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THE PATH TO SOCIALIZATION IS CLEAR

THE EXPERT COMMISSION REPORT ON "SOCIALIZING LARGE HOUSING COMPANIES" LAYS OUT THE LEGAL MEANS TO EXPROPRIATE BERLIN'S BIGGEST LANDLORDS

Since the start of the "Expropriate Deutsche Wohnen & Co." campaign, opponents of the plan have sought to discredit the socialization of housing stock. They have characterized it as unserious and legally unfeasible, sometimes suggesting that astronomical compensation figures will come into play. The report issued by the Berlin Senate's expert commission has made it strikingly clear that these arguments against the plan are unfounded. Germany's Basic Law is very clear on this point: socialization is feasible. It is a possibility allowed by the Basic Law, and an expression of its authors' desire to give legislative authorities leeway to shape the economic system beyond the constitution's own stipulations. Now it is up to Berlin's state-level governing coalition of Christian Democrats (CDU) and Social Democrats (SPD) to implement the referendum's result as quickly as possible.

The "Expropriate Deutsche Wohnen & Co." initiative has had an impact on the political agenda in Berlin since its inception in 2018. A strong tenants' movement has developed in recent years in response to perpetually rising rents, gentrification, and the financialization of housing. This movement has given rise to the demand to socialize the holdings of commercial housing companies that own over 3,000 dwellings.[1] The idea is to transfer that housing stock to a public institution that would manage it as a public enterprise with democratic participation from city residents, tenants, and staff. The first step was to collect enough signatures for a ballot measure. The second was to carry out the referendum, which took place on 26 September 2021 and won the approval of 59.1 percent of Berlin's electorate. Under a coalition of the SPD, Die Linke, and the Greens, the state senate spent a few months wrestling with how to implement the result before finally agreeing to set up an expert commission.

In June 2023, the commission published its final report, titled *"Vergesellschaftung großer Wohnungsunternehmen"* (Socializing Large Housing Companies).[2] After the heated debates of the last four years over the legal admissibility of this proposal, the significance of the report cannot be overstated. Despite all internal differences, the 13-member commission led by former Federal Minister of Justice Herta Däubler-Gmelin (SPD) emphasized that socializing large housing stocks, even below market value, is legally feasible. In light of this finding, the political debate is definitively resolved.

Special votes are yet to be held on individual issues, but the commission has evidently managed to agree, with a substantial majority, on the essential outcome. It has made clear that it sees various possible ways to enact the expropriation. It is now up to legislators to make some decisions, including whether an appropriateness test is necessary, how and in what amount the owners are to be compensated, and whether the 3,000-unit limit is to be retained, or if a different criterion should be established to distinguish between who can or cannot be expropriated.

BY LAW, THE STATE OF BERLIN CAN SOCIALIZE APARTMENTS

One widely discussed aspect of the referendum was the question of whether state of Berlin could socialize housing in the first place. In the commission's view, the state of Berlin has the authority to pass a law to bring housing stocks under public sector administration (nos. 63–66). Socialization of land is subject to concurrent legislation (in accordance with Art. 72 Para. 1 of the Basic Law), which means that state law is authoritative, except in cases where federal law has already definitively settled a matter. In the commission's view, that is not the case here, so the state can take action. Moreover, the commission stated that this authority extends to all public law provisions that are needed to execute the plan (nos. 67–72). This includes housing companies' disclosure obligations, as well as penal regulations.

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This is not the first time the question of state-level authority has played an important role: the rent freeze was ended via a decision by the Federal Constitutional Court, which denied a state-level authority.[3] However, the commission took a clear position on this issue: Berlin has the authority, and it is allowed to socialize housing.

PRECONDITIONS FOR SOCIALIZATION

The first sentence of Article 15 of Germany's Basic Law says that land, natural resources, and means of production can be socialized. The first question this raises is whether apartments can be considered land at all. The commission explained that "land" also includes buildings (no. 78). Socialization covers not only private property, but also what are called "rights *in rem*" or real rights, like rights of use, exploitation rights, and acquisition rights (no. 85).

Article 15 provides for transferral into public ownership or other forms of public enterprise. Thus, the purpose of the transfer must be non-commercial management (nos. 95–98). According to the commission, the law has to permanently ensure this (no. 99).

Additionally, the commission stipulates that socialization must occur by means of a law — the report rules out any "administrative socialization" (nos. 100–102). The time of socialization, the properties involved, and the persons affected must be identifiable. The commission operates on the assumption that property has been effectively transferred once it has been officially entered into the land register (no. 103). With respect to identifiability, the commission says that it must be possible to identify the properties solely on the basis of legal regulations. However, the law does not require either a specific address for each plot of land, nor the specific name of the company that owns the particular housing stock (no. 104). In the public debate, it has been suggested that the law requires the plot to be named specifically.[4] The commission clearly rejected this view and considered this step unnecessary.

In the commission's view, Article 15 Paragraph 1 of the Basic Law does not include any unwritten preconditions as to when a property is available for socialization (no. 105–109). Availability for socialization has a specific commercial meaning.[5] It is to be applied to all housing stocks in the state of Berlin that comprise more than 3,000 units. However, the commission believes that this discussion is ultimately irrelevant to the constitutionality of the plan.

SOCIALIZATION IS DEEMED APPROPRIATE ...

With regard to the question of whether and how socialization would be appropriate, the commission members had a variety of views (nos. 121–150). Most of them supported a modified application of the German legal principle of appropriateness *(Verhältnismäßigkeitsgrundsatz),* which is laid out below.

The commission argues that it makes no difference for the company to be divested of property whether that divestiture occurs by means of expropriation (in accordance with Art. 14 of the Basic Law) or socialization (in accordance with Art. 15) (no. 121). At the same time, it must be kept in mind that certain decisions are to be relinquished to the political process and the legislative authority in keeping with the Basic Law's orientation toward compromise (no. 123). The Federal Constitutional Court has described this as the Basic Law's economic neutrality.[6]

The majority of commission members believe that there is a distinction to be made between the authority to expropriate and the authority to socialize. In the context of an expropriation, every type of private right to property ownership can be expropriated in the interest of the public good. By contrast, in the context of socialization, only property within certain spheres can be converted into a form of public enterprise for the purpose of socialization. In this case, the end goal of socialization is simply the socialization itself. The underlying idea here is that private ownership of land, natural resources, and means of production can cause problems (no. 131). They arise from the fact that owners of these goods can exploit their power over people who are dependent on them (no. 132). Moreover, private ownership of means of production enables owners to profit from the labour of employees, while the employees only receive the compensation agreed upon (no. 133). Additionally, profits can be used for private benefit, irrespective of the public interest (no. 134), and the power of ownership can also procure political power, which contradicts the idea of equitable participation in democracy (no. 135). The report states that "socialization comprises the abrogation of economic, social, and political power asymmetries that are inherent to private ownership of the goods designated in the first sentence of Art. 15 of the Basic Law" (no. 136).

With this in mind, the majority of commission members consider it necessary to apply the legal principle of appropriateness, but in a modified form. Understood in its unmodified form, this principle states that a law is appropriate when its provisions serve a legitimate goal and are suitable, necessary, and adequate for achieving that goal.

In the commission's view, *suitability* focuses not only on the goal of socialization as designated in Article 15, but also on additional goals in the interest of the public good (no. 142). The commission regards that requirement as fulfilled by the objectives of making affordable, adequate housing available; modernization, particularly with respect to urgently needed climate change adaptations (energy remediation); creating new affordable housing through the construction of additional storeys and redensification; promoting urban development that serves the common good; allocating the available dwellings without discrimination; and preventing homelessness by eliminating or constraining evictions. These are "important issues of public interest" as established, for example, in Article 28 of Berlin's state constitution and in international law in Article 11 of the International Covenant on Economic, Social, and Cultural Rights (no. 148).

A majority of the commission members reached the conclusion that socialization promotes all of these objectives (nos. 151–159). Even renters of unaffected dwellings would probably benefit from socialization. Stable or even declining rents for an estimated 220,000 units — which amounts to 13.5 percent of all rental units in Berlin — would have a damping effect on the overall rent level via the local rent index (no. 156).

The goal of the *necessity* test is to evaluate whether less drastic means would achieve the same objectives. To that end, the commission discussed which measures have been or could be taken to combat the housing crisis. These include new construction, particularly of public housing, at a scale comparable to socialization, or even the Berlin model of cooperative land development. The commission concluded that these steps would not be equally effective

(nos. 160–170). It suspects that increasing new construction would primarily produce expensive apartments (no. 163). The Senate Department for Urban Development reported that it could build 200,000 public housing units, but only one quarter of the land required was state-owned (no. 164). A policy based on housing construction, as in the Berlin model of cooperative land development, has "had little effect in recent years" (no. 165).

By contrast, comprehensive public housing management — with housing distribution, rent legislation, and restraints on termination — would have an effect, but that could not be regarded as less drastic, because it affects all renters (no. 167).

Likewise, a majority of the commission members concluded that socialization is also constitutional with regard to the *adequacy* test (no. 171–174). In this case, the interests of homeowners and beneficiaries, the public interest in question, and the urgency of the need for housing are evaluated. Regarding the need for housing, the committee emphasizes that incomes have not kept up with rents. Basic rent in Berlin more than doubled between 2008 and 2022 (no. 189), while the real wages index increased by only 11.4 percent between 2012 and 2018 (no. 190). Over 48 percent of Berlin households spend more than 30 percent of their net income on their rent, heating, and maintenance expenses. The commission concluded that socialization of dwellings would make it possible to offer more affordable apartments to low- or middle-income people who are looking for a place to live and thereby offset the socio-spatial divide.

This means that the majority of commission members clearly believe that the principle of appropriateness is only applicable in a modified form. They provided an impressive illustration of how the socialization plan pursues the public interest in a suitable, necessary, and adequate way.

... AND WILL OFFER COMPENSATION BELOW MARKET VALUE

It is the opinion of a majority of the committee members that socialization can be compensated below market value. With respect to the nature of compensation, case law says that compensation may be monetary or in another form, such as bonds.[7] These may also be issued by a public-law institution (no. 224). The Basic Law's debt limit would not directly affect their borrowing (no. 227).

With respect to the *extent* of compensation, the commission refined the distinction between compensation for socialization and for expropriation. Unlike expropriation, socialization is not a matter of legally recognizing the interests of the owners and providing a comparable object as a replacement, which is why market value is normally taken as a starting point (no. 227). This figure reflects future revenues derived from private sale. But precisely this is beside the point in the event of socialization, because socialization seeks to override private sale (no. 229).

In particular, the commission discussed three other approaches to determining the amount of compensation. Seven members believe that compensation proportionate to the revenues derived from public sector management would be feasible (no. 231). Eight members believe it is permissible to take financial sustainability through public investment into account (no. 236). And eight members believe it is possible to establish a hypothetical market value based on potential limiting factors (no. 241). In concrete terms, this could mean looking at less drastic tools for public management of housing and assuming rents that can be funded for lower and middle incomes. This hypothetical market value could then be set as a compensation amount (no. 243).

If, contrary to the majority opinion within the commission, market value is treated as the starting point, it should nonetheless be calculated with reductions (no. 244). It is up to the legislature to decide how such reductions are determined (no. 247). In doing so, it must keep in mind the share of the object's value that can be ascribed to the affected owner's own activity (no. 248). This means that increases in value during their ownership period do not necessarily need to be compensated if they cannot be ascribed to the owners' own labour or financial expenditures, such as for improvements to the object (no. 249). An increase in value owing to market dynamics does not involve the owner's own activity and therefore need not be compensated. Consequently, the original purchase price could consistently apply, with any increases in value incorporated in the title acquisition (no. 250). Moreover, it should be noted that dwellings are very important to their tenants, so the degree of social connection that justifies reductions must be looked at very closely (no. 252–256).

NO VIOLATION OF THE BERLIN STATE CONSTITUTION

The commission sees no violation of Berlin's state constitution, even though the Berlin constitution does not stipulate any power of socialization. A majority of the commission members believes that the Berlin constitution's property rights guarantee does not exclude socialization (no. 344).

Article 1, Paragraph 3 of the Basic Law is binding on state power and thus also on the power of the individual *federal states*. In the event of a conflict between state and federal legal standards, Article 31 of the Basic Law stipulates that federal law overrides state law. The Federal Constitutional Court has recognized one exception, namely in cases where a state's basic rights conflict with the constitution, but do not include any deviating content.[8] The commission did not have recourse to this exception for the present case. The majority of the commission members do not believe that any second exception exists. According to Article 142 of the Basic Law, states' basic rights remain in effect whenever they guarantee basic rights in accordance with Articles 1 through 18 of the Basic Law. Therefore, a state-level constitutional guarantee of property cannot nullify Article 15 of the Basic Law. The fact that Berlin's state constitution does not provide enforcement powers comparable to those found in the Basic Law cannot exclude socialization in accordance with Article 15.

THE 3,000-UNIT LIMIT AND THE PRINCIPLE OF EQUAL TREATMENT (ART. 3 OF THE BASIC LAW)

The referendum made an exception for housing stock belonging to housing associations that are cooperative, state-owned, or not-for-profit. The commission believes that this would be consistent with the principle of equal treatment, and therefore feasible. These housing associations are either not concerned with maximizing profits, or they at least preclude private utilization of profits (no. 276–279). This distinction from private housing companies warrants different treatment under the law.

If the legislature should opt for a limit of 3,000 units — after which point socialization comes into force — then this limit

must be determined transparently. The commission proposes two approaches. On the one hand, the decision could simply be based on the size of the individual housing company. On the other, the extent to which public or socialized housing is needed in Berlin could be determined first. The properties concerned could then be determined on the basis of this need, taking into account the efficiency of the use of public funds (no. 312).

The commission regards the 3,000-unit limit as compatible with the principle of equal treatment, if only the affected companies' stock in excess of the 3,000-unit limit is socialized (no. 296). Nine commission members also believe that it would be defensible to include all the housing stock in Berlin belonging to companies oriented toward capital markets (Section 264d of the German Commercial Code) (no. 279).

THE COMMISSION'S FINDINGS CANNOT BE IGNORED

The Berlin Senate is no longer governed by a left-wing coalition of the SPD, Die Linke, and the Greens, which was working on implementing the referendum result, but a centrist coalition of the SPD and the Christian Democrats. In their coalition agreement, the two parties agreed to work out a framework law on socialization. There is no argument against such a law, provided that it does not serve to delay implementation of the referendum result or to avoid implementing it at all. Furthermore, the commission's report is clear: no framework law is necessary and implementation can take place directly. The city would therefore have no justification for delaying implementation yet again, and should instead work toward implementing the socialization plan as quickly as possible.

The commission is explicit not only with respect to socialization, but also concerning compensation. It has stated very clearly that several forms of compensation exist and that they can be below market value. The purpose of socialization is precisely to withdraw a commodity from the logic of the marketplace. Making compensation dependent on market logic, and therefore market value, would be contrary to this purpose.

The debate in Berlin concerning the implementation of the referendum result cannot ignore these findings. Nor can they be disregarded with respect to future socialization plans outside of Berlin.

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1 Taheri, Rouzbeh, "Deutsche Wohnen enteignen. Ein Landesenteignungsgesetz auf Grundlage Artikel 15 Grundgesetz ist das Ziel, Rosa-Luxemburg-Stiftung, Standpunkte 8/2018. **2** Expertenkommission zum Volksentscheid Vergesellschaftung großer Wohnungsunternehmen. Abschlussbericht, June 2023, available at: www.berlin.de/kommission-vergesellschaftung. The margin numbers written hereinafter in parentheses (no.) refer to this report. **3** BVerfG, order dated 25 March 2021 – 2 BvF 1/20, 2 BvL 5/20, 2 BvL 4/20. **4** See, for example, the bill drafted by the Linke caucus in Berlin dated 6 March 2021, available at: www.linksfraktion.berlin/fileadmin/linksfraktion/download/2020/2103_Klausur_Vergesellschaftungsgesetz.pdf. **5** Depenheuer, Grundgesetz: GG, seventh edition, edited by von Mangoldt, Klein, and Starck, 2018, Art. 15, margin no. 40; see also Bryde, Grundgesetz-Kommentar: GG, sixth edition 2012, von Münch and Kunig, Art. 15, margin no. 18. **6** In the "pharmacist ruling" (Apotheken-Urteil) dated 11 June 1958, BVerfGE 7, 377, 400. **7** The Federal Constitutional Court established this in its 1968 decision concerning Hamburg's levee law (Deichordnungsgesetz), BVerfGE 24, 367, 419. **8** BVerfGE 36, 342, 363.

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