No return of title necessary if the prior owner is still listed in the land register

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There is ongoing controversy in the literature regarding whether restitution proceedings are necessary when a former Jewish owner whose property was forfeited to the German state (Third Reich) before 1945 is still listed in the land register. Brettholle/Schülke dealt with this issue in their commentary on the Property Act[1],[2] and continued to stand behind their earlier opinion in the 28th supplementary issue.

Despite the nullification of the declaration of forfeiture of § 3 of the 11th Executive Order to the RBG[3] which has been repeatedly established by the Federal Court of Justice, they assume the need for restitution proceedings, since **the continuation of the actual hindrance** (by the Soviet Military Administration SMAD order no. 154/181 from 21 May 1946 and the East German (GDR) decree on the Administration and Protection of Foreign Property in the GDR from 6 September 1951 – Groß-Berlin 18 December 1951) has to be presumed.

In line with the goals set by the legislature, Brettholle/Schülke obviously want to prevent Jewish property from falling into the hands of the German government. This objective is not being challenged by those who disagree with the Brettholle/Schülke position. No one objects to uninherited Jewish property being transferred to the Conference on Jewish Material Claims Against Germany Inc. (JCC). The focus here is on cases in which the former owner himself or his/her heirs are still alive. One has to agree with Müller-Magdeburg/Giese[4] that a return of title to the JCC can be regarded as expropriation of a victim of racial persecution.

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1 Act for the settlement of unresolved property issues, or Property Act, German: Vermögensgesetz

2 "Vermögen in der ehemaligen DDR" (Property in the former GDR), Rädler/Raupach/Bezzenberger (publ.) 28th suppl. issue

3 Reich Citizenship Act, depriving Jews of their civil rights

4 Müller-Magdeburg/Giese, Die Berechtigung der Jewish Claims Conference bei Grundstücken, deren jüdischer Alteigentümer noch im Grundbuch eingetragen ist, oder : Rückübertragung an die JCC als Enteignung des rassisch Verfolgten? (Entitlement of the Jewish Claims Conference in cases of real estates whose former Jewish owners are still registered in the land register, or: reassignment in favor of the JCC as expropriation of racial persecutees?), ZOV 3/1993 issue, page 138

In inheritance cases where the beneficiaries became property owners following the death of the former owner and are in a position to assert their ownership rights, there is no need for a return of title.[5] A return of title to the JCC in this situation would be an unjustifiable expropriation.
Brettholle/Schülke fail to recognize that the actual obstacle to the unconditional power of disposition expired on 31 December 1992 when state administration was discontinued by law. After this, the heirs could present a certificate of inheritance and apply to the land registry office to change the deed and secure their ownership rights.
Brettholle/Schülke justify the need for implementing property law proceedings and the application of § 1 para. 6 of the Property Act with reference to Fieberg/Reichenbach by citing the need to extend the scope of application of § 1 para. 6 to cases involving secondary expropriation. That is absolutely justified. However, these are not cases in which the prior owner is still listed in the land register. My focus is solely on these specific cases.
The authors refer to experiences with Offices for the Settlement of Unresolved Property Issues[6] and report about the precautionary approach taken by victims to simply register possible claims following the GDR's accession. This would dispel the assumption that victims had decided against submitting a claim for their assets.
I cannot infer from the commentary whether these assumptions were made or by whom. It is a matter of fact that not all one of the entitled persons filed a claim. In cases where the return of title was decided in favor of the JCC, the claimants would have to settle for compensation from the JCC Goodwill Fund.
It is also a matter of fact that many applications have been rejected as unsubstantiated by property offices, despite evidence of Nazi persecution and expropriation measures, when the former owner was listed in the land register. This is commendable. After all, why should a complicated and time-consuming return of title proceeding be carried out when a simple rectification of the land register based on submitted certificates of inheritance is sufficient?
The JCC has also repeatedly withdrawn applications when it could be demonstrated that the heirs had requested a rectification of the land register.
A discussion of the opinion cited at the beginning of this article is necessary since the Offices for the Settlement of Unresolved Property Issues as well as the LAROV[7] Brandenburg and (according to information given in a telephone inquiry) even the BAROV[8] have embraced this opinion.

[5] Berlin Court of Appeal, judgement of December 8, 1999 - 11 U 4063/99, printed in RGV under E 164
[6] In German: Ämter zur Regelung offener Vermögensfragen = AROV
[7] State Office for Unresolved Property Issues
[8] Federal Office for the Settlement of Unresolved Property Issues

In a decision by an Office for Unresolved Property Issues (AROV) in the state of Brandenburg[9] it is assumed that a loss of property in favor of the German Reich had taken place despite the fact that M. L. is still registered as the owner in the land register. Though that assumption finds no basis in the land register. The AROV has apparently failed to notice that the Supreme Constitutional Court has rescinded all Nazi laws and decrees[10].

Therefore since M. L. did not lose his property his heirs are the present owners. There was no previous Reich property that could have become federal property now.

According to the current decision that would prevent the transfer of the property to the heirs, a factual expropriation exists that is a violation against the property ownership guarantee specified in Article 14 of Germany's Basic Constitutional Law.

For many AROVs, the property loss suffered during the Nazi era was only considered to be relevant when the original Jewish owner had no heirs, or no claim was submitted by heirs. In cases where the JCC filed claims, a property loss was assumed and the JCC was recognized as the legitimate claimant.

However, some AROVs made exceptions. In several cases in which the former Jewish owner was still registered in land registers in Berlin and Potsdam, the AROVs concluded the proceedings without decisions when the heirs obtained a rectification to the land register **after** the application period expired on 31 December 1992. The JCC then withdrew their applications submitted to the AROV.

In the case discussed here, a claim was filed by the community of heirs with no competing application submitted by the JCC. This made it much easier for the community of heirs to rectification of the land register.

The decision reads differently. "Although the revision of rights for the benefit of the German Reich to be carried out on the basis of the direction of the Reich Minister of the Interior ... was not performed, it is ... without dispute that also in the case of omitted land register transfers the act of expropriation exists" (page 13). Here the decision refers to a ruling by the Federal Administrative Court (hereinafter BVerwG – the German abbreviation for the court) from May 18, 1995 – BVerwG 7 C 19.94. – and points out that the intent of the Property Act is to redress property confiscation by the Nazi state and "includes such assets, which have been ..., at least effectively, revoked from the holder of rights."

[9] AROV rural district Barnim, decision from 24 February 2000, reg. no. 12472.

[10] Cf. the very informative article by v. Trott in ZOV 3/1998 pages 163 et seq. "Die Behandlung nichtiger Enteignungen im Rahmen des " 1 Absatz 6 VermG, dargestellt am Beispiel der Vermögensentziehungen nach § 3 der 11. Verordnung zum Reichsbürgergesetz", (The treatment of invalid expropriations within the scope of Property Act § 1 para. 6 shown by the example of property expropriations under para. 3 of the 11th executive order to the Reich Citizenship Act)

As in the case under discussion, it remains unclear how the actual expropriation resulting from a failure to enter the transfer in the land register should have appeared. Expropriation by murder in a concentration camp?

Apparently the AROV has failed to notice that the BVerwG has further developed its principles as described in a ruling from 18 May 1995. A decision from 17 January 1997 – B III 68 – reads: For the compliance with the conditions of § 1 para. 6 of the Property Act the Senate has "regarded it to be sufficient, that a measure has provided the Reich at least **the appearance of ownership** and the property has actually been taken away from the victim."

In the opinion of the BVerwG, the former owner had to "be ousted from his property **completely and conclusively**" by deliberate government action. In a decision from 17 January 1997, a claim submitted by a Jewish plaintiff was dismissed due to lack of evidence that an asset had actually been taken away from the (foreign) owner. This clear line was also followed by the BVerwG in a decision from 2 December 1999 – 7 C 46.98.

The decision clearly shows that **no transfer into public property** had taken place. In other words, the GDR (East German) authorities have also accepted and acknowledged that M. L. is, and was, the owner.

However, the AROV sees the case differently. According to its decision (page 10): "It is apparent from further correspondence that the authorities of the former GDR had problems in reaching a final clarification of the legal position concerning the ownership structure for the above cited properties. From the land registers restored in **1968** it was not apparent to them that Reich property had been created and that this was transferred into the property of the people (public property)."

This contention is completely false. The GDR was aware of the fact and had acknowledged that the discriminatory Nazi laws had been abolished by the Allies after the Second World War. The GDR had intentionally failed to transfer Reich property, which came into being as a result of discriminatory laws, into public property – **even when this was documented in Section I of the land registers, which was explicitly not the case here.** And they most certainly would not initiate such a transfer when the former owner was still listed in the land register.

The AROV regards the factual non-transfer into public property as a failure of the GDR authorities, because the creation of Reich property was not apparent in the land registers, which were restored **in 1968**. That is also false. When the land registers were restored in 1968, the ones kept in the Brandenburg State Archive that included the forfeiture declaration described above were made available. However, the forfeiture declaration – which for the most part consisted of comments

written in pencil without a date or signature –**was intentionally omitted** because the people knew that it was illegal.

Since no Reich property was created through the Nazi acts, this meant that there was no transfer into public property, and thus no creation of federal property, which is why the Federal Property Administration (Bundesvermögensamt) was not named as the institution ostensibly authorized to dispose of any such property.

The decision quotes § 3 of the Property Act: "Property that was subject to the measures within the intent of § 1 and that has been transferred into public property or sold to third parties, must be retransferred to the entitled persons upon application, unless this is otherwise forbidden within the scope of the Property Act."

Even if one assumes that the assets of M. L. were subject to measures in accordance with § 1 para. 6 of the Property Act, the necessity for a return of title based on the principle quoted is lacking the **supplementary** precondition "**and transferred into public property or sold to a third party.**"[11] Since neither of these conditions existed, the Berlin Court of Appeal is of the opinion that only a state administration effective before 31 December 1992 can be assumed.[12]

Nowhere in the decision is it mentioned that the **Supreme Constitutional Court** abolished all Nazi laws and regulations that resulted in expropriation of Jewish property after these provisions had already been rescinded in 1945 by the Allies.

This legal position remained unchanged for 45 years and was respected by the GDR authorities.

The documents now invoked by the AROV were not unknown to GDR authorities. The acknowledgement of property ownership by the person listed in the land register was not out of lack of knowledge, but was based on antifascist state policy.

The decision cites a BAROV paper with reg. no. I 1-297/93, according to which the GDR made three distinctions regarding the former property of Jewish citizens. This is correct. However it is in this regard that the joint directive from the Ministers of the Treasury and of the Interior from 11 October 1961 must be referred to here.[13] According to this directive, "property of the people" has to be entered as the owner when rectifying the land registers and inventory of real property for land holdings of the former Reich, Prussian, Wehrmacht, State, District and Community properties. **This does not apply to real property, which in the course of fascist legislation become Reich property out of racist or other political grounds**.

[11] Regional Court of Berlin in its ruling from 15 March 1996 (5 O 553/95, printed in ZOV 2/1998 p. 142).
[12] Court of Appeal, loc cit p. 108
[13] BAROV published series number 7, p. 113
[14] BAROV published series number 7, p. 137.

In 1985 it was acknowledged that such real property was still under the ownership of the Jewish owners listed in the land register. Therefore, if this property was needed for construction measures, the expropriation of the property right would have to be carried out on the basis of the Building Land Act.[14]

The decision is based on a resolution of the BVerwG of 17 January 1997 – 7B 298.96. Accordingly, § 1 para. 6 of the Property Act is also applicable not only in case of forfeiture of ownership in the legal sense, but also "if the owner's rights have been limited by state discrimination in a way that was equivalent to a loss of ownership."

The circumstances that this decision was based on concerned the rejection of a Jewish claim on the basis that no evidence could be submitted that assets had been actually taken away from the owner. This clear course was further developed by the BVerwG in its ruling from 2 December 1999 – 7 C 46.98.

The AROV is concerned that § 1 para. 6 of the Property Act[15] could be neutralized if, in line with the Supreme Court decision, Nazi coercive measures are assumed to be invalid. In doing so, it misinterprets the aim and purpose of this rule. § 1 para. 6 has **not been included in the law to allow the expropriation of Jewish property.** Its focus is on **restitution for property losses** between 1933 and 1945.

The application of § 1 para. 6 of the Property Act to cases in which the Jewish owner is still registered in the land register is only justified when no heirs have been identified. The Nazis exterminated entire families and wiped out their bloodlines. As a result, some registered property owners have no heirs. The idea is to ensure that former Jewish property does not fall into the hands of German authorities. In accordance with § 2 para. 1 of the Property Act, the JCC is entitled to claim these properties. This is the only justifiable exception.

This opinion is shared by the JCC. With the creation of the JCC Goodwill Fund, the inflexible attitudes that were still being expressed in the literature and at events even a few years ago and which amounted to an expropriation from the Jewish owners in favor of the JCC,[16] have changed. But even in these cases, the opinion expressed by the Court of Appeal is that instead of a "return of title" in accordance with §§ 3 et seq. of the Property Act, all that is necessary is a decision that

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[15] The AROV is willing to accept the legitimate position of the heirs according to § 1 para. 6 Property Act, but at the same time refuses return of title according to sections 4 and 5 of the Property Act.

[16] See e.g. Stefan Minden: Die Rechtsstellung der Claims Conference als Nachfolgeorganisation im Vermögensgesetz (The legal position of the Claims Conference as successor organization according to the Property Act), "Berliner Fachseminare" September 25, 1997 p. 7 f.

establishes the entitlement of the JCC in accordance with § 2 para. 1 sentence 3 of the Property Act.[17]

In order to support its legal interpretation of the need for property law proceedings, the AROV refers to the resolution of the Great Senate for Civil Matters (Großer Senat für Zivilsachen) at the Federal Court of Justice from 28 February 28, 1955 (BGHZ 16, S. 370 ff.) From this resolution it draws the conclusion **that the application of § 1 para. 6 Property Act must be supported.**

In fact, the resolution declares the contrary! It says, for example:

"2. The forfeiture declaration of § 3 of the 11th Executive Order to the Reich Citizenship Act was ... null and void from the beginning."

"3. ... However, with the collapse of the National Socialist regime, the victim or his heirs regained ipso jure the unlimited power of disposition over such items of property declared forfeited ... Given such a state of affairs it was not necessary to carry out proceedings for restitution." (page 351)

The "opinion, whereupon the forfeiture declaration ... would have surrendered ownership to the German Reich after its collapse ... contradicts the ... legal opinion that the 11th Executive Order had been invalid from the very beginning due to the injustice of its content." (p. 356)

"The restitution laws ... were in no way intended to require special proceedings for settling a case that no longer required a settlement because of the downfall of National Socialist tyranny. ... In accordance with this the protective intention of the restitution laws compels the conclusion that with the collapse of the Reich the victim or his heirs regained, implicitly by virtue of their property, the unlimited power of disposal of such property which, although covered by a forfeiture declaration was never really taken away by the Reich." (p. 360)

In other words, this concerns in particular those cases in which "despite the declaration of forfeiture, the victim of persecution remained listed in the land register as the owner." (p. 361) and if at the time of cessation of the National Socialist Regime "the persecuted person or his heirs were living". (p. 363)

These quotes speak for themselves and do not require any further commentary. If the AROV arrives at contrary conclusions in its decisions, this can only be explained by assuming that it did not have a verbatim copy available of the resolution form the Great Senate for Civil Matters.

[17] Court of Appeal, loc cit p. 109