LAND, PROPERTY RIGHTS AND THE NEW CONSTITUTITON

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TABLE OF CONTENTS:

Chapter 4

PROPERTY RIGHTS, RESTITUTION AND COMPENSATION IN GERMANY AFTER 1945

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1. Introduction

DURING the Second World War the Allies repeatedly assured the victims of the Nazis of restitution of their property stolen, confiscated, or taken under duress. The victims were also assured of compensation for loss of liberty, health, profession, and other forms of injury. After the unconditional surrender of Germany, the four Allied Powers, by a joint declaration on 5 June 1945, assumed supreme authority in Germany.

As a result, the Allies acquired the power to issue legislation with regard to restitution and compensation for the Nazi victims and concerning restitution retained this power. Thus, the British Military Government Order of December 1946, which defined the powers of the *Länder* (States) of the British Zone, excluded legislation on restitution from the powers delegated to the *Länder*.

In 1949 the Western Allies issued the Occupation Statute, which defined the division of legislative authority between the Allies and the German Government in the Länder. Restitution was one of the subjects specifically reserved for the Allies in order to accomplish of the basic purposes of the occupation. This meant that the Military Governments set up in 1945 in the four occupied Zones were entitled to enact legislation binding on the German people and the German courts.

It should be pointed out that neither the Order nor the Statute compensation, as distinct from restitution and reparation, was a *reserved subject*. The Länder could legislate about it, subject to review by the Military Government.

The Military Governments aimed at creating a single law on *restitution of identifiable property* for the four Zones and many drafts were discussed. Gradually the idea of quadrilateral action was abandoned due to the emerging Cold War between the Soviet Union and the Western democracies. The Soviet Union would not accept the principle of restitution of private property as their ideology did not acknowledge property rights. Attempts to create a single law that would be applicable in the British, American and the French Zones were unsuccessful and, ultimately, each Military Government issued a separate law.

2. International Aspects of Restitution and Compensation in Germany after 1945

The legislation concerning restitution and compensation to victims of the Nazis was necessary because the National Socialist regime had violated, in an incomparable way, fundamental principles of natural law and the property rights of its own subjects. Further, the regime had violated the rights of the peoples of the occupied countries by disregarding the accepted rules of international law concerning the rights of a military occupant.

The exceptional restitution legislation provided a civil remedy within German municipal law for wrongful and unjust acts of a former Government in matters that were normally matters of domestic jurisdiction, and therefore outside the scope of international law. The acts of the Nazi Government in its treatment of its own subjects were so shocking in their violation of the elementary principles of justice and humanity that their redress called for some form of international action.

Today international law is seeking to bring such acts effectively within its jurisdiction by the development of a Charter or Bill of Human Rights. In the past such acts occasionally led to what has been called

humanitarian intervention on the part of other States.

The steps taken by the three Western Allies to redress injustice did not fall within the ordinary concept of intervention, since it was based on their special powers as the supreme authority in Germany. The Allied supervision of the redress process did, however, render their action akin to humanitarian intervention. It was a conspicuous example of international action to remedy wrongs caused by the failure of a government to observe basic human rights.

Legislation concerning compensation - as distinct from restitution of property - also provided a civil remedy within German law. It applied not only to those who were German subjects, but also to the Allied and other foreign nationals who were forced by the Nazis to participate in the German war industries. These could claim for loss of liberty or of health, and the heirs of those who perished may claim for loss of life.

This part of the legislation was in substance a sanction applied through international action for grave violations of international law by the former Government of Germany, for which the German State was responsible under international law.

What could be called the largest legal process recorded in history, involving tens of thousands of foreign claimants living in all parts of the world, took place over two decades after 1945. The process was undertaken in accordance with remedial legislation, in hundreds of courts and before hundreds of administrative tribunals in Western Germany and Western Berlin.

The process was unique, not only in its scope, but in its innovations concerning municipal law and of international supervision of domestic jurisdiction. The process has drawn the attention of many lawyers, domestically and internationally, and generated a vast literature of textbooks, legal periodicals and a special series of law reports. Further, the process has set up standards, measures and procedures to restore justice and property rights.

Many historical precedents exist for the restitution of property or payment of compensation to former owners, deprived of it in the course of civil or international wars. An early example is the Treaty between Sparta and Athens at the end of the Peloponnesian war. Cicero refers to a famous case of redistribution of confiscated land by Aratus of Sikyon in *De officiis* (II, 22, 78 sq.).

The Treaty of Osnabrueck in 1648 between the Holy Roman Empire and the King of Sweden, includes articles prescribing restitution of property in detail. Churchill, in his *Life of the Duke of Marlborough*, has recorded how an ancestor of the Duke (bearing the name Winston) was sent to Ireland as a commissioner after the restoration of Charles II. His mission was to settle the claims of the Royalist land-owners who had been deprived of their estates in Ireland by Oliver Cromwell.

Finally, a law of the French revolution, of December 1790, provided for the restitution of the property of Huguenots and other religious fugitives who had been driven from France a century earlier. These examples of the past, however, pale into significance in comparison to the immense apparatus that was set in motion by the Allied Powers after 1945 in Germany.

3. Structures, Procedures and Aims of the Allied Legislation

The American Military Government was the first to take effective action, promulgating in November 1947 a *Law of Restitution of Identifiable Property*, followed by the French authorities who enacted a law for their Zone with similar principles but with considerable differences of detail. The British Military Government did not promulgate its law for the British Zone until May 1949. Finally, the Inter-Allied Governing Authority, or - in its Russian name - the *Kommandantura*, enacted a restitution law in 1950 for Western Berlin.

The laws were to be administrated by German agencies and German courts, subject to supervision by the Allied Control Council and to the final authority of a Supreme Appellate Court, composed of Allied judges in each Zone. Each of the four military laws was a *lex specialist*, in the sense of a prevailing statute, departing in many respects from the general principles of the German Civil Code with a view to secure justice in abnormal circumstances. The laws were drawn up by Allied lawyers, in consultation with German legal experts, and were issued in German, which was the official text, French and English.

The more important articles of the Laws enacted for the American and the British Zone are as follows:

(1) The purpose of the Law is to effect to the largest extent possible a speedy restitution of identifiable property to persons, whether natural or juridical, who were unjustly deprived of it between January 1933 and May 1945, by reason of their race, creed, nationality, or political opposition to National Socialism. Deprivation of property by reason of nationality should not include measures taken in the course of the war solely on grounds of enemy nationality.

(2) Property is to be restored to its former owner, or his successor in interest, in accordance with the provisions of this Law, even though the interest of other persons, who had no knowledge of the wrongful taking, must be subordinated. The provisions of the Law for the protection of a purchaser in good faith, which would defeat restitution, are to be disregarded, except where the special Restitution Law provides otherwise.

(3) Property is to be considered to have been the subject of unjust deprivation, if the person entitled to it was deprived of ownership by a transaction *contra bonos mores,* or induced by threats or duress, as well as seizure by governmental or administrative action.

(4) Any transfer or relinquishment of property made by a person who was directly exposed to measures of persecution on grounds of race, &c., and any transfer and relinquishment of property made by a person who belonged to a class, which the German Government or the National Socialist Party intended to eliminate in its entirety from the cultural and economic life of Germany by measures taken by the State or the Party, is presumed to be an unjust deprivation.

(5) One or more trust corporation(s) under German law are to be formed in the American and the British Zone for the purpose of claiming unclaimed or heirless property. The regulations of the Military Government are to provide for the establishment of such corporations, for their rights and obligations. It was felt that it would be shocking to let the ordinary law of escheat to the State apply in the case of heirless property or *bona vacantia,* which had belonged to victims of Nazi persecution whose families had been destroyed so that there was no heir.

(6) The person liable to make restitution is the person who on the effective date of the Law was the possessor or holder of the affected property.

(7) The restitution proceedings are to be conducted in such a manner as to bring about speedy and complete restitution. The restitution authorities are to take fully into account the circumstances in which the claimant finds himself as the result of measures of vicious persecution. This is to apply when the production of evidence is rendered difficult or impossible through lack of documents or the death or non-availability of witnesses.

(8) Any persecuted person, or person interested in his estate, whose last whereabouts was in Germany or in a country occupied by Germany and as to whose whereabouts after 8 May 1945 no information is available, is to be presumed to have died on 8 May 1945.

(9) Exclusion from the right of succession by will or on intestacy, which occurred during the material period by virtue of a legislative measure for any reason referred to in Article 1, is to be deemed null.

(10) A testamentary disposition made within the material period is to be valid, notwithstanding non-compliance with formal requirements, if the testator made it in view of actual, or imagined, immediate danger to life.

Under the Restitution Law the potential heirs, no matter how remote their relationship to the original owner, could present claims. But in many cases the brutal Nazi policy had exterminated entire families.

Successor organisations were formed in the three Western Zones as American, British and French

corporations to recover heirless property and use the proceeds for the relief and rehabilitation of Nazi victims generally. They were granted the same privileges and immunities from taxation as officers of the occupant Powers.

After a few years of litigation over individual claims the American and British corporations entered into negotiations with the Governments of the Länder for the global settlement of the claims. This meant that the German State Government received the assignment of the remaining claims of the corporation against persons within its jurisdiction, in return for a lump sum payment, and that the Government was free to make such settlement as appeared appropriate to it.

The final and largest settlements were concluded with the Government of Western Berlin in 1955 in respect of immovable property and in 1956 with the Federal Government in respect of the claims to movable property confiscated by the Third Reich.

4. The Administration of Claims for Restitution

The restitution decrees of the Military Governments in the American and British Zones each contained an article providing for the appointment by the Military Governments of an Appellate Authority.

In the British Zone it was called a Board of Review, which had power "to review all decisions and orders made under this Law, and nullify, amend, suspend, or otherwise modify them". The Board was composed entirely of British judges and had the authority to issue an advisory opinion on a legal principle that was binding on German courts.

The right of appeal lay not only with the German Appellate Court (*Oberlandesgericht*), but also with the German Restitution chamber. The right of audience was given to foreign lawyers, but in practise oral hearings by the Court were rare. The judgements of the Board of Review have been published in 21 volumes in English and German. The Appellate Courts of the three Allies gave different interpretations of the German law, but no attempt was made to secure uniformity or to resolve the differences.

When the Military Governments of the Western Powers and the Control Commissions were dissolved in 1954, the obligations of the German Government for restitution and compensation were not only maintained, but substantially enlarged.

The Contractual Agreements, made between the Western Powers and the German Federal Republic in Bonn in 1952, were like a Russian toy containing a doll within a doll. There were conventions within conventions and charters within conventions, including three specific agreements, concerning the law and the courts, to deal with restitution and compensation and to maintain a form of international control after Germany's sovereignty was restored.

The agreements were attached to a major Convention on "the settlement of matters arising out of the war and the occupation" and they imposed limits on the restored national sovereignty of Germany in relation to matters that were controlled by the Allies during the occupation. The agreements provided for the continuation of a measure of international supervision of the vast operation of restitution and compensation that remained in force for about 20 years.

The Federal Republic acknowledged the need, and assumed the obligation, to implement fully and expeditiously and by every means in its power, the Allied legislation and programmes for restitution. It could supplement the legislation, but only in a manner consistent with its principles.

It maintained and augmented, when necessary, the existent administrative and judicial agencies concerned with the blocking, administration and disposal of the property, which was the subject of restitution, and with the filing, investigation, adjudication and final settlement of claims.

The original agreements made in Bonn in 1952 provided that the three Powers had access to the administrative and judicial agencies for the regular observation and inspection of all matters concerning restitution. The Federal Republic undertook to furnish information and produce files and records.

When the Bonn Convention was revised in the final Agreement, made in Paris in October 1954, on the termination of the occupation regime, this provision was deleted. There had been an official exchange of letters between the Federal Chancellor and the High Commissioners of the three Western Allies, with

regard to facilities for observation and information about restitution proceedings.

The three Powers agreed to delete the clauses and the Federal Government agreed that an official, designated by each of the three Governments for the purpose of reporting on the progress of the restitution programme, should be granted reasonable facilities and supplied with the necessary information, including statistics.

Moreover, the Federal Republic undertook to ensure the payment to claimants for restitution of judgements or awards against the former German Reich on account of the confiscation of movable property, shares, banking accounts, jewellery, furniture &c. Tens of thousands of such claims were brought under the Restitution Law in the two decades following 1945.

However, until 1965 no funds were available for meeting the claims. The Convention provided that the Federal Republic was liable up to a total sum of one and a half billion marks. It also contained an express provision that the debts of the former Reich, which were expressed in Reichsmark, should be converted into Deutsche Marks at the rate of ten for one. The law to implement this provision of the Convention was enacted in 1965.

5. The Supreme Restitution Court

The final Article of the Chapter provided for the establishment of a Supreme Restitution Court to be the successor of the three appellate bodies in the three Zones. The Charter annexed to this Chapter made provision for the creation of three divisions - called Senates - corresponding with the old Board of Review in the British Zone, the Court of Restitution Appeals in the American Zone and the Higher Court for Restitution in the French Zone.

Each division comprised at least five justices, of whom two were to be appointed by each of the Allied Governments for its Zone, two by the Federal Government and one by agreement between the Western Powers and the Federal Government or, failing such agreement, by the President of the International Court of Justice. The President of the Court, was to be neither a national of the three Powers nor a German citizen. The Presidents of the British and American divisions of the Supreme Restitution Court were Danish and their colleague in the French Zone was Swiss.

The Constitution of the Supreme Restitution Court indicated that it was an international. The Presidential Council of the Court, consisting of the presidents of the three divisions, was to supply an annual report to the Governments of the three Powers, as well as to the Federal Government.

The salaries and allowances of the judicial, administrative and other staff of the Court, who were nominated, appointed or employed by the Government of any of the three Powers were established, fixed and paid by that Power in consultation with the Federal Government.

Persons appointed by the Government of the three Powers were subject to the administrative and disciplinary control of the appointing Power. The official languages of the Presidential Council were English, French and German; and of the divisions of the Court English and German or French and German.

Provision was made in the Convention for the relations between the three Powers and the Federal Republic of Germany concerning any question about the competence of the Supreme Restitution Court that could not be settled by negotiation, to be referred to an International Arbitral Tribunal.

The Tribunal was composed of nine members who were to be qualified in their respective countries for appointment to the highest judicial office or lawyers of recognised competence in international law. The appointees were required to have the same qualifications as judges of the International Court of Justice.

Of the nine members, one each was appointed by the Governments of the three Powers, three by the Federal Government and three - the president and two vice-presidents - by agreement between the Governments of the three Powers and the Federal Government or, failing agreement, by the President of the International Court of Justice. The president and vice-presidents were described as *neutral members* and could not be nationals of the three Powers nor of Germany. Only Governments could be parties before the Tribunal. During its existence the Tribunal was

never called upon to decide on any dispute regarding the competence of the Supreme Restitution Court.

6. The Administration of Claims for Compensation

The procedure for compensation claims - as distinct from restitution claims - for the sufferings of victims of Nazi persecution other than loss of property was more complex and protracted. The claims covered damage to life, limb, health, property, possessions or economic prospects and could be brought by all persons persecuted for their political convictions, race, faith, ideology or nationality.

During the period of Allied occupation, compensation was not a subject of Allied legislation, unlike restitution of identifiable property. This was dealt with by local laws, passed by the *Länder* of the Occupied Zones, subject to approval of the Military Governments. Before Western Germany was federated by the Basic Law in 1949, each *Land* could, and did, enact its own law.

While a large number of the claimants were German citizens resident in the country, a substantial number were subjects of the satellite countries or of countries occupied by the Nazis, who had been forced into the Nazi labour machine. Another group of claimants comprised former inmates of the Displaced Persons camps who had been repatriated to their original home or resettled by the agencies of the United Nations or by voluntary bodies.

The laws passed by the *Länder* of the American Zone provided for compensation on account of loss of liberty and health for all who had suffered in the concentration camps of Germany, whether resident in Germany or abroad. The laws of the *Länder* in the British Zone, however, were less adequate and, with small exceptions, limited the right of recovery to those resident in the Zone. The discrepancy was recognised and the Convention between the Western Powers and the Federal Republic in 1952 stipulated that the Federal Government "shall issue a comprehensive law of compensation which shall apply to the whole territory of the Federal Government".

The law was stipulated to be no less favourable to claimants than the legislation in force in the United States Zone and to take into account the special conditions arising from the persecution itself, including the loss and destruction of records and documents or the acts of the persecuting agencies and the death or disappearance of witnesses.

Proof of claim for compensation was more complicated than proof of claim for restitution of identifiable property. Registers existed of the immovable property confiscated or sold under duress and some evidence of the title of the claimant, or of the successor of the former owner, was usually available without too much effort.

It was more difficult to prove confinement in concentration camps or enforced labour camps. Similarly, without documentation it was difficult to prove an income of the holder of a doctor's or a lawyer's practise, or the prospects of an artistic career that had been interrupted twenty years earlier by Nazi legislation or administrative action.

A helpful factor regarding proof of confinement was the result of the Nazi passion for keeping a show of legality to cover the most atrocious administrative actions, in the form of a complete record of mass crimes.

7. Final Remarks

A final aspect of the German indemnification for the shocking acts of the National Socialist Government is a belated example of justice, voluntarily undertaken by the Federal Government. It was not imposed by the Western Allies, although it was encouraged by them.

In September 1951 the Federal Chancellor Adenauer made a declaration in the Parliament of the desire of his Government to make reparation to the State of Israel and the Jewish people for "the unspeakable crimes which were perpetrated in the name of the German people" and which imposed on them the obligation to make moral and material amends.

"The Federal Government", Adenauer said, "is prepared, jointly with representatives of the Jewish people and the State of Israel, which has been admitting so many hopeless refugees, to bring about a solution to the problem of material reparation in order to facilitate a spiritual purging of unparalleled suffering".

At the end of previous wars the vanquished have usually been compelled by the victors to pay indemnities as compensation for their losses. There is, however, no historical precedent for the voluntary payment of indemnities by a defeated State on account of the wrongs done to a minority of its subjects or to a people who, at the time of suffering, were not constituted as a political nation in a State.