR REGELUNG OFFENER VERMÖGENS, SCHRIFTENREIHE DES BUNDESAMTES ZUR REGELUNG OFFENER VERMÖGENSFRAGEN 230 (1994).

[32] That Jewish property lost or taken as a consequence of persecution should generally be returned to its owners was a claim not only made by victim groups but also by the Allies as well as—to a lesser extent—by relevant German political and economic circles. No consensus could, however, be reached concerning the extent and underlying principles of the property restitution regime. As a consequence, the remaining German *Länder* refused to establish restitution regimes themselves with their legislative competence granted without prejudice to the powers of the Allies. The latter were thus forced to take on the lead and to carry regulatory responsibility for the reparations program. Yet, the Allies were unable to find a common approach but adopted, with the exception of the Soviet Union, slightly different restitution legislation for their own occupied zones.

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59 on the Restitution of Identifiable Property (*Militärregierungsgesetz Nr. 59 über die Rückerstattung feststellbarer Vermögensgegenstände*).[33] This law included many principles advocated by American Jewish interest groups that were not necessarily shared by the other Allies or by German stakeholders.[34] Given the lack of financial resources in the post-war environment, the reparations system was based on *restitutio in integrum* of identifiable property—compensation was only to be paid if confiscated or alienated property could not be returned, such as for destruction or transformation.[35] The law aimed:

> [T]o effect to the largest extent possible the speedy restitution of identifiable property (tangible and intangible and aggregates to tangible and intangible property) to persons who were wrongfully deprived of such property within the period from 30 January 1933 to 8 May 1945 for reasons of race, religion, nationality, ideology or political opposition to National Socialism.[36]

In general, the principle of territoriality applied to the restitution process, meaning that either the property loss or seizure had to have taken place within the borders of the German Reich or, if the reclaimed property was lost or taken in the Nazi-occupied territories outside the Reich, claimants had the difficulty of proving that the property was now located in the American sector.[37]

The restitution system comprised aryanized property sold under duress to individuals or private companies as well as property formally confiscated by the state and its organs. The law stipulated objective restitution of lost or taken property irrespective of whether the property had been sold to third parties or was in the hands of the state.[38] As will be outlined in more detail in section C.I below, persecuted individuals or members of a

[33] Military Government Law no. 59 [Restitution of Identifiable Property], MILITARY GOV'T GAZETTE, GERMANY UNITED STATES AREA OF CONTROL, ISSUE G (Nov. 10, 1947) (Ger.).

[34] Constantin Goschler, *Zwei Wellen der Restitution: Die Rückgabe jüdischen Eigentums nach 1945 und 1990*, *in* RAUB UND RESTITUTION: KULTURGUT AUS JÜDISCHEM BESITZ VON 1933 BIS HEUTE 105 (Inka Bertz & Michael Dorrmann eds., 2008).

[35] Schwerin, *supra* note 6, at 490.

[36] Military Government Law no. 59, art. 1, para. 1. [Restitution of Identifiable Property], MILITARY GOV'T GAZETTE, GERMANY UNITED STATES AREA OF CONTROL, ISSUE G, Nov. 10, 1947 (Ger.).

[37] HANS-JÖRG GRAF, RÜCKGABE VON VERMÖGENSWERTEN AN VERFOLGTE DES NATIONALSOZIALISTISCHEN REGIMES IM BEITRITTSGEBIET 53 (1999).

[38] *Cf.* Military Government Law no. 59, *supra* note 36.

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persecuted group—such as the Jews—were presumed to have lost their property as a consequence of Nazi persecution. This approach stood in sharp contrast to the position held by the German *Länder,* which preferred any restitution regime to follow principles of the German Civil Code including the provisions of a *bona fide* acquisition.[39]

U.S. law recognized a collective Jewish claim that involved the transfer of heirless Jewish property to Jewish successor organizations that could use their resources for Jewish interests worldwide. Shortly after the adoption of the U.S. Military Law No. 59, the French administration issued its own restitution law that differed from the U.S. position and determined that heirless Jewish property would be used to finance a compensation fund.[40] In May 1949, the British administration followed and adopted restitution legislation that used a simplified version the U.S. approach.[41] In July 1949, a similar regulation was introduced for West Berlin by Order of the Allied Kommandantura.[42]

From the outset of Allied occupation, German authorities were required to implement the Allied property-related legislation and directives.[43] Claims for restitution had to be submitted to newly-established reparation offices at the competent regional courts.[44] If the current owner objected to the claim, the court reviewed the case in civil law proceedings. Final appeals fell under the jurisdiction of the Supreme Court of Restitution Appeals established by the Western Allies for their occupied zones and West Berlin. During

[39] Restitution could have been based on the unjust enrichment clauses of the German Civil Code (para. 812 *et seq*.). However, applying this legal regime would have entailed the intolerable consequence that the German Treasury would inherit the claims in those cases where whole families had perished under the Nazi Regime (compare para. 1936 of the German Civil Code). Moreover, restoring the pre-war situation based on a private law regime would have been extremely time-consuming, inexpedient, and unacceptable for the victims. Civil law proceedings require that every lawsuit must identify an opponent who is procedurally available and solvent. Further, the provisions on tort oblige the victim claiming damages to carry the burden of proof for all facts. These provisions would have made it impossible for many victims to make their case.

[40] Ordinance No. 120 [Restitution of Property Which Has Been Subjected to Acts of Theft], Nov. 10, 1947, MILITARY GOV'T GAZETTE, FRENCH AREA OF CONTROL (Ger.).

[41] Military Government Law no. 59 [Restitution of Identifiable Property to Victims of Nazi Oppression], May 12, 1949, MILITARY GOV'T GAZETTE, BRITISH AREA OF CONTROL (Ger.).

[42] Allied Kommandatura Berlin Order [Restitution of Identifiable Property to Victims of Nazi Oppression], Feb. 16, 1949, BK/O (49), 26 (cited in Restitution of Identifiable Property to Victims of Nazi Oppression: Allied Kommandatura Berlin Order, 44 AM. J. INT'L L. 39–67 (1950)).

[43] WALTER SCHWARZ, DIE WIEDERGUTMACHUNG NATIONALSOZIALISTISCHEN UNRECHTS DURCH DIE BUNDESREPUBLIK DEUTSCHLAND, *in* 1 RÜCKERSTATTUNG NACH DEN GESETZEN DER ALLIIERTEN MÄCHTE 27 (1974).

[44] For the purposes of this article, the term "claim" will be used for the allegation of the right to restitution or compensation, whereas the term "claim application" will be used for the written submission, requesting confirmation of the claimed right.

the first few years, the bench was entirely composed of Allied judges, but successively opened to German judges with a neutral chairman, usually of Scandinavian nationality.[45]

The Allied-German Treaty on the Settlement of Problems Resulting from War and Occupation of 26 May 1952 as amended by the "Paris Protocol" of 23 October 1954 stipulated that the Allied restitution laws remained valid for the newly established Federal Republic of West Germany as part of its legislation.[46] It was also determined that these laws could not be changed to the detriment of the claimants. However, the differing restitution laws in the various zones made the restitution proceedings very complex and difficult. Moreover, while the U.S. and British legislation generally provided for compensation claims, it did not spell out detailed proceedings and evaluation modalities.

Bound to implement the Allied restitution legislation, the West German government improved the situation with the adoption of the German Federal Restitution Law (*Bundesrückerstattungsgesetz*) in July 1957.[47] This law provided a uniform restitution system for all of West Germany based on the existing Allied laws.

The Restitution Law also determined that, in principle, full compensation was to be paid for property that was destroyed or that could not otherwise be returned on the basis of a replacement value of 1 April 1956.[48] Notwithstanding the principle of complete indemnification, the Restitution Law included a ceiling for compensation claims against the Republic of West Germany of 1.5 billion Deutschmark with the provision that all claims were to be satisfied up to at least 50%.[49] Only in 1964, with the Law's third amendment, was the ceiling dropped and the promise of full compensation realized.[50]

III. Compensation for Victims of Nazi Persecution

In the 1952 Settlement Treaty, Germany acknowledged an obligation to ensure adequate compensation for injuries not covered by the Restitution laws, such as bodily harm or

[45] Schwerin, *supra* note 6, at 491.

[46] *See* GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], Oct. 23, 1955, BGBl.II at 69 (Ger.).

[47] GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], July 19, 1967, BGBl. I at 734 (Ger.) [Federal Restitution Law].

[48] *Id.* at para. 1.

[49] *Id.* at para. 31. *Cf.* Schwerin, *supra* note 6, at 491.

[50] Report on the Reparation and Compensation for Nazi Injustice and on the Situation of Sinto and Roma in Germany, DEUTSCHER BUNDESTAG: DRUCKSACHEN UND PROTOKOLLE [BT] 10/6287 (Ger.).

damage of professional advancement.[51] Subsequently, Germany adopted a Federal Supplementary Law for the Compensation of Victims of National Socialist Persecution (*Bundesergänzungsgesetz zur Entschädigung für Opfer der nationalsozialistischen Verfolgung*) that was amended several times in the following years to expand the compensation coverage and to improve its provisions.[52] The final outcome was the 1965 Final Federal Compensation Law (*Bundesentschädigungsschlussgesetz*), which provided compensation to Nazi victims residing in Germany who had lived within the borders of the German Reich in 1937 for damages relating to life, health, liberty, property, and possessions, as well as to vocational and economic pursuits. With regards to property, the persecuted could claim the replacement value (not exceeding 75,000 Deutschmark) for any object that belonged to him or her and that was destroyed or left to be looted within the borders of the German Reich in 1937. For a claim to qualify, the loss had to have occurred because the claimant migrated or fled Nazi oppression, was deprived of his or her liberty, lived "underground," or was expelled or deported in connection with his or her persecution.[53]

IV. Equalization of Burdens ("Lastenausgleich")

The Federal Republic of Germany also provided property-related compensation to Germans "damaged by the war and its consequences." The Law on the Equalization of Burdens (*Lastenausgleichsgesetz*) entitled individuals who suffered bomb and currency damages, politically-persecuted persons, or expellees from East Germany as well as from formerly German or German-inhabited territories in Central and Eastern Europe to non-welfare assistance.[54] Guided by social justice considerations, the Equalization of Burdens Fund was filled both with public revenues and with compulsory contributions over a thirty-year period from wealthy Germans with considerable remaining property and assets.[55]

[51] Schwerin, *supra* note 6, at 490.

[52] For a more detailed overview of the various amendments, see Colonomos & Armstrong, *supra* note 6, at 402 et. seq.

[53] See Article 51 of the Final Federal Compensation Law in: GRUNDGESETZ FUR DIE BUNDERSREPUBLIK DEUTSCHLAND [GRUDNGESETZ] [GG] [BASIC LAW], June 29, 1956, BGBl. I at 570 (Ger.).

[54] Gesetz über den Lastenausgleich [LAG] [Law on the Adjustments of Burdens], Aug. 14, 1952, BGBL. I at 446 (Ger.). *See also* MICHAEL L. HUGHES, SHOULDERING THE BURDENS OF DEFEAT: WEST GERMANY AND THE RECONSTRUCTION OF SOCIAL JUSTICE 77 (1999).

[55] *See* LUTZ WIEGAND, DER LASTENAUSGLEICH IN DER BUNDESREPUBLIK DEUTSCHLAND 1945 BIS 1985, at 138 et seq. (1992) (providing a detailed description of the system financing the adjustment funds).

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Many German victims of Nazi persecution were also eligible to receive *Lastenausgleich*. These compensation payments were later deducted from their compensation payments under the Property Act and the Nazi Compensation Act.[56]

C. Reparations After German Reunification Since 1990

Unlike West Germany, East Germany did not establish a large-scale property restitution or compensation system. The GDR saw itself in the tradition of Communist anti-fascism and recognized the need for rehabilitation of its Jewish population as "victims of fascism." However, East German rehabilitation was provided through housing, medical care, and special pensions. Moreover, Jewish communities could reclaim their communal properties, such as synagogues and social centers.[57]

After the war, only Thuringia—which was initially occupied by U.S. forces before it was handed over to the Soviet military administration in the summer of 1945—adopted a restitution law for victims of Nazi persecution.[58] But the law's ratio ran contrary to the negative Socialist stance towards private property rights. Like many other Socialist countries at the time, the Soviet-occupied zone sought to abolish private property and nationalize larger scale properties by means of a Land Reform between 1945 and 1949.[59] Newly-created "socially owned property" was not to be restituted to private persons, including former Jewish right holders. Thus, the Thuringian restitution initiative led to only a few proceedings before the law was abolished in 1952.

The Soviet zone and, beginning in 1949, the GDR, *de facto* perpetuated the confiscation and aryanization of Jewish property in East German territories. Any property restitution scheme was rejected as it was seen to be "conducive to the reestablishment of the American monopoly capitalism."[60] In a similar tone, the GDR's state organ *Neues*

[56] *See infra* Part C.III.

[57] *See* Jan Philipp Spannuth, *Rückerstattung Ost: Der Umgang der DDR mit dem 'arisierten' Vermögen der Juden und die Gestaltung der Rückerstattung im wiedervereinigten Deutschland*, *in* "ARISIERUNG" UND RESTITUTION: DIE RÜCKERSTATTUNG JÜDISCHEN EIGENTUMS IN DEUTSCHLAND UND ÖSTERREICH NACH 1945 UND 1989, at 253 (Constantin Goschler & Jürgen Lillteicher eds., 2002).

[58] *Id.*at 250.

[59] *See* Rainer Frank, *Privatization in Eastern Germany: A Comprehensive Study*, 27 VAND. J. TRANSNAT'L L. 812 (1994) (describing, in more detail, how nationalization concerned industrial, commercial, agricultural, and residential property).

[60] SCHWARZ, *supra* note 43 at 327.

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Deutschland coined the West German reparations scheme agreed upon in the Luxemburg Agreement as a "business between West German and Israeli big capitalists."[61]

After the fall of the Berlin wall, the situation changed when the East German *Länder*[62] acceded to the Federal Republic of Germany in 1990. Germany accepted its historical responsibility for Nazi injustice and entered into an international legal obligation in a 1992 agreement with the U.S. to provide comprehensive reparations for victims of Nazi persecution in accordance with the applicable restitution laws.[63] Due to negotiations with the Allies and the Conference on Jewish Material Claims against Germany (JCC) and the obligations of the Reunification Treaty, Germany needed to institute a restitution and compensation process for victims of Nazi persecution for property located in the East German territory similar to the process it had previously undertaken for West Germany. However, forty-five years of Socialist rule had made property issues much more complex in comparison to the early days of West German property restitution. Nearly all industrial and agricultural property had been expropriated and re-organized as nationalized property, and socially-owned enterprises were characterized by a complex system of use, occupancy, and control rights.[64] Moreover, from 1945 to 1989, approximately 3.5 million East Germans had left their homes and resettled mainly in West Germany, leaving their property to be appropriated by the GDR. Additionally, there were also numerous expropriations and infringements by the State authorities on property rights of Germans who stayed in the GDR.[65]

Property issues belonged to the most controversial topics that the East and West German governments had to tackle in their negotiations of the terms of reunification. Property

[61] Bernhard Rürup, *Einleitung*, *in* "ARISIERUNG" UND RESTITUTION: DIE RÜCKERSTATTUNG JÜDISCHEN EIGENTUMS IN DEUTSCHLAND UND ÖSTERREICH NACH 1945 UND 1989, at 193 (Constantin Goschler & Jürgen Lillteicher eds., 2002). *See also* Colonomos & Armstrong, *supra* note 6 at 397 et seq. (providing more explanation on the Luxemburg Agreement).

[62] The *Länder* were abolished by the GDR in 1952 and re-established in 1990 as Brandenburg, Mecklenburg-Vorpommern, Saxony, Saxony-Anhalt, and Thuringia.

[63] Gesetz zu dem Abkommen vom 13. Mai 1992 zwischen der Regierung der Bundesrepublik Deutschland und der Regierung der Vereinigten Staaten von Amerika über die Regelung bestimmter Vermögensansprüche [Act of the 13 May 1992 Agreement between the Government of the Federal Republic of Germany and the Government of the United States of America concerning the settlement of Certain Property Claims] Dec. 21, 1992, BGBL. II at 1225, art. 3, para. 6 (Ger.).

[64] *See* D.B. Southern, *Restitution or Compensation: The Land Question in East Germany*, 42 INT'L & COMP. L.Q. 692 (1993).

[65] Gerhard Fieberg, *Legislation and Judicial Practice in Germany: Landmarks and Central Issues in the Property Question*, *in* CONFRONTING PAST INJUSTICES: APPROACHES TO AMNESTY, PUNISHMENT, REPARATION AND RESTITUTION IN SOUTH AFRICA AND GERMANY 81 et seq. (Medard R. Rwelamiera & Gerhard Werle eds., 1996).

claims by victims of Nazi persecution were not settled by reviving the old West German restitution scheme. Instead, the two governments decided to address them in the course of an overall settlement of all relevant property issues. They tried to avoid creating pluralist restitution regimes, and the GDR in particular was guided by the notion of a socially acceptable balance of interests between the persecuted and present occupants. Nearly fifty years after Nazi rule, the governments found the strict West German restitution laws based on Allied legislation inappropriate, as they did not allow for a *bona fide* acquisition by third parties.[66]

The post-1989 property settlement was first stipulated in a Joint Declaration of 15 June 1990 that became binding by incorporation into the Unification Treaty between the Federal Republic of Germany and the GDR.[67] While the Joint Declaration set out the general principles of property restitution and compensation, the Property Act determined the circumstances and procedure for restitution in more detail.[68] The principle of *restitution before compensation* governed the process for property confiscated by the GDR between 1949 and 1989 and for property lost as a result of religious, political, and racial persecution during Nazi rule between 1933 and 1945. However, any property nationalized in the course of the Land Reform under Soviet occupation from 1945 to 1949 could not be reclaimed. Irrespective of the principle of restitution before compensation, claimants had the right to opt for either restitution or compensation of their confiscated or lost property.[69]

At the outset of the property settlement negotiations, regulatory focus was on property issues that had arisen in connection with the previous Socialist regime(s). Property losses suffered under the Nazi regime were only introduced at the end of the legislative process as an additional category for which the negotiated restitution system was to apply. Consequently, a series of systematic problems occurred that required specialized follow-up legislation and clarification. For example, in 1992, the Property Act was amended to

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[66] Christian Meyer-Seitz, *Die Entwicklung der Rückerstattung in den neuen Ländern: Eine juristische Perspektive*, *in* "ARISIERUNG" UND RESTITUTION: DIE RÜCKERSTATTUNG JÜDISCHEN EIGENTUMS IN DEUTSCHLAND UND ÖSTERREICH NACH 1945 UND 1989, at 84 (Constantin Goschler & Jürgen Lillteicher eds., 2002) (discussing more generally a socially practicable resolution of the property question).

[67] *See* Verordnung zu dem Übereinkommen zur Regelung bestimmter Fragen in bezug auf Berlin vom 25. September 1990 [Joint Declaration for the Regulation of Open Property Issues], June 15, 1990, BGBL. II at 1273 (Ger.); Vertrag zwischen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik über die Herstellung der Einheit Deutschlands [Einigungsvertrag] [Unification Treaty], Aug. 31, 1990, BGBL. II at 889 (Ger.).

[68] Mostert, *supra* note 5, at 4–5.

[69] Gesetz zur Änderung des Vermögensgesetzes und anderer Vorschriften [Zweites Vermögensrechtsänderungsgesetz] [Second Amendment to the Property Act], July 22, 1992, BGBL. I at 1257, art. 8, para. 1 (Ger.).

improve effective redress for victims of Nazi persecution.[70] The lawmaker clarified that Nazi victims would be entitled to restitution even if their property, aryanized under Nazi rule, was later nationalized under Soviet occupation.[71] The amendment also inserted a claimant-friendly presumption of proof referring to previous Allied legislation.[72]

The Property Act only provided the legislative framework for restitution claims. Compensation claims needed to be based on the comprehensive Compensation and Adjustment Payments Act (*Entschädigungs- und Ausgleichsleistungsgesetz*), which contains separate compensation laws for property-related injustices for each of the relevant three time periods (from 1933 to 1945, from 1945 to 1949, and from 1949 to 1990).[73] Compensation claims of victims of Nazi persecution are regulated in the Nazi Compensation Act, which is Article 3 of the Compensation and Adjustment Payments Act. Compensation claims are, however, accessory to the Property Act. In other words, a compensation claim can only be successful if a restitution claim has previously been established on the basis of the Property Act. Compensation is paid out of a Federal Compensation Fund established in 1991.[74]

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[70] *Id.*

[71] *Id.* at art. 1, para. 8a, sentence 2.

[72] *Id.* at art. 1, para. 6, sentence 2. *See infra* Part C.I.

[73] Gesetz über die Entschädigung nach dem Gesetz zur Regelung offener Vermögensfragen und über staatliche Ausgleichsleistungen für Enteignungen auf besatzungsrechtlicher oder besatzungshoheitlicher Grundlage [Entschädigungs- und Ausgleichsleistungsgesetz – EALG] [Compensation and Adjustment Payments Act], Sept. 27, 1994, BGBL. I at 2624 (Ger.).

[74] The Compensation Fund was first mentioned in the Joint Declaration by the East and West German Governments. It is a special federal fund without legal personality whose assets are accounted for separately from any other assets of the Federal Republic of Germany. This construction ensures that the Fund is not affected by any budget freezes and continuous liquidity is guaranteed. Unlike compensation arrangements for other categories of claimants, which usually consist of bonds or privileges in property purchases, victims of Nazi persecution could cash in their compensatory entitlements directly. Gesetz über die Entschädigung nach dem Gesetz zur Regelung offener Vermögensfragen und über staatliche Ausgleichsleistungen für Enteignungen auf besatzungsrechtlicher oder besatzungshoheitlicher Grundlage [Entschädigungs- und Ausgleichsleistungsgesetz – EALG] [Law on the Compensation of Victims of NS Persecution], Sept. 27, 1994, BGBL. I at 2632, art. 1(1) (Ger.). The Compensation Fund is administered by the Federal Open Property Office and funded with contributions from the German Privatization Agency (*Treuhand*) and its successor organizations, former GDR State property, income generated from the Law on the Adjustment of Burdens, and to the largest extent by taxes. *Cf.* Hermann-Josef Rodenbach, *Das Entschädigungs- und Ausgleichsleistungsgesetz*, 5 ZEITSCHRIFT FÜR OFFENE VERMÖGENSFRAGEN 9 (1995).

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D. Right to Restitution

Article 1, paragraph 6 of the Property Act provides that the Act's provisions are applicable *mutatis mutandis* for losses of citizens and associations who lost their property because of forced sales, confiscation, or otherwise between 30 January 1933 and 8 May 1945 due to racial, political, religious, or ideological persecution. The following sections describe the burden of proof with respect to the property loss, typical claimant constellations, relevant principles relating to the scope, filing and assessment of restitution and compensation claims, and the applicable administrative and judicial proceedings.

I. Presumption of Loss

To ensure equal treatment with the above-mentioned West German restitution scheme, sentence 2 of Article 1, paragraph 6 of the Property Act resorts to the presumption of loss in favor of the claimant, as stipulated in the Decree of the Allied Kommandantura Berlin Decree on the Restitution of Identifiable Property (REAO).[75] Article 3 paragraph 1 of this Decree presumes that all those transactions listed under items (a) and (b)—the loss by someone who was directly subject to persecution according to Article 1 of the REAO or the loss by someone who belonged to a group of people who, as a whole, the Nazis intended to exclude, on the grounds of Article 1, from the cultural and economic life of Germany—were wrongful property losses. As of 30 January 1933, this group was deemed to be collectively persecuted and included all persons of Jewish descent, even if they were not German citizens or resided outside of the territory of the German Reich. The German Administrative Court confirmed in 1993 that all Jews who owned property within the Reich had to expect persecution with regard to their property.[76] This presumption of wrongful loss aimed to ease the burden of proof for the claimant with regard to his background as the persecuted. The claimant only had to prove that he belonged to the Jewish faith at the time of the transaction during the period of 30 January 1933 to 8 May 1945 and he could claim that he sold his property for this reason.[77]

However, the current right holder may present evidence to the contrary. For the level of proof for the rebuttal of the claim, it matters whether or not the allegedly involuntary transaction took place before or after 15 September 1935, the adoption date of the Nuremberg Laws described in Section A.I above. These laws significantly worsened the

[75] Gesetz zur Regelung offener Vermögensfragen [Vermögensgesetz – VermG] [Decree of the Restitution of Identifiable Property], July 26, 1949, VOBL. I at 221 (Ger.), *available at* http://norm.bverwg.de/jur.php?VermG,1.

[76] *See* Bundesverwaltungsgericht [BVerwG] [Federal Administrative Court], Case No. 7 C 64/02 (Oct. 23, 2003), http://www.bverwg.de/entscheidungen/pdf/231003U7C64.02.0.pdf.

[77] *See* Oberlandesgericht München [OLG München] [Higher Regional Court Berlin], NJW/RzW 1954, 252–253; Oberlandesgericht München [OLG München] [Higher Regional Court Berlin], NJW/RzW 1956, 301–302.

plight of Jewish citizens, eliminating any doubt concerning the racial persecution of Jews. Thus, any transaction after 15 September 1935 was automatically considered to be involuntary.[78] Hence, the respondent needed to present the exacerbated proof that the property loss did not occur as a consequence of racial persecution.[79]

If the loss had occurred prior to 15 September 1935, the respondent had to demonstrate that the vendor had received an adequate price that he could freely dispose.[80] For losses that took place following the Nuremberg Laws, the rebuttal further requires the respondent to prove that the transaction—in its essential content—would also have occurred without the National Socialist Regime or that the buyer took particular care of the vendor's financial interests, such as by transferring the purchase price abroad.[81]

II. The Claimants

Besides individual claimants, companies, or heirs, a major claimant was the Jewish Claims Conference (JCC). Founded in 1951, the JCC was set up to support Israel's claim for reparation and to represent the claims of Nazi persecution victims who living outside the State of Israel.[82] The JCC is an umbrella organization whose members include twenty-five of the world's largest Jewish organizations, including the Jewish World Congress and the Central Council of Jews in Germany. The JCC played a central role in the negotiations with the German Government concerning the reparations legislation and created the conditions for the restitution of Jewish property. It also serves as the successor organization for

[78] Oberlandesgericht Hamm [OLG Hamm] [Higher Regional Court Hamm], 1951, NJW/RzW, 326.

[79] *Compare* Gesetz zur Regelung offener Vermögensfragen [Vermögensgesetz – VermG] [Decree of the Restitution of Identifiable Property], July 26, 1949, VOBL. I at 221, art. 3, para 1, item (b), *available at* http://norm.bverwg.de/jur.php?VermG,1. (Ger.), *with* SCHWARZ, *supra* note 43, at 159.

[80] *See* Gesetz zur Änderung des Vermögensgesetzes und anderer Vorschriften [Zweites Vermögensrechtsänderungsgesetz] [Second Amendment to the Property Act], July 22, 1992, BGBL. I at 1257, art. 1, para. 6, sentence 2; Gesetz zur Regelung offener Vermögensfragen [Vermögensgesetz – VermG] [Decree of the Restitution of Identifiable Property], July 26, 1949, VOBl. I at 221, art. 3, para. 2; Oberlandesgericht München [OLG München] [Higher Regional Court Berlin], NJW/RzW 1954, 104, 253 (providing extra information on what constitutes an adequate price and the free disposal).

[81] *See* Oberlandesgericht München [OLG München] [Higher Regional Court Berlin], NJW/RzW 1949, 143, 206, 234; Oberlandesgericht München [OLG München] [Higher Regional Court Berlin], NJW/RzW 1956, 316; Oberlandesgericht München [OLG München] [Higher Regional Court Berlin], NJW/RzW 1953, 93; Oberlandesgericht München [OLG München] [Higher Regional Court Berlin], NJW/RzW 1952, 48; Bundesverwaltungsgericht [BVerwG] [Federal Administrative Court], Case No. 7 C 64/02 (Oct. 23, 2003), http://www.bverwg.de/entscheidungen/pdf/231003U7C64.02.0.pdf.

[82] *See generally* MARILYN HENRY, CONFRONTING THE PERPETRATORS: A HISTORY OF THE CLAIMS CONFERENCE (2007) (providing a comprehensive account of the history of the JCC); RONALD W. ZWEIG, GERMAN REPARATIONS AND THE JEWISH WORLD: A HISTORY OF THE CLAIMS CONFERENCE (2001) (same).

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Jewish communal property and associations, and represents the interests of heirless and unclaimed property.[83] With the fall of the Berlin Wall, the JCC's mandate was extended to also cover restitution claims for property located on GDR territory—an extension that the organization had been striving to achieve for many years.

Similar to the West German restitution scheme, the scope of East German property restitution is not limited to individuals, entities, or companies who suffered persecution-related injustice directly. Rather, the Property Act also allows for restitution claims from their legal successors, particularly their heirs and heirs to an heir.[84]

As mentioned above, post-reunification restitution mainly focuses on property issues in relation to prior East German nationalization policies and other property-related injustices of the former Socialist regime in the years following 1949. Property claims of victims of Nazi persecution date back further, which makes their resolution more complicated. Unlike in the earlier West German restitution process, it could be assumed in the new *Länder* that the property in question was in the possession of third parties.

The Property Act accommodates this fact in a number of provisions regulating the relationship between claimant and third parties.[85] In the case of restitution or the annulment of public administration, property rights and obligations may be enjoyed or borne by the claimant or by a caretaker nominated by the claimant. This includes *in rem* rights of others relating to the use of property.[86]

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[83] *See* Dieter Gräf, *Behandlung der vermögensrechtlichen Ansprüche der NS-Verfolgten*, 6 SCHRIFTENREIHE DES BUNDESAMTES ZUR REGELUNG OFFENER VERMÖGENSFRAGEN [Federal Open Property Office] 89 (1994) (demonstrating that the succession clause is anchored in art. 2 of the Registration regulation for the Property Act, as well as art. 2, para. 1 of the law itself and that from these two clauses, the JCC's right derives to register/claim communal property, that of associations, as well as heirless and unclaimed property).

[84] *See* Adelhaid Brandt & Horst-Dieter Kittke, *Rechtsprechung und Gesetzgebung zur Regelung offener Vermögensfragen* [RGV] 1 BUNDESMINISTERIUM DER JUSTIZ [Federal Ministry of Justice], Instruction B(2)(a) (1992); Gesetz zur Änderung des Vermögensgesetzes und anderer Vorschriften [Zweites Vermögensrechtsänderungsgesetz] [Second Amendment to the Property Act], July 22, 1992, BGBL. I at 1257, art. 2.

[85] *Cf.* Gesetz zur Änderung des Vermögensgesetzes und anderer Vorschriften [Zweites Vermögensrechtsänderungsgesetz] [Second Amendment to the Property Act], July 22, 1992, BGBL. I at 1257, art. 16.

[86] *See id.* art. 16, para. 5, (allowing that the claimant also takes over all legal rights and obligations that exist in relation to the asset); *see id.* art. 18 (describing that the restitution decision also has to determine what happens to the *in rem* rights of use, which exist in relation to the asset). Continuing legal relationships can be modified or terminated only on the basis of the applicable legislation for these kinds of transactions. The Property Act further regulates how to proceed with mortgages and similar liens that exist with regard to the asset.

Article 17 of the Property Act provides that—in the interest of social peace—the restitution and re-privatization process do not affect existing leases or user rights, unless the tenant or user did not act in good faith when concluding the contract.[87] In case of bad faith, the contract is annulled in the course of the restitution. Tenants or users of homes for one or two families or of plots used for recreational purposes are granted a preferential right of purchase upon request, provided the lease or usage agreement was concluded before 29 September 1990 and continued to exist at the time of the decision on restitution.[88] For those plots that cannot be returned, the claimant may in turn be granted a preferential right of purchase.[89]

In the West German post-war scheme, properties had to be reclaimed in civil law proceedings similar to the adversarial system prevalent in common law countries. In contrast, the post-reunification restitution scheme for the East German *Länder* was governed by administrative law proceedings characterized by the state's *ex officio* obligation to investigate all relevant facts of the case.[90] For this reason, claims concerning East German property are characterized by a tripartite relationship. While the restitution claim is directed to the current right holder, the claimant has to assert his right vis-à-vis the competent Open Property Office at the municipal, regional, or federal level (*Amt or Landesamt oder Bundesamt zur Regelung offener Vermögensfragen*).[91]

III. The Claim

Unlike in most modern day claims processes, no standardized claims form was introduced to the application process. Claimants could submit their claims to the competent Open

[87] *See id.* art. 17.

[88] *See id.* art. 20.

[89] *See id.* art. 20a.

[90] Spannuth, *supra* note 57, at 258.

[91] *See* Gesetz zur Änderung des Vermögensgesetzes und anderer Vorschriften [Zweites Vermögensrechtsänderungsgesetz] [Second Amendment to the Property Act], July 22, 1992, BGBL. I at 1257, art. 23 (detailing that the *Länder* established Municipal and Regional Open Property Offices). *See id.* arts. 6, 6a, 6b (showing that the latter level is competent for decisions regarding claims for restitution of businesses); *see id.* art. 6, para. 7 (showing that in the case *restitutio in rem* is impossible and the claimant has filed his claim within the deadline, is also competent regarding the decision on the right to compensation as well as the amount).

To ensure that the Law would be applied coherently within this federal structure, the Federal Open Property Office was founded. It was supported by an advisory board, which was composed of a representative of each of the five Law-implementing *Länder*, four representatives of lobby groups, as well as four experts. The new *Länder* therefore originally ruled on all restitution claims according to *id.* art. 30, para. 1, sentence 1; art. 30a, para. 1, sentence 1.

Property Office by formless letter. All restitution claims concerning movable property had to be received by 30 June 1993, while the deadline for claims for the restitution of immovable property was 31 December 1992. These deadlines constituted preclusive periods, so that the claim expired *post terminum*.[92] Once a claim was filed on time, the Property Act restricted the disposal of the claimed asset.[93]

The exclusion periods were intended to ensure legal clarity and certainty as quickly as possible to avoid an undue delay of highly needed investments and economic development in the East German territory. However, this objective conflicted with the claimants' difficulties in obtaining the required facts and details for their applications in due time. Particularly for the JCC—as "global successor" to all heirless and unclaimed assets—it was almost impossible to research all details necessary for the application. Therefore, the JCC filed three "blanket applications" shortly before the expiry of the claims deadline.[94]

The blanket applications led to numerous disputes concerning the minimum content of an application of those applicants whose claims were superseded by the JCC claims. Because the Property Act did not provide sufficient specification for the application's content, the Federal Administrative Court developed respective case law.[95] The Court emphasized the

[92] Given that potential claimants were spread all around the globe, advertisements were published in all relevant newspapers and journals to make the possibility to claim most widely known.

[93] *See* Second Amendment to the Property Act, July 22, 1992, BGBL. I, art. 3, para. 3.

[94] In blanket application (1), the JCC globally claimed restitution of all identifiable property, which would arise out of files and archives to which it not yet had access to, and which would confirm a loss according to article 1, paragraph 6 of the Property Act and where the JCC was eligible according to article 2. With blanket application (2), the JCC globally requested return of all assets that were claimed by third parties, where during the process it would become clear that the asset was subject to a loss according to article 1, paragraph 6 and where the JCC is the legal successor. With blanket application (3) the JCC globally claimed the return of such assets, which would be ascertainable from certain archives, their stocks and files. Attached to this application was a 77-paged annex with numerous data from national archives in Germany, Israel and the former Soviet Union annexed from regional German archives and national sources. In many claims processes the JCC is referring to these applications, which then concretized and substantiated after the expiry of the exclusions periods. *See* Philipp Holtmann, *Reine Verhandlungssache: Die Jewish Claims Conference steht in der Kritik*, JÜDISCHE ZEITUNG, July 2008 (regarding these blanket applications critically).

[95] First, it was decided that an application to claim restitution of an asset had to contain sufficient details that (at least in the way of interpretation) the claimed asset could be identified. The application has to at ensure that the asset can at least be individualized, as to not confront it unjustified with the prohibition of disposal. Bundesverwaltungsgericht [BVerwG] [Federal Administrative Court], Case No. 7 C 8.00 (Oct. 5, 2000). In view of the blanket applications of the JCC, the Federal Administrative Court further concretized that the documents submitted with the application would need to directly lead to the claimed asset, meaning that the claimed asset would need to emerge from referenced specific records. Bundesverwaltungsgericht [BVerwG] [Federal Administrative Court], Case No. 8 C-15/03 (Nov. 24, 2004). So the crucial question is what constitutes this "lead?" According to the Federal Administrative Court, this can at best be considered, if the documents listed in the blanket application provide a hint to a confiscation or forced sale of Jewish property. In addition, details have to emerge from the file that the records relate to the territorial jurisdiction of the respective Open property office.

original purpose of the exclusion period and only confirmed the admissibility of the third blanket application, which relates to property claims ascertainable from certain archives, stocks, and files.

The Federal Administrative Court challenged the administrative practice that had been established up to this point, which was based on the assumption that the three blanket applications were effective.[96] According to the Court, the Open Property Offices should have rejected numerous claims by the JCC that had been filed past the deadline. The required reference to certain documents annexed to a blanket application was only included in a few cases, and, thus, led to a timely application. Following the Court decisions, almost all parliamentary groups submitted a bill to resolve the issue of effectiveness of the application. Instead of restitution, this bill offered the alternative of compensation.[97] The political parties argued that, by failing to recognize the JCC's special position, the Federal Administrative Court's decisions undermined the Property Act's intended purpose of providing effective reparations and redress. They contended that the Federal Republic of Germany had accepted its historical responsibility for Nazi injustice and had assumed an international legal obligation in a 1992 agreement with the three former Western Allies to provide comprehensive reparations for victims of Nazi persecution in accordance with the Allied restitution laws.[98] This initiative led to an amendment of the Property Act that ensured that the successor organizations mentioned in the Act, most notably the JCC, would be compensated if restitution could not be granted because the asset was claimed by means of an invalid blanket application.[99]

IV. The Assets

Article 2, paragraph 2 of the Property Act stipulates that recoverable assets are present or former ownership of land and buildings, other rights *in rem* (such as the right of use or easement on real estate), rights to exploit (such as lease or tenure), and ownership of movable assets, credit balances, and accounts receivable. Furthermore, assets within the meaning of the Act are current or former ownership rights of business assets of enterprises seated in the GDR, including rights of shareholders residing outside of GDR territory.[100]

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[96] *See* Gräf*, supra* note 83, at 90 (issuing a communication based on this legal opinion regarding the blanket application, which had been published in its series).

[97] DEUTSCHER BUNDESTAG: DRUCKSACHEN UND PROTOKOLLE [BT] 15/5576 (Ger.).

[98] *See id.*

[99] *See id.* (describing the particulars of the regulation and decreeing that the law went into effect on 8 September 2005).

[100] *See* Adelhaid Brandt & Horst-Dieter Kittke, *Rechtsprechung und Gesetzgebung zur Regelung offener Vermögensfragen* [RGV] 1 BUNDESMINISTERIUM DER JUSTIZ [Federal Ministry of Justice], Instruction B(2)(c) (1992).

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V. Denial of Restitution

While the fundamental decision had been taken to return aryanized or confiscated real property to its former owners or their heirs, considerable exceptions were made to create a socially acceptable and politically workable system for the resolution of outstanding property claims. To some extent different to the immediate post-war period, the German population did not question Nazi wrongs in the 1990s. But concerns were raised with respect to the revitalization of the East German economy, which found itself in a dilapidated state after forty years of Socialist rule. The post-1989 property settlement needed to take into account the necessity of promoting economic investments requiring policies that tend to conflict with comprehensive restitution systems.[101]

The policy of promoting economic investments is why the Property Act excludes the repossession of properties—or the enjoyment of *in rem* rights associated with the property—if this is impossible due to the nature of the matter. In particular, the restitution of a business is no longer possible if the operation was terminated and the conditions for a resumption of its operations are no longer viable given sound business practice.[102] Moreover, laws were adopted that allowed for the sale of businesses—thus precluding restitution—to accelerate investment in the new *Länder*.[103]

Restitution is also precluded in case of a *bona fide* acquisition of ownership or use rights *in rem* of land and buildings by individuals, religious communities, or non-profit organizations after 8 May 1945.[104] However, to avoid a large-scale sale of assets after the collapse of the GDR, the Property Act introduces a number of criteria that need to be met by those claiming a purchase in good faith from 18 October 1989 onwards, the date when the GDR's long-serving Head of State, Honecker, stepped down. From this date on, property could only be acquired in good faith with the consent of the claimant, unless the acquisition was

[101] *See generally* GERHARD FIEBERG ET AL., VERMÖGENSGESETZ: VERMG (2007).

[102] *See* Gesetz zur Änderung des Vermögensgesetzes und anderer Vorschriften [Zweites Vermögensrechtsänderungsgesetz] [Second Amendment to the Property Act], July 22, 1992, BGBL. I at 1257, art. 4, para. 1.

[103] Article 4, paragraph 1 of the Property Act makes reference to the Regulation on the Foundation and Activities of Companies with Foreign Shares in the GDR (*Verordnung über die Gründung und Tätigkeit von Unternehmen mit ausländischer Beteiligung in der DDR*) (January 1990), the Privatization Law (*Treuhandgesetz*) (June 1990), or the Law on the Foundation and Activities of Private Companies and on Company Shares (*Gesetz über die Gründung und Tätigkeit privater Unternehmen und über Unternehmensbeteiligungen*) (March 1990).

[104] Gesetz zur Änderung des Vermögensgesetzes und anderer Vorschriften [Zweites Vermögensrechtsänderungsgesetz] [Second Amendment to the Property Act], BGBL. I at 1257, art. 4, para. 2 (July 22, 1992).

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requested in writing or otherwise put on record before 1 October 1989; if the transaction was based on the Law on the Sale of Nationally-Owned Buildings (*Gesetz über den Verkauf volkseigener Gebäude*); or if the purchaser had made substantial investments to the property prior to 19 October 1989.[105] Good faith cannot be assumed in case the purchase was generally not in line with the applicable GDR legislation or good business practice, provided that the purchaser knew or should have known this. Bad faith is also assumed if the transaction involved corruption or the abuse of personal power, particularly with regard to the date or the completion of the acquisition or the selection of the purchase item. Furthermore, no good faith can be claimed if the former owner sold the property under duress or was deceived by the purchaser or a third party.[106] These provisions stand in stark contrast to the German Civil Code, according to which a purchaser can in principle claim good faith acquisition if the property rights register lists the seller as owner.[107]

Finally, property rights to land and buildings cannot be returned if restitution interfered with urban planning or community use. The Property Act clarifies that such is the case if the claimed land and buildings were significantly altered in their usage or purpose and if there is public interest in upholding this situation. Restitution is further excluded if the land or building is bestowed for public use, utilized for housing developments, or was provided for commercial use or incorporated into a corporate entity and cannot be returned without significant impairment to the company.[108]

VI. Compensation of Equal Value and Quid Pro Quo

In its attempt to reverse existing legal relationships with regard to an asset, the Property Act also specifies in great detail how to compensate for measures that enhance the asset's value.[109] In case of a successful restitution claim, the claimant is held to pay compensation to the current right holder for the increased value through measures that the latter can account for, such as development, construction, refurbishment, or maintenance of the property.[110] Value-enhancing measures affected prior to 2 October 1990 are to be

[105] *Id.*

[106] *Id.* art. 4, para. 3.

[107] BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], Aug. 18, 1896, REICHSGESETZBLATT [RGBL.] 195, § 892.

[108] Vermögensgesetz [Property Act], July 22, 1992, BGBL. I art. 5.

[109] The Property Act regulates the compensation of equal value and set-off of considerations in significant detail, and the following explanations will limit themselves to the essential, necessary for this article. *Id.* arts. 7, 7(a).

[110] *Id.* art. 7, para. 1. Should the proof no longer be possible, article 7, paragraph 1, sentence 2 opens the possibility to use estimation. *Id.*

compensated with the objective value given at the time of the restitution decision.[111] With the exception of emoluments from rental or other contracts earned after 1 July 1994, restitution does not generally entail a restitution of gains drawn from the asset prior to the decision. With respect to the mentioned emoluments, the claimant is entitled to recovery as of the date when the decision on restitution is final.[112]

In case of restitution, the claimant has to surrender to the respondent any payments received for the loss of the asset, such as a refund for the purchase price. Payments made in Reichsmark are to be converted into Deutschmark in the ratio of 20:1.[113]

E. Right to Compensation

As described above, the Property Act only covers restitution claims. Compensation claims of victims of Nazi persecution are regulated in separate legislation—the Nazi Compensation Act—but can only be granted once the damage is ascertained according to Article 1 paragraph 6 of the Property Act.[114] Until 2004, the Regional Tax Office Berlin (*Oberfinanzdirektion Berlin*) determined the compensation amount following a decision on the merits by the competent Open Property Office.[115] Aiming to speed up the decision-making process, the authority to determine the compensation amount was transferred to the Federal Open Property Office in 2004.[116]

The Nazi Compensation Act is part of a comprehensive Compensation and Adjustment Payments Act that foresees various bases for the calculation of compensation amounts depending on the type of property in question.[117]

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[111] *Id.* art. 7, para. 2. If the activities of article 7, paragraphs 1 and 2 have been financed by mortgages, the indemnity rights do not exist. *Id.*

[112] *Id.* art. 7, para. 7. The right holder has the right to set-off expenses. *Id.* at art. 7, para. 3.

[113] *Id.* art. 7(a), para. 2.

[114] *Cf.* Caroline Dostal, *Comment on the Ruling of the Administrative Court of Berlin* (*Verwaltungsgericht Berlin*), *in* 6 RECHTSPRECHUNGSÜBERSICHT 29, 29 (Fed. Open Prop. Office ed., 2005).

[115] NS-Verfolgtenentschädigungsgesetz [Law on the Compensation of Victims of Nazi Persecution], BGBL. I art. 1, para. 1 (Sept. 27, 1994).

[116] The Regional Tax Office Berlin still housed the central archive of the 1930s, which was used as the basis for the calculation of compensation. The Office had played a central role in the aryanization. In January 2004, the competence regarding claims pursuant to article 1, paragraph 6 of the Property Act was transferred to the Federal Office for the Regulation of Open Property Issues, which now decides the merits as well as the compensation amounts. The competence was changed due to the pressure of the JCC, which demanded faster decision making and hoped this measure would accelerate the proceedings.

[117] *See supra* Part B (discussing the Compensation and Adjustment Payments Act in greater detail).

I. Real Estate

The assessment base for compensation of real estate, including buildings, agricultural, and forest property, derives from a multiplication of the standard tax value, the substitute tax value, or an auxiliary value to be determined.[118] According to Article 2 of the Nazi Compensation Act, compensation is calculated at four times[119] the last standard tax value that was established prior to the loss, which, in many cases, relies upon the real estate valuation operation in 1934. In other words, a first step in determining the compensation amount is to verify the last standard tax value. Primary sources of evidence are old records, information received by the claimant in the claims form for real estate that is verified by the Open Property Office in a special template, and data provided by fiscal or building authorities.[120] In case the standard tax value cannot be determined, or it is evidently incorrect, a substitute tax value is used that might have been established in the above-mentioned compensation proceedings according to the 1952 Law on the Equalization of Burdens. Indications that the claimant benefited from this compensation scheme are found in the completed claims form for which the Open Property Office had designed a verification template. If neither the historical standard tax value nor the substitute tax value from previous compensation proceedings are available, the Federal Open Property Office will determine an auxiliary value following the provisions of the 1934 Real Estate Valuation Act (*Reichsbewertungsgesetzes*).[121]

The Compensation and Adjustment Payments Act provides the general rule that long-term liabilities in connection with the property are deducted at half their value from the assessed amount of loss-related damage.[122] Recognizing the special situation of Jewish victims of Nazi persecution, the Nazi Compensation Law alters this rule and foresees that no liabilities that arose between 15 September 1935 and 8 May 1945 are taken into

[118] The German tax system bases its valuation on the periodic assessment of tax values for real estate, businesses, etc. The last periodic assessment prior to most losses under the Nazi regime occurred in 1934–1935, which—if it is available—is the value being used for these compensation claims. For the Equalization of Burdens, detailed lists were established that would determine the substitute tax value for businesses. Therefore, if it is known that a mechanic had between 2.9 and 3.3 employees, the substitute tax value for his business was 6000 RM.

[119] This figure differed from the multiplier in post-1949 compensation.

[120] NS-Verfolgtenentschädigungsgesetz [Law on the Compensation of Victims of Nazi Persecution], Sept. 27, 1994, BGBL. I art. 2.

[121] *Id.* art. 2, paras. 2, 3.

[122] Entschädigungs—und Ausgleichsleistungsgesetz [Compensation and Adjustment Payments Act], Sept. 27, 1994, BGBL. I art. 3, para. 1, sentence 2.

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account at all.[123] Moreover, to avoid unfair double taxation of the claimant, the Federal Constitutional Court decided in 2000 that purchase price payments are taken into account when determining the compensation amount if they were made after the property loss.

II. Corporations, Receivables, and Trademark Rights

As with real estate, compensation for loss of corporations is based on the standard tax value, the substitute tax value, or the auxiliary value of the business, namely the net assets or the appraised value.[124] The value of the net assets is calculated from the difference between capital and liquid assets on the one hand and all liabilities on the other.[125] Relevant in this context is the company's balance sheet prior to the property loss. Should this balance sheet be missing, comparable documents with sufficient reliability have to be produced. Similar to the procedure applicable for real estate, old records, information provided by the claimant on the claims form for corporations, and information provided by fiscal authorities are the primary sources of evidence in addition to other archives, such as the trade register. If none of these sources are available, the value of the company's assets must be appraised. In these circumstances, the provisions of the Law on the Equalization of Burdens concerning the appraisal of an auxiliary value serve as a useful indicator.[126] This appraisal value can be determined according to its tabulations on guiding values (such as for handcraft, retail, and whole sale). The tabulations list auxiliary values per type of enterprise according to number of employees, business volume, debts, and so on.

A private monetary entitlement, such as account balances or secured liabilities, are exchanged 2:1 into Deutschmark according to the book value at the time of loss.[127]

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[123] NS-Verfolgtenentschädigungsgesetz [Law on the Compensation of Victims of Nazi Persecution], Sept. 27, 1994, BGBL. I art. 2, sentence 2.

[124] *Id. See also* Caroline Dostal, *Die Anrechnung von dinglichen Belastungen bei Betriebsgrundstücken nach VermG, EntschG und NS-VEntschG*, 55 INFORMATIONSDIENST FÜR LASTENAUSGLEICH [IFLA], 61–64 (2006) (providing further differentiation).

[125] NS-Verfolgtenentschädigungsgesetz [Law on the Compensation of Victims of Nazi Persecution], Sept. 27, 1994, BGBL. I art. 4, para. 2.

[126] BUNDESAUSGLEICHSAMT [PRESIDENT OF FEDERAL ADJUSTMENT OFFICE], RICHTZAHLEN FUER DIE ERMITTLUNG DER ERSATZEINHEITSWERTE DER GEWERBLICHEN BETRIEBE DES HANDWERKS, DES EINZELHANDELS, DES GROSSHANDELS SOWIE DES GASTSTAETTEN- UND BEHERBERGUNGSGEWERBES [GUIDING FIGURES FOR DETERMINING THE REPLACEMENT VALUE OF COMMERCIAL CRAFTS, RETAIL, WHOLESALE, CATERING AND HOTEL BUSINESSES] (1958).

[127] NS-Verfolgtenentschädigungsgesetz [Law on the Compensation of Victims of Nazi Persecution], Sept. 27, 1994, BGBL. I art. 5, para. 1. In case the private monetary entitlement was accounted for in *Reichsmark* (and the property was lost prior to 24 June 1948), the exchange calculation differed. The first 100 *Reichsmark* were exchanged at 50%, the remainder up to 1000 *Reichsmark* at 10%, and anything above 1000 *Reichsmark* at 5%. The result of this calculation would then be the basis for the compensation determination.

III. Set-off of Considerations and Deduction of Equalization of Burden Payments

According to the Compensation and Adjustment Payments Act, considerations or earlier (partial) compensation payments are to be set off against the compensation claim. Considerations are primarily the purchase price for the property, including black money, as long as proof exists of the payment and of the transfer of the money.[128] If the vendor was released of liabilities or obligations, the Open Property Office verifies whether and to what extent the payments were used to pay off liabilities or obligations.[129]

In determining the compensation amount for property losses of Nazi victims, the Open Property Office also takes into account compensatory payments received by the claimant or his legal predecessor relating to the respective property pursuant to the Equalization of Burdens Act.[130]

F. Claims Process

According to the Property Act and the Nazi Compensation Act, claims proceedings were originally designed as mass claims processes. German regulators attempted to standardize the proceedings significantly. The Open Property Offices produced standardized decisions using pre-fabricated text modules for various case categories. In addition, verification templates and requests were designed with a view to ensure that cases could be decided expeditiously. Unlike most mass claims processes today, the proceedings lacked standardized claims forms and allowed applications to be filed by informal letter.

I. Administrative Proceedings

Irrespective of the intent to streamline the proceedings considerably, the reparation process is taking much longer than originally expected.[131] To a certain extent, as with many

[128] Entschädigungs—und Ausgleichsleistungsgesetz [Compensation and Adjustment Payments Act], Sept. 27, 1994, BGBL. I art. 6.

[129] FED. MINISTRY OF FIN., FED. OPEN PROP. OFFICE & REG'L OPEN PROP. OFFICES OF BERLIN, BRANDENBURG, MECKLENBURG-VORPOMMERN, SAXONY, SAXONY-ANHALT, AND THURINGIA, GEMEINSAME ARBEITSHILFE ZUM ENTSCHÄDIGUNGSGESETZ UND AUSGLEICHLEISTUNGSGESETZ [JOINT GUIDANCE NOTE ON THE COMPENSATION AND ADJUSTMENT PAYMENTS ACT], *in* SCHRIFTENREIHE DES BUNDESAMTES ZUR REGELUNG OFFENER VERMÖGENSFRAGEN 32, 329 (Fed. Open Prop. Office ed., 2005).

[130] Entschädigungs—und Ausgleichsleistungsgesetz [Compensation and Adjustment Payments Act], Sept. 27, 1994, BGBL. I art. 8. *See supra* Part A.IV (providing additional information on the Act).

[131] An interesting comparison in approach, results, speed, and costs to the post-reunification reparation process is the Property Claims Commission under the German Forced Labour Compensation Programme. *See* IOM, *supra* note 3.

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other property restitution and compensation processes, the process is lengthy because ownership questions or actual property losses are so complex that the desired standardization was unable to meet the needs of many individual cases. Possibly because of a lack of precedent, German lawmakers did not establish a specialized mass claims process and instead reverted to regular administrative proceedings that they attempted to accelerate by inserting standardized parts of the claims and decision-making procedure. Thus, it does not come as a surprise that in German reparations, the balance between individual justice taking due regard of case detail and a speedy and expedient mass claims procedure shifted towards the former.

As mentioned above, German administrative law contains an *ex officio* obligation of the appropriate authorities to investigate the relevant facts of a case. At the same time, it places a duty on the claimant to cooperate with the State in resolving the case, a principle reinforced by the Property Act.[132] In case an application does not sufficiently specify the claimed asset, the Open Property Office usually sets a deadline for the claimant to provide more explanation and detail. To ensure that the authorities live up to their obligations to investigate *ex officio,* the Property Act grants the claimant a right to demand information if he has been able to provide *prima facie* evidence of his property right.[133] If the claimant fails to respond, the Office may reject the claim. [134]

Upon receipt of the claim, the Open Property Office registers each application, assigns a claims number, and sends an acknowledgement of receipt to the claimant. Restitution and Compensation proceedings follow the same procedures as other administrative proceedings in Germany, meaning that they are in writing. However, unlike some other mass claims processes, which did not foresee any hearing in person, the claimant has the opportunity to appear before the Open Property Office. Lawyers make use of this opportunity again and again and appear in person before at the office. The fact that claimants themselves make less use of it stems from the fact that they are scattered all over the world and are often reluctant to appear before German authorities.

In principle, reparations proceedings—including the appeals procedure—are free of charge. [135] The claimant does, however, have to bear the charges for his legal representation. Should the lawyer's service be deemed necessary for expedient pursuit of the claim, and should the claimant's appeal be successful, the claimant will get the lawyer's expenses reimbursed.

[132] Vermögensgesetz [Property Act], July 22, 1992, BGBL. I art. 31, para. 1.

[133] *Id.* art. 31, para. 3.

[134] *Id.* art. 31, para. 1(b).

[135] *Id.* art. 38.

II. Legal Remedy

Decisions made by the first level Municipal Open Property Office can be appealed, but decisions made by the Regional Open Property Office after 2004 do not offer this remedy.[136] An earlier version of the Compensation and Adjustment Payments Act foresaw a higher-level administrative appeals procedure, but the relevant provision was abolished to speed up the process.[137]

Once all administrative remedies are exhausted, the parties are entitled to file administrative court proceedings against the decisions of the Regional Open Property Office or, for compensation claims, directly against decisions of the relevant department.[138] Notwithstanding regular recourse to the administrative courts, in some cases, an appeal can also be lodged before the Federal Administrative Court complaining against a denial of the right to appeal. Needless to say, many reparation cases are also resolved by judicial and extrajudicial settlement.

As previously stated, many cases involve three or more parties to the restitution process. The multiparty character of the proceedings leads to an increased use of remedies both on the administrative level and the judicial level. Parties receiving a negative decision often doubt its legality—a situation that prolongs the overall reparation process for many years. Without legal clarity following a final decision, the property can neither be returned to the claimant nor attract adequate investment leading to a loss of value over time.[139]

Over the years, it became evident that both the Property Act and the Nazi Compensation Law left a number of loopholes and open legal questions. These questions often become subject to litigation involving the JCC as plaintiff. In particular, following the above-mentioned abolition of the possibility to file an administrative objection in 2004, the number of court cases, especially relating to compensation issues, rose dramatically. The high caseload that often concerned the same legal questions made the Open Property

[136] *Id.* art. 36, para. 1.

[137] Vermögensgesetz [Property Act], July 22, 1992, BGBL. I art. 36, para. 4 (as amended in 2005).

[138] Vermögensgesetz [Property Act], July 22, 1992, BGBL. I art. 37.

[139] Compare with, for example, the prominent case of Ms. Gabriele Hammerstein; the JCC appealed the decision for the restitution of a plot in Schwerin, which led to a considerably lengthened procedure, during which the condition of the house deteriorated further and further and the property lost its value. Ms. Hammerstein sued the JCC in the United States, however, the court decision referred to the German jurisdiction. *See* Hammerstein v. Conference on Jewish Material Claims Against Ger., No. 100767/2007, 2008 N.Y. Misc. LEXIS 8918 (N.Y. Sup. Ct. April 2, 2008). *Cf.* Holtmann, *supra* note 93 (listing a number of similar such cases). *Cf.* Christoph Scheuermann, *Die Vergessene*, 52 DER SPIEGEL 44–46 (2010) (citing the most recent examples of these cases).

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Offices file model law suits aiming to create precedents, to achieve legal clarity, and to speed up the process.[140]

III. Burden of Proof

Section C.I described the claimant-friendly presumption of proof relating to the loss of property as a result of Nazi persecution from 1933 to 1945. The claimant nonetheless carries the burden of proof for the actual ownership of the property claimed to have been lost under these circumstances.[141] This means that the regular rules concerning the burden of proof are also applicable for the Property Act, as well as for the Nazi Compensation Act. The basic judicial rule is that the party claiming certain facts in its favor must also prove their existence.[142] In the context of the Property Act, this means that restitution or compensation can only be granted if the claimant is able to provide evidence that he or his predecessor did indeed own the property in question. Sixty years after the loss, it does not come as a surprise that claimants, in particular the JCC, heavily criticized this rule because they had serious difficulties producing the required proof of ownership. Called to judge the issue, the Federal Administrative Court argued that the regular evidentiary rules pay due respect to such difficulties by allowing the judiciary to ease the burden of proof, such as by admitting circumstantial evidence.[143]

G. Implementation of Restitution and Compensation Cases

Restitution of East German properties started immediately after East Germany's accession to the Federal Republic of Germany in 1990. In total, by the end of 2013, claims for

[140] It was also in the interest of the State not to promote increasing costs because, on the one hand, interest must be paid on compensation claims by the month prior to the announcement of the ruling as of 1 January 2004 according to article 2 of the Nazi Compensation Act. NS-Verfolgtenentschädigungsgesetz [Law on the Compensation of Victims of Nazi Persecution], Sept. 27, 1994, BGBL. I art. 2. The interest is set at a monthly rate of 0.5% and was implemented so as to expedite the processing of claims. On the other hand, court costs represented a significant expense.

[141] *Cf.* Dostal, *supra* note 113, at 29.

[142] Bundesverwaltungsgericht [BVerwG-Federal Administrative Court], Case No. 7 C 16/05 (Aug. 31, 2006), *available at* http://www.bverwg.de/entscheidungen/entscheidung.php?ent=310806U7C16.05.0 (outlining the above-mentioned ruling of the Administrative Court Berlin, which is hereby confirmed). *See also* Bundesverwaltungsgericht [BVerwG-Federal Administrative Court], Case No. 7 B 21/05 (July 29, 2005), *available at* http://www.bverwg.de/entscheidungen/entscheidung.php?ent=290705B7B21.05.0.

[143] BVerwG, Case No. 7 C 16/05 (Aug. 31, 2006). *See also* Bundesverwaltungsgericht [BVerwG-Federal Administrative Court], Case No. 8 B 5/08 (Apr. 8, 2008), *available at* http://www.bverwg.de/entscheidungen/entscheidung.php?ent=080408B8B5.08.0 (discussing the shift in burden of proof).

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215,627 assets were filed in the scope of Article 1 paragraph 6 of the Property Act.[144] The successor office of the Federal Open Property Office, the Federal Office for Central Services and Open Property Issues (BADV), reported that claims for 171,832 assets (approximately eighty percent) were resolved in first instance.[145] Regarding compensation claims, BADV statistics for 2013 mention 22,111 settled cases of a total number of 23,036 compensation claims.[146] The authors were unable to research, however, how many compensation proceedings followed restitution proceedings, particularly how many cases were finally settled by now.

In a 2012 report on indemnification provisions, the German Ministry of Finance lists 1.928 billion EUR in compensation payments transferred until 2011 pursuant to the Nazi Compensation Act, 2.023 billion EUR as compensation payments transferred until 2011 pursuant to the Federal Restitution Law, and 46.726 billion EUR as compensation payments transferred until 2011 pursuant to the Final Federal Compensation Law.[147] Of the latter amount, 491 million EUR were paid as compensation for damages to property and assets.[148] An additional 591 million EUR were marked for the 2012 Federal budget.[149] Approximately seventeen percent of the payments according to the Final Federal Compensation Law and the Federal Restitution Law are made to German residents, approximately forty percent to Israeli residents, and the remaining forty-three percent to claimants in other countries.[150]

H. Final Remarks

Twenty-four years after reunification, the reparations process for East German property is still not completed. Besides the magnitude of the concerned assets, the slow process can be explained with the design of the German reparations proceedings. In weighing the need to resolve open property issues quickly with the desire to provide accurate justice on a case by case basis, the German reparations process stands in some contrast to modern

[144] This number contains claims for 149,752 plots of land, for 45,805 enterprises, and for 20,070 movable properties. Approximately 88 percent of the immovable property claims were settled. FED. OFFICE FOR CENTRAL SERVICES AND UNRESOLVED PROP. ISSUES [BADV], STATISTICAL OVERVIEW (2013).

[145] *Id.*

[146] *Id.*

[147] FED. MINISTRY OF FINANCE, COMPENSATION FOR NATIONAL SOCIALIST INJUSTICE—INDEMNIFICATION PROVISIONS 29 (2012).

[148] *Id.* at 32.

[149] Bundesministerium der Finanzen [Federal Ministry of Finance], *The Structure of the Federal Budget*, http://www.bundeshaushalt-info.de (last visited Sep. 12, 2014).

[150] FED. MINISTRY OF FINANCE, *supra* note 147, at 30.

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mass claims processes. Generally set up in the immediate aftermath of conflict, the latter emphasize the speedy resolution of property disputes because they need to provide quick solutions to pending displacement issues and ensure immediate reconstruction and renewed investments. In post-conflict settings, it is often found that rough "quick" justice is more helpful than lengthy individualized claims resolution aiming at 100% accuracy in its assessment and decision-making.[151]

Although claims collection, case management, and decision-making involve, as shown above, a number of standardized procedures similar to modern mass claims processes, Germany's post-reunification restitution scheme remained a regular administrative process at its core. Without a standardized claims form, the process was not designed to facilitate large-scale computer processing and analysis. Claimants' right to seek judicial review of the administrative decisions of the Open Property Offices further slowed down the process. Post-reunification restitution took place over six decades after the persecution of Jews during the Nazi regime. The passage of time made restitution or compensation factually and legally more difficult in the West German predecessor system. That the socialist authorities had added yet another layer of property-related injustice after 1945 added to the complexities of the restitution process. Post-reunification restitution of properties lost, or "aryanized," during the Nazi regime took place at a time of transition involving multiple socio-political changes in post-socialist East Germany. Regulating multiple property claims in connection with three different previous political regimes led to an extremely complex and intricate body of law requiring a vast amount of administrative and judicial resources and time.

A number of other differences between the West German restitution system after 1945 and its East German counterpart in 1990 are worth noting. Although factually and legally more complicated, procedurally the East German process went much smoother in general, and the competent administrative authorities and courts adopted a reconciliatory approach.[152] While post-1945 restitution concerned many businesses still operating, the post-1990 system often involved claims for the compensation of properties that had been destroyed or were impossible to return, such as because they were now used for social or educational purposes. Previous nationalization of larger properties meant that claims in post-socialist East Germany were mostly directed against the state, whereas in post-war West Germany, they mainly concerned individuals. As a consequence, East German proceedings tend to be more technical and standardized, whereas the West German experience was more controversial and emotional. The West German restitution process

[151] IOM, *supra* note 3, at 1.

[152] Christian Meyer-Seitz, *Entwicklung der Rückerstattung in den neuen Bundesländern seit 1989*, *in* "ARISIERUNG" UND RESTITUTION: DIE RÜCKERSTATTUNG JÜDISCHEN EIGENTUMS IN DEUTSCHLAND UND ÖSTERREICH NACH 1945 UND 1989, at 276 (Constantin Goschler & Jürgen Lillteicher eds., 2002); Goschler, *supra* note 34, at 41.

has been criticized for obstruction at the administrative level, although many cases were undisputed.[153] While judicial review generally ensured that claimants eventually could claim their rights, the process was complicated and slow. Moreover, that claimants and "aryanizers," who often contested having acquired the disputed property in good faith, met face-to-face in the adversarial court proceedings, thus making the process a very painful personal experience in many cases.[154]

In particular, in the post-reunification proceedings, the complexity of the reparations regime in general did not allow non-lawyer claimants to file their case without recourse to legal counsel. As a consequence, a new and lucrative area of work opened up for lawyers and other relevant professionals. In some cases, law firms might even have encouraged claimants to pursue their case even though they were based on doubtful merits. Criticism was also launched toward the JCC for taking a life of its own and not always serving the interests of individual victims.[155]

German reparations have been called impressive and a success by most accounts.[156] But was it all worthwhile? Did these efforts foster a spirit of reconciliation between Germans and persecuted Jews, their heirs, and Jewry in general, as well as between Germany and Israel, the proclaimed homeland of all Jews? Answering these questions in detail would exceed the scope of this article focusing on legal and institutional history of German reparations. A sound analysis would require assessing all complementing German reparation schemes, including the Luxemburg Agreement, the slave labor compensation scheme, and the restitution programs discussed in this article. The German Ministry of Finance states that all public-sector compensation payments made until 2011 amounted to 69.039 billion EUR.[157]

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[153] *Cf.* Jürgen Lillteicher, *Rechtsstaatlichkeit und Verfolgungserfahrung: "Arisierung" und fiskalische Ausplünderung vor Gericht*, *in* "ARISIERUNG" UND RESTITUTION: DIE RÜCKERSTATTUNG JÜDISCHEN EIGENTUMS IN DEUTSCHLAND UND ÖSTERREICH NACH 1945 UND 1989, at 156 (Constantin Goschler & Jürgen Lillteicher eds., 2002). *See also* CHRISTIAN PROSS, PAYING FOR THE PAST: THE STRUGGLE OVER REPARATIONS FOR SURVIVING VICTIMS OF THE NAZI TERROR 165 et seq. (1998) (observing various health damages).

[154] *Cf.* Spannuth, *supra* note 56, at 58; Colonomos & Armstrong, *supra* note 6, at 410–11 (addressing the issue of compensation).

[155] Hammerstein v. Conference on Jewish Material Claims Against Ger., No. 100767/2007, 2008 N.Y. Misc. LEXIS 8918 (N.Y. Sup. Ct. April 2, 2008).

[156] Colonomos & Armstrong, *supra* note 6, at 408; Roy L. Brooks, *A Reparations Success Story?*, *in* WHEN SORRY ISN'T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN INJUSTICE 17 (Roy Brooks ed., 1999). *See also* Buxbaum, *supra* note 2.

[157] FED. MINISTRY OF FINANCE, *supra* note 146, at 29. This figure includes payments made under the Federal Compensation Act, the Federal Restitution Act, the Compensation Pension Act, the Nazi Compensation Act, the Luxemburg Agreement, and the comprehensive bilateral compensation agreements; it also includes compensation payments by the Länder made outside the Federal Compensation Act, the Hardship Compensation

The German reparations scheme did help Germany to rejoin the international community after World War II and the Holocaust, and it significantly contributed to the gradual establishment of good relations between Germany and Israel.[158] But to what extent did reconciliation happen on the individual level? It is generally assumed that individual reparations systems, if well-designed, support post-conflict reconciliation in various ways.[159] Returning property or making respective compensation payments intend to satisfy victims' needs or to improve their living conditions. Reparations arrangements also include a public recognition of past injustices and promote the same recognition of individuals. However, the experiences of many victims of Nazi persecution might have been different. Reconciliation is unlikely for traumatized claimants having to face an overwhelming and complex claims process implemented by the successor institutions of those originally responsible for the property loss. This feeling of mistrust tended to be magnified in compensation proceedings pursuant to the Nazi Compensation Act because its provisions were too complicated for a layperson to follow. Neither is reconciliation likely to be fostered by lawyers who portray the Federal Republic of Germany as the opposing party to their clients. Previous research emphasized the re-traumatizing experience of victims having to prove their damages to body or health before a cold bureaucracy.[160] Property rights restitution might be less complicated because objective evidence may more easily be available to support the case, but property restitution or compensation also tends to revive possibly repressed memories of traumatizing past events in connection with forced migration and other mass crimes.[161] Irrespective of the factors described concerning the parties and the design of the claims process, the inherent linkage between restitution and memorization may make restitution processes as such an extremely painful experience for victims.

Germany is generally well-respected for its official recognition of and remorse for the crimes committed during the Nazi regime. The reparation programs discussed in this article

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Fund, the Foundation for Remembrance, Responsibility and the Future as well as other payments. *See* Pierre D'Argent, *Reparations after World War II*, *in* 8 THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 893–98 (Rüdiger Wolfrum ed., 2012) (giving a more comprehensive overview of the wider German reparations scheme).

[158] Colonomos & Armstrong, *supra* note 6, at 409–410.

[159] Elin Skaar, Siri Gloppen & Astri Suhrke, ROADS TO RECONCILIATION 8 (Elin Skaar, Siri Gloppen & Astri Suhrke eds., 2005); Pablo de Greiff, *Introduction* to *Repairing the Past: Compensation for Victims of Human Rights Violations*, *in* THE HANDBOOK OF REPARATIONS, *supra* note 1, at 2; Pablo de Greiff, *Justice and Reparations*, *in* THE HANDBOOK OF REPARATIONS, *supra* note 1, at 469.

[160] Colonomos & Armstrong, *supra* note 6, at 410–11.

[161] Dan Diner, *Der Holocaust in den politischen Kulturen Europas: Erinnerung und Eigentum*, *in* AUSCHWITZ: SECHS ESSAYS ZU GESCHEHEN UND VERGEGENWÄRTIGUNG 68 (Klaus-Dietmar Henke ed., 2001).

are complemented by numerous commemoration initiatives in and outside Germany. However, it is doubtful how far the official admission on German responsibility actually led individual Germans to recognize that many of their families benefited from large-scale "aryanization" of Jewish property and other injustices. Research demonstrates significant differences between the public discourse and inner-family remembrance and storytelling.[162] Moreover, the Friedrich Ebert Foundation recently published two studies with the disconcerting finding that anti-Semitism in Germany, as in other parts of Europe, is on the rise again.[163]

More systematic psycho-sociological research would be required to assess the impact of the German reparations on the attitudes of individual Germans. One possible outcome of such research might be that the majority of Germans took limited notice of the reparations programs despite the considerable financial, administrative, and judicial resources applied. This might be a result of an overly complex reparations regime as well as the cautious disclosure by the German Government of the payments made in their totality.

[162] HARALD WELZER, SABINE MOLLER & KAROLINE TSCHUGGNALL, "OPA WAR KEIN NAZI": NATIONALSOZIALISMUS UND HOLOCAUST IM FAMILIENGEDÄCHTNIS 248 (2002).

[163] ANDREAS ZICK, BEATE KÜPPER & ANDREAS HÖVERMANN, INTOLERANCE, PREJUDICE AND DISCRIMINATION: A EUROPEAN REPORT (2011), http://library.fes.de/pdf-files/do/07908-20110311.pdf; OLIVER DECKER, JOHANNES KIESS & ELMAR BRÄHLER, DIE MITTE IM UMBRUCH: RECHTSEXTREME EINSTELLUNGEN IN DEUTSCHLAND 2012 (2012), http://www.fes-gegen-rechtsextremismus.de/pdf_12/mitte-im-umbruch_www.pdf.