

## Lost Information and Competing Interests in Restoring Germany's Dispossessed Property - The Recent Decision of the German Federal Administrative Court

By Hanri Mostert\*

### A. Introduction

With the progressive "accession" of the German Democratic Republic to the Federal German Republic after the reunification in 1990, Germany had to deal with a number of impediments emanating from the attempt to reconcile different political, social and legal models that developed during the forty years of separation between East and West Germany. Among these was the issue of how the property order in Germany would be influenced by seeking to integrate two such different socio-political and legal systems.<sup>1</sup> As the discussion below indicates, the demands placed by this issue on the courts, legislature and administration of the newly reunified Federal German Republic still cause repercussions.

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\* Associate Professor, Faculty of Law, Stellenbosch University, South Africa. [hmos@sun.ac.za](mailto:hmos@sun.ac.za). I am grateful to Stefan Häußler, who clarified some of the finer detail in the German text of the Federal Administrative Court's decision for me, and to the Max Planck Institute for International and Foreign Public Law in Heidelberg, for making available their library facilities to me. The financial assistance of the National Research Foundation and the University of Stellenbosch is hereby gratefully acknowledged. Opinions expressed in this case discussion should not be attributed to either of these institutions.

<sup>1</sup> See inter alia: O. Deppenheuer *Eigentum und Rechtsstaat* NEUE JURISTISCHE WOCHENSCHRIFT 53 (2000) 6, p. 385-390; R. Meixner *Entscheidung des Bundesverfassungsgerichts zum Entschädigungs- und Ausgleichsleistungsgesetz* DIE ÖFFENTLICHE VERWALTUNG 55 (2002) 21, p. 900-908; K.-A. Schwarz *Wiedergutmachung und die "exceptio pecuniam non habendi"* DIE ÖFFENTLICHE VERWALTUNG 53 (2000) 17, p. 721-729; A. Jaekel *Zur Rechtsprechung des Bundesverwaltungsgerichts zu den Überschuldungsfällen* ZEITSCHRIFT FÜR VERMÖGENS- UND INVESTITIONSRECHT 6 (1996) 3, p. 113-117; T. Schweisfurth *Von der Völkerrechtswidrigkeit der SBZ-Konfiskationen 1945-1949 zur Verfassungswidrigkeit des Restitutionsausschlusses 1990*, ZEITSCHRIFT FÜR VERMÖGENS- UND INVESTITIONSRECHT 10 (2000) 9, p. 505-521; and generally also T. Schweisfurth *SBZ-KONFISKATIONEN PRIVATEN EIGENTUMS 1945 BIS 1949*, Baden-Baden, Nomos (2000). P.E. Quint *THE IMPERFECT UNION - CONSTITUTIONAL STRUCTURES OF GERMAN UNIFICATION*, Princeton, Princeton Univ. Press, (1997) deals with the intricacies of the Re-unification in particular.

One such problem relates to the extent to which the reparation arrangements in West Germany influenced the measures undertaken in East Germany. Refugees who left Germany between 1933 and 1945 were forced to sell their immovable property and could only take a restricted amount of currency out of the country.<sup>2</sup> The persecuted that did not flee only rarely survived the large-scale massacre of so-called "state enemies" during the National Socialist reign of terror that persisted through the end of World War II.<sup>3</sup> In both cases, the victims' land often ended up in the hands of Nazi Party organizations or members, without any systematic alterations to the land register.<sup>4</sup> The *Wiedergutmachung* initiative in the German Federal Republic was aimed at providing some kind of reparation for these victims of National Socialism.<sup>5</sup> The *Bundesgerichtshof* (BGH – Federal Court of Justice) declared on one occasion that these reparation arrangements were compatible with article 14 of the Basic Law.<sup>6</sup>

No comprehensive rehabilitation was ever envisaged in the German Democratic Republic for the victims of National Socialism,<sup>7</sup> and in particular no restitution of

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<sup>2</sup> M. Southern *Restitution or Compensation: The Land Question in East Germany* 1993 INT. & COMP. L.Q 690 at 691.

<sup>3</sup> Id.

<sup>4</sup> Id.

<sup>5</sup> The *Wiedergutmachung* initiative did not incorporate only a reparations program for dispossessed property. Instead, it constituted a full-blown attempt to induce social change in Germany, dealing with "denazification" and reform of the civil service over and above its attempts to restore property. It is outside the scope of this discussion to undertake an extensive discussion of this initiative, or even to list comprehensively the legislative and administrative measures applied to this initiative. For more detail, see esp. C. Goschler *WIEDERGUTMACHUNG – WESTDEUTSCHLAND UND DIE VERFOLGTEN DES NATIONALSOZIALISMUS (1945-1954)* Munich, R. Oldenbourg Verlag (1992); and the case study of National-Socialist induced dispossession of Jewish property in the Rhineland-Palatinate between 1938 and 1953 as documented by W. Rummel & J. Rath "DEM REICH VERFALLEN – DEN BERECHTIGTEN ZURÜCKZUERSTATTEN" Koblenz, Verlag der Landesarchivverwaltung Rheinland-Pfalz (2001). A commentary on the most important laws behind the *Wiedergutmachung* initiative, e.g. the *Bundesgesetz zur Entschädigung für Opfer der nationalsozialistischen Verfolgung* (Federal Act for Compensation of Victims of National-Socialism); *Gesetze zur Regelung der Wiedergutmachung nationalsozialistischen Unrechts für Angehörige des öffentlichen Dienstes im Inland und im Ausland* (Acts for the Regulation of the Reparation of National-Socialist Injustice for Foreign and Inner Civil Servants), and *Gesetze zur Wiedergutmachung nationalsozialistischen Unrechts in der Kriegsopferversorgung für Berechtigte im Inland und im Ausland* (Acts for the Reparation of National-Socialist Injustice in the Care of Entitled Victims of War), see H-G. Ehrig & H. Wilden (eds) *BUNDESENTSCHÄDIGUNGSGESETZE KOMMENTAR*, Munich, C.H.Beck (1960) and the references provided there.

<sup>6</sup> BGHZ 52, 371 at 381.

<sup>7</sup> W. Tappert *DIE WIEDERGUTMACHUNG VON STAATSUNRECHT DER SBZ / DDR DURCH DIE BUNDESREPUBLIK DEUTSCHLAND NACH DER WIEDERVEREINIGUNG*, Berlin, Berlin-Verl. Spitz (1995) 19-71 gives a detailed analysis of the attempts at *Wiedergutmachung* that were undertaken.

property, which had been lost as a consequence of persecution in the period between 1933 and 1945, had been undertaken.<sup>8</sup> However, after reunification, it was not clear how the forcible dispossession or confiscation of property, situated in the former 'East zone', could be brought in line with the new legal order in a reunited Germany.<sup>9</sup> The victims<sup>10</sup> or their relatives demanded the necessary relief from the two uniting German governments.<sup>11</sup>

The framework within which certain property, expropriated or confiscated in the territory that would become the German Democratic Republic, was to be returned to its original owners, was first set out in the Joint Declaration in respect of the Regulation of Unresolved Property Questions.<sup>12</sup> The Joint Declaration formed the political and legal basis for the regulation of property in a new, reunified Germany. Its aim was to return expropriated property in the German Democratic Republic to its original owners or their heirs,<sup>13</sup> although several pragmatic considerations restricted the general intention of restitution. The Joint Declaration was incorporated<sup>14</sup> into the Unification Treaty,<sup>15</sup> and thus obtained binding legal force.<sup>16</sup> It

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<sup>8</sup> D. Visser & T. Roux *Giving back the Country: South Africa's Restitution of Land Rights Act, 1994 in Context* in R.W. Rwelamira & G. Werle (eds) *CONFRONTING PAST INJUSTICES - APPROACHES TO AMNESTY, PUNISHMENT, REPARATION AND RESTITUTION IN SOUTH AFRICA AND GERMANY*, Durban, Butterworths, (1996) at 99.

<sup>9</sup> O. Kimminich *DIE EIGENTUMSGARANTIE IM PROZEß DER WIEDERVEREINIGUNG - ZUR BESTANDSKRAFT DER AGRARISCHEN BODENRECHTSORDNUNG DER DDR*, Frankfurt am Main, Landwirtschaftl. Rentenbank, (1990) at 80.

<sup>10</sup> Who were mostly Jews who survived the holocaust, or their descendants, but also included relatives of the conspirators of 20 July (the day on which a failed assassination attempt on Hitler took place).

<sup>11</sup> G. Fieberg *Legislation and Judicial Practice in Germany: Landmarks and Central Issues in the Property Question* in M.R. Rwelamira & G. Werle (eds) *CONFRONTING PAST INJUSTICES - APPROACHES TO AMNESTY, PUNISHMENT, REPARATION AND RESTITUTION IN SOUTH AFRICA AND GERMANY*, Durban, Butterworths, (1996) at 82.

<sup>12</sup> *Gemeinsame Erklärung zur Regelung offener Vermögensfragen*, 15 June 1990, BGBl. 1990 II at 1273.

<sup>13</sup> D.P. Kommers *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 2<sup>nd</sup> ed., Durham, Duke University Press, (1997) at 256.

<sup>14</sup> Incorporated into the Unification Treaty as Exhibit III, the agreement covered seized businesses and real estate-nearly all the industrial and landed property in the German Democratic Republic.

<sup>15</sup> Art. 41(1) of *Vertrag zwischen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik über die Herstellung der Einheit Deutschlands-Einigungsvertrag* - 31 August 1990, BGBl. 1990 II at 889.

<sup>16</sup> G. Fieberg *Legislation and Judicial Practice in Germany: Landmarks and Central Issues in the Property Question* in M.R. Rwelamira & G. Werle (eds) *CONFRONTING PAST INJUSTICES - APPROACHES TO AMNESTY,*

forms part of the foundations of modern German law.<sup>17</sup> To clarify the general provisions of the Joint Declaration, the Unification Treaty provided for more detailed measures regulating property issues. For present purposes, mention must be made of the *Gesetz zur Regelung offener Vermögensfragen* (Law on the Regulation of Unsolved Property Questions or the "Property Act"),<sup>18</sup> which regulated the circumstances under which the principle of natural restitution<sup>19</sup> would apply. Other legislation,<sup>20</sup> which provided additional conditions to regulate the principle of natural restitution, falls outside the scope of this discussion.

*Rückübertragungsansprüche* (restitution claims) had to be registered at one of the 221 local branches of the *Amt zur Regelung offener Vermögensfragen* (Open Property Office)<sup>21</sup> in Germany. These local Property Offices are subject to one of six superior (provincial) Property Offices.<sup>22</sup> Once a restitution claim had been lodged, the per-

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PUNISHMENT, REPARATION AND RESTITUTION IN SOUTH AFRICA AND GERMANY, Durban, Butterworths, (1996) at 83.

<sup>17</sup> B. Diekmann *DAS SYSTEM DER RÜCKERSTATTUNGSTATBESTÄNDE NACH DEM GESETZ ZUR REGELUNG OFFENER VERMÖGENSFRAGEN*, Frankfurt am Main, Lang, (1992) at 43-55.

<sup>18</sup> *Gesetz zur Regelung von offener Vermögensfragen*, BGBl. 1990 II at 1159.

<sup>19</sup> The principle of natural restitution (*Rückgabe vor Entschädigung*) refers to the policy actually to return property to the original owners. Where restitution is not possible, compensation may be advanced in stead. The policy of natural restitution is laid down and simultaneously limited in articles 41(1) and (2) of the Unification Treaty. The chief mechanism for giving this principle practical implication, was the Property Act. Section 1 is the key provision. Subsections (1) to (7) enumerate the various categories of property which could be subject of restitution claims, while subsection (8) excludes restitution in a further number of categories. *Restitution before compensation* did not mean that rehabilitation in the economic sphere would necessarily be guided by present market values. It merely established the precedence of rehabilitation in kind over rehabilitation in money.

<sup>20</sup> E.g. the *Act on Special Investments in the German Democratic Republic* (*Gesetz über besondere Investitionen in der Deutschen Demokratischen Republik*, BGBl. 1990 II at 1157) - the "Investment Act" and its successors, the "Investment Acceleration Act" (*Gesetz zur Beseitigung von Hemmnissen bei der Privatisierung von Unternehmen und zur Förderung von Investitionen*, BGBl 1991 I at 766) and the "Investment Priority Act" (*Gesetz über den Vorrang für Investitionen bei Rückübertragungsansprüchen nach dem Vermögensgesetz-Investitionsvorranggesetz*-BGBl 1992 I at 1268) provided additional conditions to regulate the principle of natural restitution.

<sup>21</sup> Restitution claims had to be registered in the local Property Office of the district where the claimant (or the deceased in the case of a claim by the descendants) last lived, but could also be directed to the office in the district where the property in question was situated. The victims of persecution under national-socialism and foreign residents had to register their claims at the Federal Ministry of Justice in Bonn.

<sup>22</sup> C.E. Scollo-Lavizzari *RESTITUTION OF LAND RIGHTS IN AN ADMINISTRATIVE LAW ENVIRONMENT - THE GERMAN AND SOUTH AFRICAN PROCEDURES COMPARED* LL M Research Dissertation, University of Cape Town, (1996) at 45.

son with the power of disposition over the property - usually the *Treuhand* or another state or local authority - could not dispose of the land,<sup>23</sup> except in very limited circumstances.<sup>24</sup> The deadline for lodging restitution claims was set at 31 December 1992.<sup>25</sup> Property not claimed by that date would belong to the person with *de facto* power of disposal over it.<sup>26</sup> Over 1.2 million applications were lodged, the majority concerning landownership and affecting over one-third of the land area of the former German Democratic Republic.<sup>27</sup>

After a restitution claim had been lodged, the relevant property office had to analyze the substance and feasibility of the claim. In some areas, like the suburbs of Berlin and central areas of cities, multiple claims seeking recovery of the same pieces of land to different "prior" owners were sometimes encountered.<sup>28</sup> It was up to the federal, provincial and local property offices to trace the original owners of such property with proper title to it. Once a claim had been sufficiently clarified, the office would make a *Vorbescheid* (provisional decision), either to reject or uphold the claim, or find that the applicant is only entitled to compensation, and not restitution.<sup>29</sup> Appeals against such a decision had to be directed to the superior Property Office in a specific area, where they would be decided upon by a committee established especially for this purpose.<sup>30</sup> If the claim for restitution was endorsed, an application could be brought to the local Land Registry for the entry of the correct

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<sup>23</sup> Sec. 3(3)1 and 15(2) of the Property Act.

<sup>24</sup> E.g. where an investment priority decision or investment certificate had been granted. In such cases, the right to restitution was overridden. C.E. Scollo-Lavizzari RESTITUTION OF LAND RIGHTS IN AN ADMINISTRATIVE LAW ENVIRONMENT - THE GERMAN AND SOUTH AFRICAN PROCEDURES COMPARED, LL M Research Dissertation, University of Cape Town, (1996) at 45-50; M. Southern *Restitution or Compensation: The Land Question in East Germany* 1993 INT. & COMP. L.Q 690 at 695.

<sup>25</sup> § 30a of the Property Act.

<sup>26</sup> *Gesetz zur Änderung des Vermögensgesetzes und anderer Vorschriften (2. Vermögensrechtsänderungsgesetz)* 14 July 1992; 1992 BGBl. at 1257

<sup>27</sup> M. Southern *Restitution or Compensation: The Land Question in East Germany* 1993 INT. & COMP. L.Q 690 at 696, citing the FRANKFURTER ALLGEMEINE ZEITUNG of 24 Jan 1992; FINANCIAL TIMES of 25/26 Jan 1992.

<sup>28</sup> M. Southern *Restitution or Compensation: The Land Question in East Germany* 1993 INT. & COMP. L.Q 690 at 696.

<sup>29</sup> C.E. Scollo-Lavizzari RESTITUTION OF LAND RIGHTS IN AN ADMINISTRATIVE LAW ENVIRONMENT - THE GERMAN AND SOUTH AFRICAN PROCEDURES COMPARED, LL M Research Dissertation, University of Cape Town, (1996) at 50 ff.

<sup>30</sup> *Ibid.* 46 ff.

particulars of the proprietor.<sup>31</sup> If a claim was rejected by the property office in the provisional decision, an appeal could be lodged first at the provincial and subsequently at the federal property office.<sup>32</sup> After exhausting internal appeals, the applicant could appeal to the Administrative Court.<sup>33</sup> It was expected that only a few of the numerous restitution claims would result in court proceedings, since most could be resolved through the administrative pre-trial phase of the process.<sup>34</sup> Every now and again, however, the judiciary is called upon to decide matters relating to the restitution procedure.<sup>35</sup> In particular, it has to deal with the difficult position ensuing from multiple claims in respect of a single land unit. From such decisions, the difficulties with the multi-layered demands placed by the restitution program on the German administrative and property law system becomes clear. The recent decision of the German Federal Administrative Court's Seventh Senate,<sup>36</sup> which forms the subject of this discussion, is illustrative thereof.

## B. Background and Facts

The case involved an erf in Berlin, which originally belonged to a person of the Jewish faith prior to World War II.<sup>37</sup> It was sold in 1936 to one R.Z., whose heirs were the applicants in the present case. Parts of the land were converted into so-called "Volkseigentum" in 1958, whilst the rest was expropriated roundabout 1984.

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<sup>31</sup> G. Fieberg *Legislation and Judicial Practice in Germany: Landmarks and Central Issues in the Property Question* in M.R. Rwelamira & G. Werle (eds) *CONFRONTING PAST INJUSTICES - APPROACHES TO AMNESTY, PUNISHMENT, REPARATION AND RESTITUTION IN SOUTH AFRICA AND GERMANY*, Durban, Butterworths, (1996) at 85.

<sup>32</sup> § 22-26 of the Property Act.

<sup>33</sup> M. Southern *Restitution or Compensation: The Land Question in East Germany* 1993 INT. & COMP. L.Q 690 at 695.

<sup>34</sup> M. Southern *Restitution or Compensation: The Land Question in East Germany* 1993 INT. & COMP. L.Q 690 at 696 provide interesting statistics as to the number of applications (said to have exceeded 1,1 million, of which 30 500 related to land and buildings, rather than businesses). In 1993, according to this source, only 8,5% of the land claims had been finalised, and it was speculated that the issue would take another 30 years to resolve.

<sup>35</sup> G. Fieberg *Legislation and Judicial Practice in Germany: Landmarks and Central Issues in the Property Question* in M.R. Rwelamira & G. Werle (eds) *CONFRONTING PAST INJUSTICES - APPROACHES TO AMNESTY, PUNISHMENT, REPARATION AND RESTITUTION IN SOUTH AFRICA AND GERMANY*, Durban, Butterworths, (1996) at 88.

<sup>36</sup> Decision of 23 October 2003, BverwG 7 C 62.02; VG 31 A 371.99.

<sup>37</sup> A more detailed version of the background to the case is contained in par I of the decision (note 36 above).

In order to better understand the present case, it is necessary briefly to review those aspects of the confiscation and expropriation policy of the former German Democratic Republic which are relevant in the present discussion. *Volkseigentum* (People's Property) refers to property, mostly of an industrial or agricultural nature and including land, buildings, installations, machinery, raw materials, industrial products, copyright and patents, which was expropriated for public purposes<sup>38</sup> after the establishment of the German Democratic Republic in 1949 and during its forty-year existence.<sup>39</sup> In most cases extremely low compensation, if any, was awarded.<sup>40</sup> The ownership entitlements of "Peoples' Property" were exercised by the socially owned firms of the state.<sup>41</sup> Enactment of expropriation legislation after the Soviet occupation zone became the German Democratic Republic in 1949 had as its main purpose the establishment of a socialist conception of ownership,<sup>42</sup> and therewith the transformation of individual ownership to so-called *Volkseigentum*.<sup>43</sup> On this basis countless expropriations and other infringements of property rights, in particular with regard to land, apartment ownership and means of production, took place.<sup>44</sup> These confiscations and expropriations were undertaken in terms of regulations applying to all inhabitants of the German Democratic Republic, citizens as

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<sup>38</sup> This included expropriation of land for the building of cities and development of belowstructure; for industrial settlements, energy management and for military purposes. D. Visser & T. Roux *Giving back the Country: South Africa's Restitution of Land Rights Act, 1994 in Context* in R.W. Rwelamira & G. Werle (eds) *CONFRONTING PAST INJUSTICES - APPROACHES TO AMNESTY, PUNISHMENT, REPARATION AND RESTITUTION IN SOUTH AFRICA AND GERMANY*, Durban, Butterworths, (1996) at 100.

<sup>39</sup> P.E. Quint *THE IMPERFECT UNION - CONSTITUTIONAL STRUCTURES OF GERMAN UNIFICATION*, Princeton, Princeton Univ. Press, (1997) at 124.

<sup>40</sup> *Id.*

<sup>41</sup> S. Pries *DAS NEUBAUERNEIGENTUM IN DER EHEMALIGEN DDR*, Frankfurt am Main, Lang, (1993) at 120-121.

<sup>42</sup> G. Fieberg *Legislation and Judicial Practice in Germany: Landmarks and Central Issues in the Property Question* in M.R. Rwelamira & G. Werle (eds) *CONFRONTING PAST INJUSTICES - APPROACHES TO AMNESTY, PUNISHMENT, REPARATION AND RESTITUTION IN SOUTH AFRICA AND GERMANY*, Durban, Butterworths, (1996) at 82.

<sup>43</sup> D. Visser & T. Roux *Giving back the Country: South Africa's Restitution of Land Rights Act, 1994 in Context* in R.W. Rwelamira & G. Werle (eds) *CONFRONTING PAST INJUSTICES - APPROACHES TO AMNESTY, PUNISHMENT, REPARATION AND RESTITUTION IN SOUTH AFRICA AND GERMANY*, Durban, Butterworths, (1996) at 99.

<sup>44</sup> See in general M. Southern *Restitution or Compensation: The Land Question in East Germany* 1993 *INT. & COMP. L.Q.* 690 at 696 and the statistics provided by this source, mentioned in note 34 above.



well as foreigners.<sup>45</sup> They were not necessarily arbitrary, and not necessarily aimed at putting a particular group or person at a disadvantage, even if the compensation amounts offered (if any) were very low. Instead, they could be regarded as part of the socialist system of the German Democratic Republic. As a result, expropriation for the purpose of conversion to *Volkseigentum* only rarely gave rise to valid restitution claims. In the present case, the restitution claim only related to that part of the property that was expropriated in 1984.

After enactment of the Property Act in 1990, R.Z. lodged a claim for restitution of the original erf at the "Open Property Office," which was responsible for handling all restitution claims. In 1992, before the cut-off date for the lodging of restitution claims, the Conference on Jewish Material Claims against Germany Inc., which by law<sup>46</sup> was designated as the lawful heir of all Jewish patrimonial rights, likewise filed a general claim of restitution (or, alternatively compensation where the former was not possible) of all identifiable patrimonial rights envisaged by par 2 (1) and (2) of the Property Act. At this point the particular erf, which formed the subject matter of R.Z.'s claim, was not expressly affected by the Conference's claim. It was only in 1994, after thorough research, that information from the so-called Jewish Address Book came to light, indicating that the relevant erf was affected by the Conference's general claim.

The Open Property Office initially rejected the claim of the Conference, but later retracted its original decision, deciding in 1998 that the relevant land had to be transferred to the Conference.<sup>47</sup> As such, the Open Property Office dealt with the clashing proprietary interests to the land by arguing that R.Z. was only second in line as far as the claims for restitution were concerned.<sup>48</sup>

The applicant in the ensuing dispute was one of R.Z.'s heirs. His request that the land be retransferred to the heirs of R.Z. was granted by the Administrative Court in Berlin in 2002. This decision was based mainly on the argument that the so-called individualization of the Conference's general claim constituted a new claim for restitution, which could not be entertained since it fell outside the legislative cut-off

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<sup>45</sup> For an overview of the situation, see M. Southern *Restitution or Compensation: The Land Question in East Germany* 1993 INT. & COMP. L.Q 690ff. and P.E. Quint *THE IMPERFECT UNION - CONSTITUTIONAL STRUCTURES OF GERMAN UNIFICATION*, Princeton, Princeton Univ. Press, (1997) at 124ff.

<sup>46</sup> § 2 (1) of the Property Act.

<sup>47</sup> See the consideration of this aspect in par I of the Federal Administrative Court's decision (note 36 above).

<sup>48</sup> *Id.*



date for lodging of restitution claims, which was 31 December 1992.<sup>49</sup> The Administrative Court in Berlin regarded the individualization of the claim to the relevant land in 1994 as a new and separate act, not related to the original general claim of the Jewish Conference.<sup>50</sup> Against this result, the Jewish Conference brought an appeal, the process that gave rise to the consideration of the case by the Federal Administrative Court.

### C. Decision of the Federal Administrative Court

The Federal Administrative Court eventually found in favor of the Jewish Conference.<sup>51</sup> It was found that, although the Administrative Court in Berlin correctly assumed that the restitution claim had at least to be individualized, it did not acknowledge that such individualization could be effected through reference to deeds and documents mentioned in the lodged claim. Since the Administrative Court in Berlin did not regard reference to such documents as sufficient to determine the subject of the claim,<sup>52</sup> it did not establish facts necessary to the decision in the present instance, relating to the requirements for the payment of compensation in § 1(6) of the Property Act. Accordingly, the Federal Administrative Court decided to refer the case to the Administrative court for renewed consideration.

The Federal Administrative Court's reasoning was based on the relevance of the 1992 cut-off date in the context of the general claim that was lodged by the Jewish Conference.<sup>53</sup> The cut-off date, according to the Court, has the purpose of ensuring the speedy establishment of legal certainty, limiting the debilitating effects of the restitution program on dealings with property and promoting investment.<sup>54</sup> These purposes are in the interest of the Federal Republic as a whole.<sup>55</sup> It was indicated that, although the minimum requirements concerning the content of a particular claim are not specified by the Property Act, the Federal Administrative Court has in

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<sup>49</sup> The details of the decision of the Berlin Administrative Court of 27 September 2002, in as far as they are relevant to the present case, are contained in par I of the Federal Administrative Court's decision.

<sup>50</sup> *Id.*

<sup>51</sup> See par II of the Federal Administrative Court's decision (note 36 above).

<sup>52</sup> *Id.*

<sup>53</sup> See par II (1) of the decision (note 36 above).

<sup>54</sup> These objectives are articulated by the Court in par II (1) (a) of the decision (note 36 above).

<sup>55</sup> The court quotes the decisions of 24 June 1999 – BVerwG 7 C 20.98 and BVerwGE 109, 169 at 172 as authority.

previous decisions established some norm in this regard. Accordingly, the affected patrimonial interests need at least to be individually specifiable.<sup>56</sup>

The Court then tested the present case against this requirement, focusing on the legal status of the Jewish Conference as successor organization, and found that the purpose for which it was instituted will not be served if a strict interpretation of § 30 (1) Sent. 1 and § 30a (1) Sent. 1 read with § 2 (1) Sent. 3 of the Property Act is preferred.<sup>57</sup> In particular, the Jewish Conference was acknowledged as the legal successor of numerous unknown Jewish right holders.<sup>58</sup> This quality had to be heeded when the requirement of specification of the restitution object was to be considered.<sup>59</sup> The Court particularly remarked that the situation of the Jewish Conference cannot be compared to that of other claimants, who, as a rule, could more readily determine the identities of their predecessors-in-title and the nature of the patrimonial interests affected.<sup>60</sup>

The Court acknowledged that the requirement of specification of a particular claim is purposeful and in line with the requirements of § 30 (1) Sent. 1 of the Property Act.<sup>61</sup> However, it was also mindful of the particular position of the Jewish Conference and its difficulty with strictly complying with the cut-off date whilst having to deal with difficulties of proving the dispossessions that occurred in respect of Jewish Property.<sup>62</sup> The Court considered the fact that the legislature was cognizant of these difficulties in respect of movable property, but not in respect of immovables.<sup>63</sup>

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<sup>56</sup> See par II (1) (a) of the decision (note 36 above), and the authority quoted: Decision of 5 Oct. 2000 – BVerwG 7 C 8.00 – Buchholz 428 § 30 VermG No. 21.

<sup>57</sup> In essence, a joint reading of these provisions of the Property Act indicates the prerequisites for restitution in terms of the Act, providing for the type of claims to be considered and the cut-off date for lodging of such claims.

<sup>58</sup> See par II (1) (a) of the decision (note 36 above).

<sup>59</sup> Id.

<sup>60</sup> See par II (2) (c) of the decision.

<sup>61</sup> See the court's reliance on BVerfGE 78, 20 at 24; BVerwG decision of 18 May 1995 – BVerwG 7 C 19.94 – Buchholz 428 § 1 VermG No. 44 p. 117.

<sup>62</sup> See par II (2) (c) of the decision.

<sup>63</sup> See par II (1) (a) of the decision.

Mindful of the requirement that the object of restitution needs to be determinable in terms of the law,<sup>64</sup> the Court nevertheless specified that the restitution claim itself need not conclusively prove the exact content and situation of the restitution object.<sup>65</sup> Instead, in order to stay in line with the cut-off date, the claim needs simply to contain specifications that would indicate particular patrimonial interests.<sup>66</sup> The replacement of a particular interest by another at random must however be excluded.<sup>67</sup> In other words, the restitution object needs to be specified in the lodged claim, but not individualized. Individualization can take place at a later point in time, thereby giving effect to the claim whilst simultaneously remaining within the boundaries set by the cut-off date.<sup>68</sup>

On the basis of this reasoning, the Court considered several aspects of the Jewish Conference's claim. One part of the Conference's general claim<sup>69</sup> indicated that it was particularly aimed at proprietary interests of Jews dispossessed or confiscated on the basis of discriminating regulations of the National-Socialist regime or related organizations.<sup>70</sup> It also specified the sources on the basis of which individualization of Jewish property could be established (e.g. state archives, documents kept in the respective municipal offices etc.).<sup>71</sup> The Federal Administrative Court found this description to be sufficiently detailed to warrant effectiveness of the timely general claim, when viewed in conjunction with the individualization that occurred in 1994 after the Jewish address book with the relevant details of the property was consulted.<sup>72</sup> It was apparent from the documents consulted by the Jewish Conference and presented during the course of the proceedings that the initial disposal of the

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<sup>64</sup> § 2 (1) (3) of the Property Act.

<sup>65</sup> Par II (1) (b) of the decision (note 36 above).

<sup>66</sup> Id.

<sup>67</sup> See the court's reliance on the decision of 28 March 1996 – BVerwG 7 C 28.95 – BVerwGE 101, 39 at 43.

<sup>68</sup> Here the court relies on its previous decision of 24 June 1999 – BVerwG 7 C 20.98 – BVerwGE 109, 169 at 172.

<sup>69</sup> The so-called "*Anmeldung 3*". The Conference's claim was structured in three parts, the first two of which did not pass the scrutiny of the court, the first because of the very general nature in which it was phrased, and the second because of the element of chance in respect of its assumption of Jewish property which was built into the claim. See par I and II (2) (a) and (b) of the decision (note 36 above).

<sup>70</sup> See par II (2) (c) of the decision (note 36 above).

<sup>71</sup> Id.

<sup>72</sup> Id.

property by its Jewish owner to R.Z. amounted to a forced sale.<sup>73</sup> This information was not displayed in the general address book of registered immovable property, since it was not usual at the time of the original disposal to publicize Jewish land relations.<sup>74</sup> As a result, this particular piece of land never became the subject of an award under the *Wiedergutmachung* policy of the former West Germany and the Allied forces.

#### D. Referral for Reconsideration

On the basis of the arguments set out above, the Federal Administrative Court decided to refer the case back to the Berlin Administrative Court for reconsideration, ordering the latter specifically to take into account the evidence emanating from deeds and documents that can be advanced by the Jewish Conference.<sup>75</sup> In this context specifically, the Court provides a broad basis upon which evidence may be lead, when indicating that not only the Jewish address book of Berlin, but also any other documents or deeds which are mentioned in the general claim, must be considered in determining the ownership of the property in dispute.<sup>76</sup>

The Federal Administrative Court acknowledged that the referral for reconsideration of this case to the Administrative Court in Berlin will presuppose an additional effort to be made on the part of the latter.<sup>77</sup> It would have to clarify the ownership issue that was previously not considered on account of the Berlin court's stance as to the application of the cut-off date requirement. The Federal Administrative Court then placed responsibility for leading of evidence on the Jewish Conference, indicating that the process needs to be facilitated by the co-operation of the applicant.<sup>78</sup> The Jewish Conference was accordingly obliged to provide all relevant and available information that would aid the Berlin court's decision.<sup>79</sup> The Federal Administrative Court added that this task should not be too difficult, in view of the

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<sup>73</sup> Id.

<sup>74</sup> Id.

<sup>75</sup> Par II (3) of the decision (note 36 above).

<sup>76</sup> Id.

<sup>77</sup> Id.

<sup>78</sup> Id.

<sup>79</sup> Id.

evidence already lead by the Jewish Conference as to the ownership of the disputed property.<sup>80</sup>

### E. Concluding Remarks

The decision of the Federal Administrative Court indicates some of the difficulties still experienced when dealing with the reparation arrangements negotiated in the wake of the German reunification endeavor. On the one hand, the courts and administrative structures created for this purpose have to grapple with balancing interests of a variety of stakeholders, some of whom have no direct relation to the original dispossessory actions. On the other hand, the case makes it clear that at least a part of the present German property system is still based on actions which took place prior to or during World War II, and which involved confiscation or dispossession of property as a result of the discriminatory policies of the time. Added hereto is the problem of the disparate systems of property that developed in the divided Germany after the war. Although the present case did not deal explicitly with the latter, it certainly indicates the scope of the repercussions, had a full-scale integration of these systems been incorporated in the reparation initiative after 1990.

Another issue appearing from the present case is the question of missing information in the process of awarding restitution of property. As has been indicated by the Federal Administrative Court, the task of the Jewish Conference depends upon the degree to which information about confiscated, expropriated or abandoned property of those that suffered under the regime of National Socialism still exist and is accessible. The success with which this organization can fulfill its representative function will, further, be related to the judiciary and administration's willingness to acknowledge the peculiar situation of the Conference, and to accommodate it in interpreting the requirements for restitution set by the Property Act.

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<sup>80</sup> Id.