PROBLEMS OF COMPENSATION AND RESTITUTION IN GERMANY AND AUSTRIA

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I

BACKGROUND

During the twelve years of its existence Nazi Germany carried out what was probably the greatest program of looting and spoliation of property that was ever devised. It was a conscious policy arising out of a complex of motives, some as ancient as the almost immemorial concept of "spoils of war," and some arising from factors which would require analysis by a modern psychiatrist. There is a distinction (which for technical reasons will be maintained in this paper) between acts of spoliation within Germany and such acts accomplished in other countries, as the Nazis overran them. The distinction is superficial because the overrunning of foreign countries was conceived by the Nazis as an extension of the German imperium, and the principle underlying spoliation was the same in Germany and abroad—the superior claim of the *Herrenvolk* and the German State to property held by what was conceived as inferior types of people.

Within Germany the program of spoliation was directed mainly against the Jews and was pursued by a variety of methods ranging from the passage of legislation to outright murder. These same tactics were employed against the property of Jews who were found in German-annexed or German-conquered countries. Measures of lesser severity were employed against other persons and institutions in those countries.

The post-war process of returning property to German-occupied countries came to be called "external restitution" and that of returning property to individuals when it had been taken in Germany was called "internal restitution." While this paper in using the word "restitution" will confine itself to "internal restitution," as to both the concept of "return" has a common origin in the wartime and post-war expressions of the Allied Powers. From these the intent to return spoliated property is quite clear.

Undoubtedly the basic motive of the Allies in seeking return of the despoiled property was the general shocking inequity to the modern Western mind of linking property rights with class status, but the stimuli which transformed a feeling into a positive program were pressures to rectify these obvious injustices. In the case of external restitution, the despoiled countries were the movants, as were the despoiled

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persons or their heirs resident in Allied countries in the matter of internal restitution.

The basic Allied expression of an intent to accomplish the process of restitution is contained in the "Inter-Allied Declaration Against Acts of Dispossession Committed in Territories Under Enemy Occupation or Control" issued in London on January 5, 1943.¹ Here, after the declaration of intent, the operative words are those reserving the rights of the signatories to declare invalid any transfers of or dealings with property situated in the territories "which have come under the occupation or control" of the enemy nations. While the use of the perfect tense demonstrates that the declaration as such did not apply to acts of dispossession accomplished within the boundaries of pre-war Germany, subsequent actions of the Allied Powers made it plain that the general concept here found expression.

The legal complexities of the problems to be solved in effecting restitution in Germany (hereinbelow discussed at greater length) were not, at war's end, susceptible of immediate solution. But the intent of the Allies to attack and solve the problems is demonstrated in paragraph 42 (b) of the Four-Power Control Agreement of September 20, 1945, where the signatories declared:

The German authorities will comply with such directions as the Allied Representatives may issue regarding the property, assets, rights, titles and interests of persons affected by legislation involving discrimination on grounds of race, colour, creed, language or political opinions.

This had been a United States policy at an earlier date, when the directive of the Joint Chiefs of Staff to the Commander-in-Chief of the United States Occupation Forces (popularly known as JCS 1067) had been formulated in April of 1945. (The directive was not, however, released until October 17, 1945.) Here the United States Commander-in-Chief had been directed at paragraph 48 (e) (2) to impound:

Property which has been the subject of transfer under duress or wrongful acts of confiscation, disposition or spoliation, whether pursuant to legislation or by procedure purporting to follow forms of law or otherwise.

¹ The Union of South Africa, the United States of America, Australia, Belgium, Canada, China, the Czechoslovak Republic, the United Kingdom of Great Britain and Northern Ireland, the Union of Soviet Socialist Republics, Greece, India, Luxembourg, the Netherlands, New Zealand, Norway, Poland, Yugoslavia, and the French National Committee:

Hereby issue a formal warning to all concerned, and in particular to persons in neutral countries, that they intend to do their utmost to defeat the methods of dispossession practiced by the governments with which they are at war against the countries and peoples who have been so wantonly assaulted and despoiled.

Accordingly, the governments making this declaration and the French National Committee reserve all their rights to declare invalid any transfers of, or dealings with, property, rights and interests of any description whatsoever which are, or have been, situated in the territories which have come under the occupation or control, direct or indirect, of the governments with which they are at war or which belong or have belonged, to persons, including juridical persons, resident in such territories. This warning applies whether such transfers or dealings have taken the form of open looting or plunder, or of transactions apparently legal in form, even when they purport to be voluntarily effected.

The governments making this declaration and the French National Committee solemnly record their solidarity in this matter.

The problem of "restitution" concerned itself with finding ways to solve the problems arising out of the unjust treatment of property rights. The treatment of problems arising out of the unjust treatment of persons is termed "compensation." Expressions of Allied intent on this problem are much more limited. The one Allied agreement in which a thesis of compensation may be found is in the agreement on reparations from Germany, dated Paris, December 21, 1945. Article 8 of the agreement deals with the allocation of a reparation share to non-repatriable victims of German action. This Article recognizes that "large numbers of persons have suffered heavily in the hands of the Nazis and now stand in dire need of aid to promote their rehabilitation but will be unable to claim the assistance of any Government receiving reparation from Germany." Accordingly the signatory governments agreed to work out a common agreement with the Intergovernmental Committee on Refugees (succeeded by the I.R.O.) along the following lines:

A. A share of reparation consisting of all the monetary gold found by the Allied Armed Forces in Germany and in addition a sum not exceeding 25 million dollars shall be allocated for the rehabilitation and resettlement of non-repatriable victims of German action.

B. The sum of 25 million dollars shall be met from a portion of the proceeds of German assets in neutral countries which are available for reparation.

C. Governments of neutral countries shall be requested to make available for this purpose (in addition to the sum of 25 million dollars) assets in such countries of victims of Nazi action who have since died and left no heirs.

II

PROBLEMS AS OF V. E. DAY

As to restitution, the scale of takings, transfers, and subsequent transfers of property over a period of 12 years in the case of Germany and 7 years in the case of Austria by the sheer mathematics of probability results in the near impossibility of a complete analysis or categorization of the situations to be remedied. It also makes essential a system of restoring and making whole devised along the most broadly equitable lines.

As of the end of World War II there were a great many mechanical and economic difficulties to be overcome in attempting to restore anything like the *status quo ante* with respect to property. Chief among the difficulties requiring new modes of legal attack was the standing of the bona fide third party holder of real property. To what extent did such a holder have notice when he purchased from the original wrongdoer or an intermediate holder, particularly when, by pre-Nazi law, he was under no obligation to go behind the title inscribed in the Land Register in the name of his predecessor? If such property were to be returned to the original owner what rights existed as between the bona fide third party and the original wrongdoer? What was to be done in the case of accretions or contributions made to the property by the person in possession or a mesne holder in good faith? What was to be the

status of the claims of bona fide creditors whose rights were secured by the property? In addition to such problems concerning a bona fide third party holder (or "occupant" as he came to be known), a currency conversion in 1948 in Germany was still further to complicate the problem of indebtedness secured by the property, as well as the problem of return of consideration actually obtained by the original owner at the time of the original forced transfer.

Economic problems affecting the occupying powers arose from the magnitude of the destruction of Jewish life. Of the 600,000 Jews who had been in Germany in 1933, only 300,000 remained alive as of V.E. day, and of these only about 15,000 remained in Germany. If return were to be made of the property of these persons, and if return were to be made to the heirs and successors of the 300,000 slain, the economic problems resulting from absentee ownership would have to be faced by the occupation authorities, and since the moral right to transfer of income or other earnings would be strongly claimed by restitution claimants in the countries of the occupying powers, the economic problem involved was sure to be raised by back-home pressures.

A program of restitution would also raise political problems in the governance of occupied Germany, and in relations with the Austrian Government. For instance, since the physical effects of war had developed an acute housing crisis in the metropolitan centers of Germany and Austria, the political problem of ousting occupants in favor of claimants was raised. In this connection, too, the requisitioning needs of the occupation forces had imposed an additional burden upon the use of existing dwellings. Were claimants to receive the same treatment as occupants when requisition was to be made?

In addition to problems in the general fields of law, economics, and politics, there were many special problems. For example, there were a whole host of problems dealing with corporations which had to be untangled. During the Nazi regime corporations from the control of which their real owners had been ousted by discriminatory legislation continued to function and grow, bought and sold assets, expanded or diminished. Share capital was increased, borrowings were undertaken. How was the proportion of the claimant's present interest to be computed? How was the loss of preemptive rights to be handled? All this was further complicated by the general European custom of the issuance of bearer shares, and the probative problems to which this practice gave rise.

What were the solutions in the case of the restitution of special property rights such as patents and copyrights, which had limitations of time and use? What was to happen in other special property situations, such as the licensee's obligation to work a limited right of exploration to the point of discovery in order to transform it into a vested right of exploitation under the mining laws?

And how, finally, was the problem of heirless assets to be resolved? It was obvious that a large part of the assets owned by the slaughtered thousands must have no

natural heirs, and it could not be just that this property escheat to the benefit of a group which must include the persecutors.

In the case of compensation for damages to the person there were even more difficult problems. What scale of measurement could be used to evaluate gross damages to the person such as imprisonment, maiming, and death? How was it possible to compute the damage caused by the interruption of education or the interruption of a career? In narrower fields, what effective compensation could be made to those who had pension rights under governmental or private systems, and who now lived abroad? What was to become of their contributions to social security funds? These last, of course, were largely transfer problems, but they were keenly felt.

Consideration of the reinstatement of employment rights or the restoration of contracts for services led to simpler problems, but the commutation of these rights also resulted in transfer questions.

These problems, and many others, were foreseen before the end of the war, but they proved so difficult of solution that the first Austrian restitution law of general application was not enacted until February 6, 1947,² and the first restitution law of general application was passed in the United States Zone of Germany November 29, 1947.³ (An elementary and very limited restitution law was enacted for Thuringia in the Soviet Zone on September 14, 1945, but so far as can be learned no action was ever taken under this law actually to effect restitution.)

III

RESTITUTION AND COMPENSATION LAWS OF GERMANY AND AUSTRIA

A. Restitution in Germany

As noted above, the first restitution law of general application in Germany was passed in the United States Zone on November 29, 1947 (Military Government Law 59). A more limited restitution law had been promulgated by the French Military Government on November 10, 1947 (Ordinance 120). No law effecting restitution was passed in the British Zone until May 12, 1949, when the British Military Government promulgated Military Government Law 59 in form substantially similar to the American law. These laws of course applied only to the Western Zones of Germany. In Western Berlin an order of the Allied Kommandatura was issued on July 26, 1949, which in general follows the British Military Government Law 59.

Since the United States Military Government Law 59 is the most extensive it would be well to set forth its salient features and to comment upon them in the light of the needs they sought to fulfill.

(1) The intent of the law is explicitly set forth in Article I, where the purpose

² 3d Restitution Law, Bundesgesetzblatt Enactment No. 54.

³ Part 3, subtitle A, title 10, Code of Federal Regulations (1947 Supp.) §§3.75-3.93; 72 F. R. 7983-7994; Statement, the Adjutant General, 12 F. R. 7983-94 (Nov. 28, 1947). Military Government Law No. 59.

is stated to be to effect speedy restitution of identifiable property to the largest extent possible "to persons who were wrongfully deprived of such property within the period from January 30, 1933 to May 8, 1945, for reasons of race, religion, nationality, ideology, or political opposition to National Socialism."

The approach to third party problems is likewise explicitly set forth in Article I, paragraph 2 of which directs the restoration of property to its former owner or his successor in accordance with the provisions of the law, even though the interests of other persons who had no knowledge of the wrongful taking must be subordinated. It also states that provisions of law affecting protection of purchasers in good faith which would defeat restitution should be disregarded except as otherwise provided by Law 59.

Thus, the broad equitable approach necessary in cutting through the complexities of multitudinous transactions and devolutions in being made clear at the outset, serves as a guide to the interpretation of the law to the end that the greatest possible measure of relief may be given those wrongfully despoiled of their property.

(2) Within this framework Article II defines acts of confiscation. The important categories of confiscatory action are:

1. A transaction *contra bonos mores*, threats or duress, or an unlawful taking or any other tort;
2. Seizure due to governmental act or by abuse of such act;
3. Seizure as a result of measures taken by the NSDAP, its formations or affiliated organizations. . . .

To constitute confiscation such actions must have been caused by or constituted measures of persecution for any of the reasons set forth in Article I.

An interesting feature of this Article is its anticipation (and barring) of possible strict legalistic interpretation of acts of confiscation. It makes unavailable to the occupant defenses based, for instance, upon the plea that at the time of its commission the confiscatory act was not *contra bonos mores* because it conformed to the then prevailing *mores* concerning discrimination against certain classes of individuals. The interdiction of such defenses is, of course, in line with the general equitable philosophy behind the law.

(3) Article III was drafted for the purpose of simplifying the evidentiary problems faced by claimants who would have to prove the fact of confiscation. This Article establishes a rebuttable presumption of confiscation where the person against whom the act was taken was directly exposed to persecutory measures (hereinafter called a "persecutee") or belonged to a class of persons which was to be eliminated from the cultural and economic life of Germany by measures taken by the State or by the National Socialist party (hereinafter called a "discriminatee"). In these cases it provides that any transfer or relinquishment of property by either of such persons between January 30, 1933, and May 8, 1945, shall be presumed to be a confiscatory act. The unsupported presumption, however, may be rebutted by a showing

that the transferor was paid a fair purchase price, but only if he were not denied the free disposal of the monies received by reasons of his status in a class discriminated against.

Article IV supports the presumption of confiscation by giving the claimant the power of avoidance of any transaction involving the transfer or relinquishment of property entered into by the discriminatee during the period from the date of the first Nuremberg laws (September 15, 1935) to May 8, 1945, but permits the interposition of defenses (a) that the transaction as such would have taken place even in the absence of National Socialism, or (b) that the transferee protected the property interests of the claimant or his predecessor in an unusual manner, and with substantial success.

Article V establishes a rebuttable presumption that a gratuitous transfer made by a persecutee within the period from January 30, 1933, to May 8, 1945, constituted a bailment or fiduciary relationship rather than a donation.

(4) The definition of confiscated property, establishment of the above mentioned presumptions, and the power of avoidance cuts through for the benefit of the claimant the possible defenses of good faith and lack of notice which might have ordinarily been raised by an occupant of real property under a title registration system. And this is as it should be, since real property transfers in pre-war Germany traditionally were accomplished with great scrupulousness, and, notwithstanding the safeguard of registration, ordinarily with careful examination of the legitimacy of title held by the transferor, while the dispossessions practiced in Nazi Germany were open, notorious, and extensive.

With respect to personalty, however, other considerations necessarily arise. The turnover of personal property is always much more rapid than that of realty. The number of transactions intervening between the original act of confiscation and the time of a possible claim for restitution would ordinarily be so great that the likelihood even of implied notice to the present holder would in most cases be non-existent. Accordingly, the general rule (Article 19) is that "tangible personal property shall not be subject to restitution if the present owner or his predecessor in interest acquired it in the course of an ordinary and usual business transaction in an establishment normally dealing in that type of property."

However, where, from the facts, notice might exist or be implied, exceptions are made to the rule, and a claim for restitution will lie. The general exceptions in Article 19 also cover religious objects, property of unusual scientific, artistic or sentimental personal value, and property acquired at an establishment engaged to a considerable extent in the business of disposing of confiscated property. Money (Article 20) is restitutable only if the claimant can show that the holder knew or should have known at the time of its acquisition that it had been confiscated. But in the case of bearer instruments (Article 21) the holder (who in the absence of special circumstances is entitled to a presumption of good faith if the acquisition

were made in the course of ordinary and usual business transactions) must bear the burden of showing that he did not know or should not have known that the instrument had at any time been confiscated. In addition, where the degree of notice approaches actual notice (as where the bearer instruments constituted a participation in a family enterprise) bearer instruments are unconditionally subject to restitution.

(5) The problem of third party rights is, like all others in this Law, approached on an equitable basis, and with the recognition of possible equities existing in the favor of the third party.

Third party interests in property which existed prior to the act of confiscation are continued to the extent that they thereafter have remained undischarged or unextinguished (Article 37). This also applies to any interest subsequently created to the extent which the total amount of all claims (such as mortgages against the property) does not at the time the claim is made exceed the total of all similar interests at the time of the act of confiscation. The same rule, *mutatis mutandis*, applies to such encumbrances as easements where, for instance, a prior easement had been extinguished and a subsequent easement was no more burdensome than the one existing at the time of confiscation.

The rule on the limitation of encumbrances is relaxed to the extent that certain post-confiscatory claims may be secured by the property. These claims are those which might arise from expenditures made in good faith by the restitutor for the benefit of the property, but even this relaxation is carefully limited in favor of the claimant.

An encumbrance created by any act constituting confiscation (such as a mortgage or lien impressed upon the property in connection with the Capital Flight tax or the Property Tax on Jews) inures to the benefit of the claimant of the property (Article 38).⁴

(6) Other important general provisions of this Law provide that:

(a) If the claimant relinquishes all other claims under this Law, he may demand from the person who first acquired the property payment of the difference between the price received and the fair purchase price of the property (Article 15).

(b) The claimant is required to refund to the restitutor any consideration which he may have received in the original transaction less any sum of which he may not have had free disposition. In addition to this the claimant must refund the amount of any original encumbrance discharged after the time of confiscation, unless it has been replaced by another encumbrance or would be extinguished by operation of Article 38. However, in no event is he required to make refund in an amount exceeding the value of the property at the time of restitution (Article 44).

⁴ The text of this article as printed in the Federal Register for Nov. 29, 1947, is misleading. It reads: ". . . such an encumbrance shall devolve on the claimant. . . ." The German text reads: "So geht das Recht aus einer solchen Belastung auf den Berechtigten über, und ist bei Berechnung der in Artikel 37 vorgesehenen Belastungsgrenze nicht zu berücksichtigen," which would be translated as "The rights flowing from such an encumbrance" etc. The German text is official.

(7) Many of the special problems referred to in Part II of this paper are covered by this Law. For instance, the adjudicatory bodies created by the Law are empowered to do such things as to order the cancellation, new issue, or exchange of instruments evidencing participation in business enterprises, where these have been confiscated, and the enterprise was closely held, to the end that the claimant may be restored to his original participation in the enterprise (Article 23).

The most important special problem treated by this Law, however, is the problem of heirless assets. In connection with this a presumption of death as of May 8, 1945, is created in Article 51 as to "any persecuted person whose last known residence was in Germany or a country under the jurisdiction of or occupied by Germany and its Allies and as to whose whereabouts or continued life after May 8, 1945, no information is available. . . ." Article 10 empowers creation of a successor organization to be appointed by the Military Government, which shall be entitled instead of the State to the entire estate of any heirless persecuted person.⁵

(8) The law created special procedures and tribunals for its implementation:

- (a) A Central Filing Agency for the receipt and processing of petitions for restitution (Article 55).
- (b) Restitution Agencies, the function of which is to receive completed petitions from the Central Filing Agency and attempt to effect an amicable settlement between the parties (Article 52 and 62).
- (c) Restitution chambers of German District Courts composed of a presiding judge and two associate judges, one of the three of which must belong to a class of persons determined to be a persecutee (Article 66) under the general definition of Law 59. These chambers have the responsibility of adjudicating claims in which amicable settlement cannot be reached (Articles 63, 64, 67, and 68).
- (d) Appeals from the judgment of the restitution chambers may be taken to German appellate courts (Oberlandesgericht), which however may only render judgment on the law (Article 68).
- (e) A Court of Restitution Appeals has the power to review any decisions or any claim for restitution under this Law, both as to law and as to fact, and take whatever action is deemed necessary with respect thereto (Article 69). This Court, by Military Government Regulation, is composed of three members of the judiciary of United States courts in Germany.

Naturally there are also provisions requiring persons who have or had confiscated

⁵ This was implemented by the Military Government in 1948 by the appointment of the Jewish Restitution Successor Organization (JRSO), a New York State corporation representing all leading Jewish organizations in the world. The funds and properties received by JRSO under the law are used for the relief and rehabilitation of Jewish victims of Nazism. The special courts administering Law 59 are empowered to recognize other appropriate successor organizations as proper claimants for heirless property not claimed by JRSO.

property in their possession at any time after it was transferred or taken from a persecuted person, to report these facts to the Central Filing Agency (Article 73), and empowering the Restitution Authorities to issue temporary injunctions or restraining orders for the safeguarding of property (Article 52).

As of December 31, 1950, there had been about 65,000 individual restitution claims received by the Restitution Agencies in the United States Zone. Of these, about 25,000 claims had been finally disposed of. Of the 163,000 claims made by the Jewish Restitution Successor Organization (JRSO), about one-half to two-thirds are estimated to be duplications. About 47,000 JRSO cases had been forwarded to the Restitution Agencies, of which slightly less than 8,000 had been finally disposed of. The total value of the properties restituted was about 521 million Deutsche Marks.

In the British Zone as of the middle of 1950, some 68,000 declarations of confiscated property had been filed, and against these there were about 35,000 claims filed. Of these only a minor fraction had been finally disposed of.

In Western Berlin, as of the middle of 1950, there had been 28,850 claims filed, of which 13,800 had been forwarded to the Restitution Agencies; 450 odd had been finally disposed of.

There are no reliable statistics available concerning the operation of the restitution program in the French Zone.

B. Compensation in Western Germany

The difficulties in promulgating a uniform General Claims Law for the United States Zone made it necessary to enact interim legislation providing for payments to persecutees and their relatives whose economic conditions necessitated immediate financial support. Such legislation was promulgated in the form of Interim Award Laws which were enacted by the four Laender of the United States Zone in the summer of 1946.

Pursuant to the requests of the Military Government, the Laenderrat (Council of the four Laender comprising the United States Zone) studied the problems of further indemnification laws and by November, 1948, submitted for Military Government approval "Draft Law Concerning Redress of National Socialist Wrongs (General Claims Law)." After further study and redrafting the Law received the approval of the United States Military Governor in August, 1949, and soon thereafter was promulgated in individual texts by each of the Laender. Except for necessary minor administrative differences, the four Laender laws are identical.

C. Basic Provisions and Implementation of the General Claims Laws

The basic provisions of the laws and implementing regulations are as follows:

(1) There is a right to indemnification (here called "restitution") in any person who, under National Socialist dictatorship (January 30, 1933 to May 8, 1945), was persecuted because of political conviction or for racial, religious or ideological grounds and, therefore, has suffered damage to life and limb, health, liberty, posses-

sions, property, or to his economic advancement, *unless* such person shall have: (a) supported the National Socialist dictatorship; or (b) after May 8, 1945 been deprived of Civil Rights; or (c) after May 8, 1945 been sentenced by final judgment to prison for more than three years (Article 1).

(2) For the Land to be liable as restitutor, such person shall have (a) had his legitimate domicile or usual residence within that Land on January 1, 1947; or (b) been assigned to that Land as refugee on that date; or (c) having had such domicile or residence, died or emigrated prior to that date (Article 6), except that the Land is not liable for damages for loss of liberty to anyone who died or emigrated prior to January 1, 1947 (Article 15, Section 4).

(3) Persons who resided in a Displaced Persons Camp in the United States Zone on January 1, 1947 are also eligible, provided they are integrated into the legal and economic system of the Land from which they claim restitution or become integrated within one year after the effective date of this law, or after December 31, 1946, emigrated or will emigrate from such Land, except that residence in a transient camp for emigrants shall not be taken into consideration (Article 6).

(4) Damages to real property shall be compensated by the Land in which the realty is located, regardless of the domicile or usual residence of the claimant (Article 6).

(5) Monetary claims for the period prior to June 21, 1948 shall be computed in Reichsmark and converted into Deutsche Mark at the ratio of 10:2 (Article 3).

(6) The right to claim restitution shall, except in certain cases, pass to the heirs of eligible claimants (Article 9).

(7) The time for filing has now expired, but originally the law provided that, in general, where the claimant was within Germany, he must have filed an informal claim before March 31, 1950, and he must have submitted the formal application forms and required documents by June 30, 1950. Claims filed from outside Germany must have been submitted not later than June 30, 1950, and the required forms and documents must have reached the Land Claims Office on or before September 30, 1950.

(8) Damage to life and limb, health, and liberty is compensated as follows (Articles 13-15):

(a) Death benefit—

Annuity to widow until death or remarriage.

Allowance to minor children.

Lump sum payment for past period between death and commencement of annuity.

(b) Damage to body—

Medical treatment.

Annuities if 30 per cent incapacitated.

Lump sum payment for past period.

- (c) Deprivation of liberty—
150 DM for each month of detention, granted independent of other restitution payments.
- (9) Damage to possessions and property is compensated as follows (Articles 17-20):
 - (a) Repairs—up to 75,000 DM for each individual case.
 - (b) Refund of special taxes and fines.
- (10) Damage to economic advancement is compensated as follows (Articles 21-36):
 - (a) Reinstatement of civil servants and indemnification not to exceed 25,000 DM.
 - (b) Indemnification of other employees or workers.
 - (c) Indemnification and restoration of licenses to persons in the free professions.
 - (d) Reinstatement in the social insurance system.
- (11) Payments in settlement of claims shall be made in accordance with three classes of priority. Class I includes: (a) medical treatment; (b) annuities for incapacitation or as death benefits; (c) pensions to civil servants; (d) payments to employees and workers and to members of the free professions; and (e) half of the indemnification for deprivation of liberty. Class II includes: (a) balance of payment for deprivation of liberty; (b) up to 10,000 DM of payments for damage to property, fines and taxes, and payments to civil servants, workers, and professionals not covered in Class I. Class III includes all remaining payments. Payment of Class I and II Claims shall be completed within five years after the effective date of this law, and all payments are to be completed by 1960 (Articles 38-39).
- (12) Each Land is instructed to establish:
 - (a) a general filing agency with which claims against the Land can be filed;
 - (b) appropriate authorities entitled to represent the Land (Fachbehoerden);
 - (c) authorities to examine the claims and grant payment in settlement thereof (Guetebehoerden); and
 - (d) claims courts established in accordance with United States Military Government Law No. 59.

A coordinating committee composed of leading restitution officials from all Laender of Western Germany has been established in Munich. It is the purpose of this committee to consider all major problems in connection with General Claims legislation in order to bring about inter-zonal harmonization of ordinances and directives. Agreements reached by the committee are, however, not binding upon the Laender, which are free to issue implementations according to their own decisions. The present discrepancies in general claims legislation, and in its implementation, would seem to indicate that this committee has not been successful to any marked degree in accomplishing its purpose.

Under the provisions of the Interim Awards Laws, approximately 42,700,000

DM were paid out in three years between promulgation of these laws in 1946 and enactment of the General Claims Laws in 1949. A considerable amount of this sum will, of course, count toward final settlements under the General Claims Laws.

Between the coming into force of the General Claims Laws and March 31, 1950, petitions totalling 156,729 were received by claims offices in the four Laender. As of the end of March, 1950, payments had been made in the amount of approximately 30,000,000 DM. By October, 1950, these totaled about 100,000,000 DM. Approximately 23,000,000 DM of the 30,000,000 DM were paid in the form of advance payments, mostly for deprivation of liberty, based merely on a cursory examination of claims. Claims actually processed and adjudicated by settlement authorities (*Gueterberhoerden*) totalled approximately 6,800 and payments of approximately 7,000,000 DM were made. These adjudications and payments were made in Wuertemberg-Baden and Bavaria only. There are as yet no settlement authorities in Hesse and Bremen and no adjudications have been made, although some 30,000 claims have been received in Hesse and some 7,000 in Bremen.

Restitution officials believed that by June 30, 1950, the extended deadline for filing for persons outside Germany, approximately 200,000 claims would have been received. They estimate the total amount of payment to be made in final settlement of all claims at approximately 1,000,000,000 DM.

It is of additional interest to note the Immediate Aid Law—(Economic Council Ordinance No. 71-A) adopted on June 10, 1949 by the Bipartite Board for the United States and United Kingdom Zones of occupation. This law grants aid in the form of subsistence, educational aid, reconstruction aid, grants for household effects, and communal aid to persons who have suffered damage by reason of permanent loss of domicile or permanent residence, damage to property, losses through Currency Reform, or political persecution from January 30, 1933 through May 9, 1945; *provided* (a) they need help owing to the damage they have suffered, and (b) they were domiciled in the currency area on June 21, 1948 or will be released from war captivity to this area. A tax is levied on real property in the area to pay for the Immediate Aid.

In so far as this ordinance applied to political persecutees, it comes within the same general category as the general claims laws, and payments to political persecutees have been made under it. It is, of course, in force only in the United States and United Kingdom Zones and applies only to persons who are in need.

D. General Claims Legislation in Other Zones

As of the summer of 1950, while Laender outside the United States Zone had enacted various laws, ordinances, decrees, and administrative directives covering individual aspects of the problem dealt with in the United States Zone by the General Claims Laws, legislation of comparable scope to that in the United States Zone did not exist in the British Zone or in Berlin and had only recently come into effect in the French Zone.

In the British Zone, the Land Niedersachsen grants annuities for damage to life or limb inflicted on Nazi persecutees. Claimants under this law must have their domicile in Land Niedersachsen and must have been German nationals on the date when the damage was inflicted.

The City of Hamburg compensates former political prisoners in 3 per cent bonds at the rate of 150 DM for each month of detention. Claimants must have lived in Hamburg on January 1, 1949 or returned to Hamburg after that date.

All of the Laender of the British Zone have promulgated laws providing for indemnification payments to political and religious persecutees for deprivation of liberty. Persons entitled to claim under these laws must have been domiciled or must have had their usual residence in the respective Laender on January 1, 1948.

It should be pointed out that most of the legislation described in the foregoing does not apply to persecutees who left Germany before, during, or since the War or who are no longer German Nationals. This results in barring most of the surviving persecutees from becoming claimants, and reveals the laws to be more in the nature of local aid than thorough-going indemnification.

In the French Zone, the redress of wrongs resulting in damages or personal injuries not connected with the restitution of identifiable property was originally charged as a German responsibility under Ordinance No. 164. Recently, however, laws similar to the United States Zone General Claims Laws came into effect in the three Laender of the French Zone upon publication in the respective official Gazettes on May 27, 30, and 31, 1950.

E. Restitution and Compensation in Austria

Enactment of restitution and compensation legislation in Austria began at an earlier date than the enactment of the German laws. This was possible, because Austria, though occupied by the Four Powers, had a functioning Federal Government as early as 1945. There is no single law which covers all aspects of restitution or of compensation, as in Germany. Instead there is a series of laws, some of which prepared the groundwork for restitution and compensation, and others of which deal with special aspects of these problems.⁶

Preliminary legislation, part of which was enacted as early as May 10, 1945, required a census and registration of property and property rights which had been alienated arbitrarily (even though on the basis of laws and other enactments) on racial, national and other grounds in connection with the seizing of power by the Nazis.⁷ Other laws authorized the Ministry of Property Control and Economic Planning to appoint public administrators for enterprises subject to registration and which might be subject to spoliation, deterioration, or decrease in value.⁸

⁶ The best summary in English of these laws is contained in the pamphlet "Restitution and Compensation Legislation in Austria," by Dr. Nehemiah Robinson, published by the Institute of Jewish Affairs of the World Jewish Congress in 1949.

⁷ Staatsgesetzblatt #10, May 10, 1945; BGBl 1946, #150, July 24, 1946; BGBl 1946, #166, Sept. 15, 1946.

⁸ BGBl 1946, #157, July 26, 1946; BGBl 1949, #163, June 29, 1949.

The basic law upon which the whole structure of restitution legislation depends is the Nullification Law.⁹ This law nullified all transactions and other actions taken during the German occupation, in connection with the German political and economic penetration of Austria, which aimed at depriving natural and juridical persons of properties and rights which were theirs on March 13, 1938 (the date of Anschluss with Germany).

The First Restitution Law¹⁰ presaged both the subsequent Austrian laws and the German law in several important particulars. The law applied to a limited number of properties—merely covering those which were administrated by the Austrian Federal Government or by its individual States—the theory apparently being that alienated properties which were so imminently in danger of spoliation and deterioration that administrators had to be appointed could best be handled by the real owners.

This law, the intent of which was to restore properties to the former owners or heirs by virtue of the nullity of the alienation, provided that the properties were to be returned in their then present state, together with existing usufructs. Like the German law it provided that encumbrances in favor of third persons acquired after alienation were void, but could be recognized by the claimants. However (again as in the German law) encumbrances to secure payments of the Reich flight tax and special Jewish Levy were void *ab initio*. Claimants were limited to the dispossessed owner, his spouse, ascendants and descendants, brothers and sisters and their children, and other heirs of law if they were a true part of the owner's household.

The Second Restitution Law¹¹ which in all other important aspects was similar to the First Restitution Law, covered properties which, as a result of the initial confiscation, had become the property of the State after March 13, 1938.

The Third Restitution Law¹² covered the vast bulk of confiscated properties. In this law, while presumptions in favor of the claimant are not spelled out as they are in the German law, the same result is reached since the burden of proving that the property was not wrongly alienated is placed on the present holder by the Nullification Law. As in the German law, where the claimant was subjected to political or racial persecution by the Nazis, the present holder may show that the transfer of the property would have taken place independently of the Nazi seizure of Austria. This the present holder may do by proving that the claimant freely chose the buyer and received adequate compensation.

Claimants are restricted to the former owner, his spouse, ascendants and descendants, sisters and brothers, and other heirs of law if they formed a true part of the household of the deceased.

Other similarities with the German law are the requirement that the claimant repay to the holder that part of the consideration received which was actually at

⁹ BGBl 1946, #109, May 15, 1946.

¹¹ BGBl 1947, #53, Feb. 1, 1947.

¹⁰ BGBl 1946, #56, July 26, 1946.

¹² BGBl 1947, #148, June 18, 1947.

the free disposal of the claimant, and the provisions relating to personalty. The provisions regarding encumbrances are somewhat more favorable to the holder than the provisions in the German law, however, since encumbrances not expressed in money, such as easements, are retained in force.

Procedurally, the system is somewhat similar to that implementing the German law. While recognizing amicable settlements, concluded after April 27, 1945, the procedure follows the non-contentious procedures of Austrian law. Restitution Commissions are established at the District Courts, each consisting of a judge, a Chairman and vice-chairman, and assessors. The judges are appointed by the Chairman of the Appellate Court and the assessors are selected from lay-judges in commercial and labor courts. Decisions must be made by a majority of a three man group consisting of either the judge or the chairman and two assessors, one of whom must be a persecutee. Appeals from decisions of the Commission are lodged with the Superior Restitution Commission established at the Appellate Court, the composition of which is similar to that of the Restitution Commission. Appeals on the law may be carried to the Supreme Commission if the value of the restitution exceeds 15,000 schillings. Appeals to the Supreme Commission where the Superior Commission upholds the decision of the Restitution Commission are permissible only with the consent of the Superior Commission. All members of the Supreme Commission must qualify as judges and are appointed by the Chairman of the Supreme Court.

The Fourth Restitution Law¹³ deals with re-registration of firm names, cancelled or changed during Anschluss directly or indirectly under Nazi compulsion.

The Fifth Restitution Law¹⁴ deals with the restitution of the property of juridical persons which have lost their juridical identity in connection with acts of persecution and have not regained it at the time of coming in force of this law. The basic presumption of alienation exists where the participation in the entity was alienated and the loss of juridical identity was made possible through the preceding alienation of title to the shares or alienation of the property of the juridical person. Claimants are limited to former owners of the participations and their heirs as in the Third Restitution Law.

Under the law the Restitution Commission may either re-establish the juridical person or, where the Commission decides this is not in the public interest, an assignment and distribution of the property of the juridical person may be made to the claimants. However, these actions may only be taken in favor and on motion of participants of the juridical identity who at the time of its dissolution represented at least a majority of the participants.

The Sixth Restitution Law¹⁵ deals with the restitution of patents, trademarks, and designs and with inventions by employees which were taken over by their employers on the basis of certain German legislation and registered at the German

¹³ BGBl 1947, #143, May 21, 1947.

¹⁴ BGBl 1949, #164, June 22, 1949.

¹⁵ BGBl 1949, #199, June 30, 1949.

patent office. It also deals with the alienation and defeating of licensing arrangements. The remedies here are similar to those in the Third Restitution Law.

No provision is made in the restitution laws for the distribution of heirless assets. The reason for this is that it has always been expected that a Four Power Peace Treaty with Austria would, in some manner, cover this problem. There is a draft proposal, tentatively accepted by the Four Powers, which would provide for an equitable distribution of heirless and unclaimed assets, in such a manner that they would not escheat to the State. Details of this proposal, however, cannot be published here since, technically, the proposal is still under consideration by the Four Powers.

In addition to the foregoing laws which apply to properties and rights alienated after the period of Anschluss, there are three laws which deal with property alienated between March 5, 1933, and March 13, 1938. The first of these¹⁶ deals with properties of democratic organizations in the political, economic and cultural fields which were confiscated or alienated without remuneration on the basis of measures inconsistent with laws in force on March 5, 1933. The law has particular application to the restoration of properties of the Social Democratic party and its associates, of the Christian Labor organizations, and of the Communist Party.

The second law¹⁷ deals with leases to apartments and business premises, and land and buildings which belong to democratic organizations in the political, economic and cultural fields.

The third of these laws¹⁸ deals with rights resulting from private employment lost between March 5, 1933, and March 13, 1938, on political grounds on the basis of laws and other enactments, but excludes losses resulting from National Socialist activity. Persons eligible under the law are those who lost, in whole or in part, the right to salary, severance pay, or pension.

As of the middle of 1950 under the First Restitution Act there have been almost 11,000 individual claims received by the Restitution Commissions in Austria of which some 7000 were granted, about 900 denied, about 500 withdrawn, about 2000 still under consideration, and about 400 to be reached for consideration.

Under the Second Restitution Law about 1100 claims had been received of which about 400 were granted, 200 denied, 375 were under consideration, 50 had been withdrawn, and 90 had not yet been taken up.

Under the Third Restitution Law about 33,000 claims had been filed of which almost 9000 were granted, 3200 denied, 6300 had been compromised, 1200 had been transferred to procedures under other restitution or restoration laws, and about 9400 had not yet been taken up.

The laws of Austria dealing primarily with compensation¹⁹ apply only to citizens of Austria. These are divided into two categories, those defined as the victims of the

¹⁶ BGBl 1947, #55, Feb. 6, 1947.

¹⁷ BGBl 1949, #165, June 22, 1949.

¹⁸ BGBl 1941, #208, July 14, 1949.

¹⁹ BGBl 1947, #183, July 4, 1947; BGBl 1948, #7, Dec. 18, 1947; BGBl 1949, #148, July 14, 1949.

fight for a free democratic Austria and those who were victims of political persecution.

Included in the first category are those persons who fought for Austria either with arms or words or deeds and who between March 6, 1933, and May 9, 1945, suffered any of the following losses:

- (a) Died in the struggle or in consequence of wounds, illness, imprisonment, or mistreatment;
- (b) Were executed;
- (c) Sustained serious health impairment in consequence of wounds, illness, imprisonment, or mistreatment;
- (d) Sustained imprisonment for at least one year (or six months if the imprisonment was connected with especially serious bodily or mental sufferings) for political reasons.

In the second category are persons who, during the period from March 6, 1933, to May 9, 1945, suffered serious losses for political reasons or because of race, religion or nationality, through action of the courts, the administration, or the NSDAP and its agencies. The losses covered are:

- (a) Loss of life;
- (b) Deprivation of liberty for over three months;
- (c) Certain impairments of health;
- (d) Loss of over one half of one's previous income for at least three years;
- (e) Interruption for at least three and a half years of one's education.

The claimants are limited to the persons who were injured or their spouses until remarriage, ascendants and descendants, orphaned brothers and sisters, stepparents and stepchildren (including stepbrothers and stepsisters up to the age of 24) who were dependent upon the dead person.

In the main, compensation is taken care of by the award of special privileges, since in the light of the Austrian budgetary situation adequate amounts of money could not be obtained to compensate everybody by way of money payment. These privileges include:

- (a) Special privileges in social insurance;
- (b) Special privileges in reconstruction of their economic position (such as appointment to office and private employment);
- (c) Special privileges in allotment of apartments and garden plots;
- (d) Dispensation or reduction of certain scholastic and examination fees.

In addition, minimal annuities to provide for their subsistence are granted to those persons who suffered serious bodily injury or were otherwise incapacitated. Special medical assistance and child care are also provided.

A special Reinstatement Law²⁰ applies to persons whose ordinary domicile or

²⁰ BGBl. 1947, #160, July 4, 1947.

permanent residence is in Austria, where their employment was discontinued for political or racial reasons. The discontinuance of employment either on the basis of legislative provisions or by the employee on his own volition is presumed to be on political grounds if the employee was at the time of notice or dismissal subject to political persecution, and the employer cannot prove that the employment was discontinued for other reasons.

Under the foregoing circumstances the wronged employee is to be reinstated, the conditions of employment being those prevailing in the enterprise at the time of reinstatement. However, this obligation does not exist if the employee's position was abolished before January 1, 1947, on economic or technical grounds; or his former position was held by someone not belonging to the category of disqualified persons, and an obligation of reemployment in a similar position is not warranted; or if the employee is not capable of discharging the obligation of his former employment; or if he was condemned for certain criminal acts; or if he is over 65 and is entitled to a pension. Where the employee cannot be reinstated he is given a priority to employment in a position for which he is qualified.

Where the employee is not reinstated he may claim the benefits of what is called the Seventh Restitution Law²¹ which applies to persons whose rights to salary, severance pay, or annuities were wholly or in part abrogated or unfulfilled. His spouse, ascendants and descendants, brothers and sisters and their children, and heirs at law who constituted a part of the employee's household may claim if the employee be deceased. Depending upon the terms of the employment and the amount of wages, the maximum claim may not exceed 24,000 schillings, with payment of amounts exceeding 5,000 schillings distributed over a period of months, and with a minimal monthly payment of 500 schillings.

While not only the employer but his successors are liable for such payments, there are certain exemptions from such responsibility, as where the employer or his successor made the payments due the employee to a third person on the basis of obligation imposed by law. (For instance, during Anschluss certain annuity payments had to be made to the German Reich on the basis of the 11th Ordinance of the Reich Citizenship Law.)

Where compensation cannot be made in these cases or where the employer has ceased to exist and has no successors, the law declares that an official statute will provide for the possibility of receiving such payment out of the heirless property fund. This latter provision may not prove to be effective if the heirless property fund is treated in the manner now contemplated by the draft Austrian Treaty.

In addition to the foregoing, there is a special law²² which tolls the bar of statutes of limitations where persons after February 12, 1934, were on political grounds prevented from invoking court action.

²¹ BGBl 1949, #207, July 14, 1949.

²² BGBl 1947, #40, July 2, 1947.

IV

CONCLUSION

Laws of this nature are bound to be unpopular with everybody concerned. Those who are wronged can, of course, never be made whole, and do not consider that the laws go far enough. The wrongdoers or their successors as property holders have, with possession, developed a sense of property right, and, ignoring the initial wrong committed, feel unjustly treated where they have invested time and money in the operation and management of the property acquired by them.

Extrinsic factors, such as currency reform in Germany, tend to heighten the charge of injustice by third persons who may have acquired confiscated property in good faith. (For instance, a third party holder may have paid a claimant full value in the amount of 20,000 marks for a piece of property before conversion, while the claimant now can recapture it for only 2000 marks.)

In Germany, for instance, while the attitude of top German officials connected with the program is thoroughly realistic, and recognizes fully that the Restitution program must be carried out, there have been times when Restitution programs in certain Laender declined in output in terms of number of cases processed. (In the last half of 1950, however, output materially increased.) There have also been formed so-called Restitutor Organizations in the three zones of Western Germany which take the line that the existing laws are not fair, that present programs should be suspended, and that a new start should be made on a uniform Restitution Law which gives "fair" recognition to the rights of present holders.

In Austria there have been attempts made from time to time to reopen the restitution cases already settled in the favor of claimants and to set aside some 25 per cent of the unclaimed property of victims of the Nazi regime for the purpose of compensating so-called "hardship cases"—those who had acquired confiscated property during the Nazi regime in alleged good faith. But all such attempts have failed, and at the present time there seems to be little likelihood that any material changes will be made in the present Restitution Laws.

The charge has been made that both in Germany and Austria sufficient pressure was not put upon German and Austrian authorities to have the restitution cases settled quickly. But certainly, a good part of the delay in processing cases has been due to the time consumed in corresponding with overseas claimants, and their own difficulties in directing the amassing of evidence by transatlantic correspondence. And there have also been difficulties in obtaining the services of adequate numbers of people, not completely prejudiced against claimants, and otherwise qualified, to process all claims quickly.

The achievement of the United States, Great Britain, and France in obtaining the enactment and implementation of the above described laws is, notwithstanding

all criticism of the scope and effectiveness of the laws, a remarkable one. To the best of the writer's knowledge no such laws, providing for the recovery of losses to persons who were not citizens of the sponsoring countries at the time the losses occurred, have ever before been enacted. The scope of the laws themselves is remarkable concerning both the kind and degree of the wrongs to be remedied. However well—or poorly—these laws have worked, they constitute an important and useful precedent in the development of world law.