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HOLOCAUST AND RESTITUTION

Part III

**THE LEGAL ASPECTS:
Rehabilitation and Restitution**

AN IMMOVABLE PROPERTY RESTITUTION LEGISLATION DATABASE: ESLI'S Initiative to Bring Present and Future Meaning to the Terezin Declaration Commitments*

*Published Professional
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The 2009 Terezin Declaration reflects the will of 47 nations to continue to enhance their efforts to right the wrongs committed against groups persecuted during World War II. These commitments are not only important with respect to bringing justice to those affected by persecution during the Holocaust, but also are important from the standpoint of transitional justice as now understood, including as a way of reducing the likelihood of future genocides or mass atrocities. The European Shoah Legacy Institute (ESLI) was established to monitor progress and advocate for the principles enshrined in the Terezin Declaration, in particular that of immovable (real) property restitution. ESLI's latest project – the immovable property database initiative – will provide a much needed and long overdue dynamic tool for claimants, heirs, scholars, governments, NGOs – any stakeholder – to help navigate current property restitution issues by confronting the path through the past which brought us to current state of affairs.. When completed, the online database will be a user-friendly, public-access comparative repository of legislation and

* This paper is based on presentations made by Kristen Nelson and Rajika Shah at the “Holocaust and Restitution” conference organized by the New Balkans Institute, the Belgrade Research Center for Humanities and Arts, the Agency for Restitution of Republic of Serbia, and the Association of Public Prosecutors and Deputy Public Prosecutors of Serbia and held in Belgrade, Serbia on 10–11 May 2015.

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international and domestic case law (both past and present) from every country that has endorsed the Terezin Declaration. Using the online database to examine the often thorny and emotionally charged issue of heirless property, in particular, is emblematic of how the content can be used to drive the conversation for solutions forward and possibly give rise to intertwined policy-related questions.

Key words: immovable (real) property, ESLI, private property, communal property, heirless property, database, Holocaust (Shoah), restitution, compensation

BY ENDORSING THE 2009 TEREZIN DECLARATION, 47 nations agreed to continue and enhance their efforts to right the wrongs committed against groups persecuted during World War II. These commitments are not only important with respect to bringing justice to those affected by persecution during the Holocaust, but also are important from the standpoint of transitional justice as now understood, including as a way of reducing the likelihood of future genocides or mass atrocities.

The European Shoah Legacy Institute (ESLI) was established in 2010 to monitor progress and advocate for the principles enshrined in the Terezin Declaration.

One of the areas highlighted by the Terezin Declaration – and one that continues to garner considerable attention – is that of immovable (real) property restitution, including private, communal and heirless property.

ESLI's latest project – the immovable property database initiative – will provide a much needed and long overdue dynamic tool for claimants, heirs, scholars, governments, NGOs – any stakeholder – to help navigate current property restitution issues by confronting the path through the past which brought us to where we are today. Using the database to examine the often thorny and emotionally charged issue of heirless property, in particular, is emblematic of how the content can be used to drive the conversation for solutions forward and possibly give rise to intertwined policy-related questions.

ESLI's Immovable Property Database Initiative

In 2015, as part of its international monitoring and advocacy mandate, ESLI commissioned the creation of an online database relating to immovable property confiscated or otherwise misappropriated during the Holocaust era, 1939–1945. The database initiative is headed by Professor Michael J. Bazylar (1939 Scholar in Holocaust and Human Rights Studies, Chapman University Fowler School of Law) and Lee Crawford Boyd (Shareholder, Brownstein Hyatt Farber & Schreck, LLP). When completed, the online database will be a user-friendly, public-access comparative repository of legislation and international and domestic case law (both past and present) from every country that has endorsed the Terezin Declaration. The database will be the first and only compilation of this type of information. It will also be dynamic, meaning that it can be updated and modified to reflect legal changes relating to the ongoing restitution and compensation efforts in each of the 47 Terezin Declaration countries.

Core components of a country's entry in the database will include restitution and/or compensation-related information falling into four broad categories: commitments made in post-war armistices and agreements, private property restitution, communal property restitution, and heirless property restitution.

For each country's restitution regime (historical and current), the goal is to: catalogue the scope of restitution and/or compensation legislation and its associated regulations; identify the time period covered by the legislation and what kind of property (private, communal, heirless) is covered; ascertain whether eligibility is contingent upon citizenship in the legislating country; clearly list claim filing deadlines; describe how the claims process works (including who decides the claims, standard of proof, necessary documentation, associated costs, appeals procedures); and describe notable judicial decisions interpreting the legislation (including national court decisions and decisions of the European Court of Human Rights in Strasbourg). Where available, statistical information concerning the status of claims, value of restituted property, length of claims process, etc. will be included.

Another important component to the database will be to place a country's legislation and restitution regime into its proper historical context. A casual user of the database may, for example, have limited awareness that property confiscated from Jews and other targeted groups during World War II in central and eastern

Europe was confiscated for a second time during widespread nationalization efforts by emerging post-war Communist regimes (confiscations which this time affected the entire population). Including information about these so-called double confiscations helps to explain why restitution efforts faltered or failed to come to fruition for decades following the end of World War II. In addition, such context explains why restitution in these countries is often not merely a question of returning property confiscated during the Holocaust but is also a matter of unwinding subsequent Communist nationalizations of that same property. Of course, historical explanations do not absolve countries from legal or moral obligations vis-à-vis immovable property restitution.

In order to help hold countries accountable for their Terezin Declaration commitments in the area of immovable property restitution, database country reports are framed around whether a country is meeting the restitution standards established in the Terezin Declaration and the 2010 Guidelines and Best Practices for the Restitution and Compensation of Immovable (Real) Property Confiscated or Otherwise Wrongfully Seized by the Nazis, Fascists and Their Collaborators during the Holocaust (Shoah) Era between 1933–1945, Including the Period of World War II (Terezin Guidelines and Best Practices), which was approved by 43 of the Terezin Declaration governments in 2010. Adopting countries are encouraged to use the Terezin Guidelines and Best Practices when developing their national restitution programs. Notable provisions include that the restitution process should be accessible, transparent, simple, expeditious and non-discriminatory (para. d); claimants should have unfettered and free access to archives (para. e); and restitution *in rem* is the preferred outcome (para. h).

Database Preparation Process

The corpus of the database content is the product of multi-layer research efforts. Pro bono lawyers from three major U.S.-based international law firms conducted initial independent country research. Many of the participating lawyers were physically located in the country they researched and/or licensed to practice there. These attorneys gathered primary restitution legislation and caselaw.

The next major step has been to involve the Terezin Declaration governments directly. Government consultation is one of the unique features of the ESLI immov-

property prepared by other organizations. During summer 2015, Questionnaires and preliminary research findings were sent to all Terezin Declaration countries. The goal is to have each member government return completed Questionnaires so that complete information can be published in the online database. As of the end of November 2015, final responses from 16 governments (via Questionnaire or otherwise) have been received. More are expected by the end of the year.

Research and Questionnaire responses are then converted into a comprehensive country report, which will appear on the online database. The final step is for independent scholars, local and international organizations, and domestic lawyers with restitution practices, to review and check the reports for accuracy.

Database Goals and Objectives

The publication of a database of this type of comprehensive immovable property legislation is in and of itself a major step that fulfills a remedial function. The database will enable users of all types to access current information in one central repository that is word searchable across countries and by type of property (i.e., private, immovable or heirless). Standard categories will appear in each country's database entry, which will facilitate comparative studies of restitution regimes. The database will also provide fair and even transparency across countries on the issue of immovable property restitution by reporting on legislative successes, and also exposing gaps in a country's current system.

This leads to another hallmark feature of the online database – that there will be regular updates and progress reports for countries that refer back the Terezin Guidelines and Best Practices. The database will be a living and breathing document and not simply a confined snapshot of restitution at a given time.

Database Outcomes

ESLI's mandate as advocate for the Terezin Declaration places the organization in a position where it can and should propel policy change in the area of immovable property restitution. The information contained in the database can facilitate ESLI's policy efforts.

From the outset, there is the sincere hope that the database will show the absence of any negative impact on the economies of countries that have success-

fully passed and implemented restitution/compensation legislation for immovable property.

Using information gathered about restitution regimes across countries, ESLI can also spearhead the preparation of uniform model codes (for example, that would cover heirless property). While uniform codes may not be the “one size fits all” solution for countries who have not passed certain types of immovable property legislation, in the case of heirless property, they could be a rubric for how to equitably balance the opportunity for redress for Holocaust victims who have no heirs, with certainty in the marketplace and repose to current occupants and titleholders (i.e., so that property may be purchased without fear of future litigation).

The database is also a step towards preserving future memory. Sadly, it is a fact that immovable property restitution is a fading hope for survivors. Within the next approximately 12 years, all remaining Holocaust survivors will be gone. What must remain are their memory, their experience, and documentation about what it took for them to get back what was stolen.

The database is not merely an historical record, but hopefully also a deterrent against future atrocities – a chronicle showing that, more than 70 years on, countries are still grappling with how to provide redress for confiscations that occurred during the Holocaust. For example, in countries where ordinary civil laws must be used to seek return of property (as is the case in Poland), the existing paradigms have resulted in continued impunity. Ordinary property laws are written for the ordinary, not for the extraordinary (such as the Holocaust).

Using the Database to Drive the Conversation on Heirless Property Solutions

One of the ways the database content can be used is to help promote conversation and development of intertwined policy-related questions on heirless property. This is particularly relevant for those countries still searching for effective solutions.

By way of background, the too-often wholesale extermination of families during the Holocaust had the effect of leaving most expropriated property without heirs to claim it. Before the Nazi takeover of power in 1933, Europe had a vibrant and mature Jewish culture. By 1945, most European Jews – two out of every three

Peace in 1947 and as recently as the Terezin Declaration, Terezin Guidelines and Best Practices, and 2015 Concluding Statement of the Co-Chairmen of the International Conference on Welfare for Holocaust Survivors and Other Victims of Nazi Persecution, emphasize that heirless property from victims of the Shoah should not revert to the state but instead should be primarily used to provide for the material needs of Holocaust survivors most in need of assistance.

When looking at data spanning the 47 Terezin Declaration countries, solutions for heirless property issues often stand out as the most intractable hurdle in the field of immovable property restitution. Moreover, owing to the nature of the property – that there are no heirs to claim it – it is also the type of property that may be most at risk of being forgotten, because it has no natural champions. The database will reflect the somewhat unfortunate, yet sadly unremarkable, fact that there is still much to be done in many Terezin Declaration countries when it comes to finding heirless property solutions. A vast amount of heirless property continues to be unaddressed, unclaimed and unrecompensed.

The fact that this online database is a dynamic repository of information means that it has the capability to effectively capture changes in law and political will over time, and can be used as a comparative tool to better dissect the heirless property issue and see if what worked in one country might work in another. It enables policy-makers like ESLI to endeavor to propose heirless property solutions, which can be crafted from the best portions of various previously successful domestic heirless property efforts.

Heirless property solutions appear in many stages across Terezin Declaration countries – anywhere from effectively complete or in-progress, to nascent or non-existent. There is the example of Germany, where the issue of heirless property was initially addressed in the years immediately after World War II in the case of West Germany – with the creation of the so-called Jewish successor organizations in the American, British and French zones, and again following the fall of the Berlin Wall in 1989 – with the Conference on Material Claims Against Germany (Claims Conference), which became the legal successor to heirless property in the former German Democratic Republic (GDR).

In Hungary, it was the late 1990s before the country enacted legislation – giving effect to the country's commitments under the 1947 Treaty of Peace, which stated that heirless property would be “transferred by the Hungarian Government to organizations in Hungary representative of (...) persons, organizations or com-

munities [who were the object of racial, religious or other Fascist measures of persecution] (...) for purposes of relief and rehabilitation of surviving members of such groups, organizations and communities in Hungary.” Hungary passed Act X of 1997 on the implementation of provisions included in Article 27, Item No. 2, of Act XVIII of 1947, related to the Peace Treaty of Paris, and transferred funds of over USD 20 million (in the form of bonds, and real and immovable property) – and later beginning in 2007, an additional USD 21 million – to the Hungarian Jewish Heritage of Public Endowment (MAZSOK).

There are also countries like Serbia, who, in its 2011 Law on Property Restitution Compensation [Zakon o vraćanju oduzete imovine i obeštećenju Republike Srbije] (*Službeni glasnik RS 72/2011*), committed to pass future legislation on heirless property and are considering the passage of that law presently.

In the case of Poland, no heirless property legislation exists. In fact, according to the 8 March 1946 Decree Regarding Post-German and Deserted Properties, property not claimed by private owners within the 10-year statute of limitations period became property of the Polish state. Yet, the legal characterization of heirless property in Poland remains in a somewhat suspended position, currently benefiting neither the state nor the Jewish community. On the one hand, there is no Polish provision for transferring heirless property to the Jewish community for the benefit of needy survivors, and on the other hand, Polish succession law requirements generally do not permit the state Treasury to obtain ownership over Jewish heirless property (because, for example, the state cannot prove with adequate documentation the former owner of the property is dead and has no heirs).

Undoubtedly there are also countries whose heirless property regimes lie somewhere between the examples mentioned.

From a comparative standpoint, after examining all of the existing heirless property solutions, the result might be that what worked in one country, for example Germany or Hungary, is a solid rubric for other countries.

Moreover, the hope is that the completed database will encourage ESLI and other database users to pose and answer some of the difficult questions associated with heirless property. A few questions come to mind:

The very concept of restituting heirless property is a post-World War II construct for addressing the largely denuded European Jewish community. Typically, putting aside unnatural forces that lead to the expiration of an entire family line, it is generally understood in Europe that if a family line dies out, the state succeeds to

the property for the benefit of all. But the issue with Holocaust confiscated heirless property is not to unjustly enrich the state if the state itself was responsible for the family line dying out in the first place. Yet, even within this unique context of the Holocaust, arguably a state will contend that it cannot be expected to distribute property to people who never owned it. Or, the state may assert that it was occupied during the Holocaust and cannot be legally liable for situations that gave rise to heirless property. Where is the appropriate compromise? What has the compromise been in the past?

The search for a claimant to heirless property held by the state has inevitably led to disparate groups and entities claiming to represent the Jewish population as a whole. There is also an argument to be made that the heirless property should be returned to the local Jewish community. Considering Latvia as an example, there were very few Latvian Jews in the country after the war and a significant portion of the ones who were present under Soviet rule had little to no connection with Latvia before World War II. Should the heirless property be transferred to local Jewish communities who are composed mainly of people who arrived after World War II? Should it go to a large umbrella organization like the World Jewish Restitution Organization whose mission is to represent all Jewish people?

These are just a few of the important questions raised by the research in ESLI's online database of immovable property, and no doubt there will be many more.

Conclusion

In closing, the value of ESLI's living repository of data on immovable property cannot be overstated. The database's ability to capture historical trends and reflect current gaps in law, to inspire answers to intractable property issues where none seem yet to appear, and to promote thoughtful discourse on the rationale behind immovable property restitution as a whole and who should benefit, will continue to lead to progress on these outstanding issues in the area of immovable property restitution.

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Rezime:

Baza nepokretne imovine: Inicijativa ESLI i budući značaj projekta za Terezinsku deklaraciju

Terezinsku deklaraciju iz 2009. potpisalo je 47 zemalja do 2015. godine i odnosi se na obavezivanje zemalja potpisnica da će se zalagati za ispravljanje nepravde koja je učinjena manjinskim grupama u toku Drugog svetskog rata. Ovakve obaveze nisu samo važne zbog donošenja pravde žrtvama Holokausta, već i zbog tranzicione pravde i obeshrabrivanja sličnih genocida i zločina u budućnosti. Evropski institut za Holokaust (ESLI) osnovan je radi praćenja pomenutog procesa, naročito u vezi sa restitucijom nepokretne imovine. Poslednji projekat ESLI, koji je odnosi na bazu nepokretne imovine, pružiće neprocenjivu pomoć budućim istraživačima, potražiocima imovine, državnim ustanovama, nevladinom sektoru za izazove u vezi sa restitucijom nepokretne imovine.

Kad jednom bude završen, projekat Baze nepokretne imovine pružaće uvid i u sve do tada donete zakone koji se odnose na restituciju nepokretne imovine država potpisnica Terezinske deklaracije.

Ključne reči: nepokretna imovina, ESLI, privatno vlasništvo, kolektivno vlasništvo, posed bez vlasnika, baza podataka, Holokaust (Šoa), restitucija, obeštećenje

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