

Section 2, Paragraph 1, Sentence 3 German Property Law: is it unconstitutional?

Thoughts on the Goodwill Fund of the Jewish Claims Conference

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(Published in “Zeitschrift für offene Vermögensfragen”, November/Dezember 2008 p.277ff.)

Section 2, paragraph 1, sentence 3 German Property Law stipulates that the Conference of Jewish Material Claims against Germany, Inc. (JCC) enters into the rights of injured Jewish parties in the sense of section 1 paragraph 6 German Property Law if the Jewish entitled persons or their successors in interest did not claim themselves. Therefore this is regarding cases in which there were no heirs because the Nazis murdered entire families but also cases, in which the heirs for different reasons did not claim within the claim deadlines.

This means there are two different categories of claims which not only can be handled differently but should be handled differently for reasons which will be explained below..

The basic idea behind section 2 German Property Law is that not only the German state but also aryanizer should not benefit from the properties of persecuted Jews.(1)

But it was never intended to redistribute the Jewish properties as is the result of the practical application of the law and how the JCC deals with it.

As far back as World War II the idea grew that the Jewish People as a whole should make collective claims against Germany. In 1944 in Palestine Siegfried Moses published his book “Jewish Post War Claims”, in which he underlines that besides individual claims for restitution there has to be a collective claim, “based on Jewish individual claims where entitled persons are unknown or whose heirs have died, and on claims of Jewish communities and institutions which do not exist any more.” The Jewish people as a whole should be entitled as lawful heirs for the heirless properties of murdered fellow-believers. (2)

It was also seen that the restitution of looted properties alone is not enough to satisfy the idea of reparation.(3)

The Federal Republic of Germany took that into account with the Staatsvertrag with Israel and the contracts with the Claims Conference in 1952 and the laws of compensation and restitution.

Also in later negotiations and additional contracts with the JCC it has always been reconfirmed that Germany carries a special responsibility for the destinies of the persecuted Jews.

Back to section 2, paragraph 1, sentence 3: according to official explanations this rule is based on the thought that in no case should the German state benefit by the regulations of section 1

paragraph 6. But should this also lead to a redistribution of properties and thereby their expropriation?

Art. 14 of the German Constitution states: “The right of property and heritage are guaranteed.”

In my understanding with section 2, paragraph 1, sentence 3 German Property Law the legislator has taken away the right of heritage of Jewish beneficiaries and thereby the guaranty of property of art. 14 German Constitution (The same is true regarding the rigid application of section 30a Property Law).

These problems came up previously with the laws of restitution whose highest principle should be the reparation in favour of the persecuted. Nevertheless, when the claim was not made in the allocated timeframe, the legislator did accept that the damaged person or his heirs lost their rights to a succeeding organization. (This has been decided, however, by the Allies before the Constitution became effective.)

Discussing a decision of the BGH (Federal Court of Germany)(BGHZ 16, 350 ff.) the Oberstes Rueckerstattungsgericht (Supreme Restitution Court) Berlin came to the result that the legislator did prefer that the group of persecuted people of which the persecuted person was part did benefit from the restitution of the looted property and to reach that objective in certain cases the legislator has put the interests of the persecuted persons themselves aside. (4)

The damaged persons and/or heirs are of another opinion. They regard the JCC merely as a kind of trustee for themselves and regard the exclusion of their rights as a second or subsequent expropriation. In the literature it has been discussed whether the restitution to the JCC has been an expropriation of people persecuted because of race. (5)

With section 2 paragraph 1 Property Law the rightful heirs are excluded which is the reason why the JCC only after much pressure of the interested parties accepted to establish a good will fund from which the actual beneficiaries can participate. The JCC does not do that without strings and restraints as I have explained previously. (6)

Section 2 paragraph 1 Property Law should have been amended with the duty of the JCC, if not to search for the true heirs, at least to let them participate if they do make themselves known and furthermore without imposing a deadline.

Since such a rule is missing, the JCC has no legal obligation for such action (therefore “good will”). Least of all is JCC obligated to search for heirs. It is often resented that the JCC enters into legal proceedings against the heirs and litigates for the heritage. (7)

The intention of section 2 paragraph 1 sentence 3 Property Law has been the exclusion of the German state from the properties of persecuted Jews. Has this objective been reached at all? Naturally, the German state (that is the federal state, the Laender and the communities) had to be excluded only where he would have been the beneficiary. But also aryanizers should not benefit from looted Jewish properties. Section 1 paragraph 6 Property Law is valid independent of the person of the beneficiary.

If neither an entitled person nor the JCC made a claim pursuant to the deadline of 31.12.1992 or 30.06.1993 it still remains a loss of property due to persecution in favour of the German state and its citizens. This is indeed an unhappy result.

Often, even the text in JCC publications, gives the impression as if with Vermoögensgesetz the JCC automatically becomes the heir of the Jewish properties. But this is not true. The JCC can benefit from the stipulated lawful succession only when it has put forward a claim according to section 1 paragraph 6 Property Law before the respective deadlines.

As the JCC naturally was not able to put together all the necessary documentation for their claims in two years time, it was given the opportunity of a global (unspecified) claim. Shortly before the deadline of December 1992 JCC has made three such global claims at the Ministry of Justice.

At the beginning the offices of restitution of property dealt with those global claims rather liberally.

The federal government and the state governments agreed that all three global claims are valid. But this situation changed with the restrictive practice of the courts. (8)

First the 7th and following him also the 8th senate of the Federal Administrative Court negated the validity of global claims 1 and 2 completely and that of global claim 3 partially. (9)

Unfortunately I do not have any statistics as to how many JCC claims which have been refused due to late or insufficient specification concern private persons and how many the state. At least in the latter case based on the intention of section 2 paragraph 1 sentence 3 Property Law no rejection should have occurred. Here we have a contradiction between the noble intention on the one hand and the insistence on the formal needs of the Property Law on the other.

If the Federal Republic would have really meant the intention of reparation, a claim would not have been necessary at all when it was clear that the state has come into the possession of looted Jewish property.

There are people who are entitled and who did not make a claim after 1990 because they themselves or their ancestors had previously made claims according to the former laws of reparation. In previous times these claims have been rejected, because the property was outside the territory of the Federal Republic. The respective files are still at the office of reparation (now archive of the state of Berlin), at the office of restitution and also at the federal archives.

If the Federal Republic would have seriously wanted Jewish looted properties not to fall into German hands wouldn't it have been possible and necessary to check the old files, pick up all the cases which have been rejected for the above mentioned reasons and open them again without the necessity of a new application? Perhaps the intent was meant to be serious but nobody thought of such a possibility.

Now, the former claims not only regard the relation of the entitled persons with the state and his offices of restitution, but also, as far as the JCC has claimed successfully up to 1992, the relation of the entitled persons with the JCC good will fund. As the JCC has created an April 2004 deadline, all claims have since been rejected regardless of the reason in the particular case.

The entitled persons did not make claims up to 1992 with AROV or later with the JCC for the possible following reasons:

- a) the original owner was still registered in the land register**
- b) a claim had already been made in the fifties or sixties**
- c) the heirs obtained knowledge of the properties beyond the deadline.**

Item c) is especially important today as it plays a big role in claims for the good will fund.

The internet provides much information about the JCC under www.claimscon.org. Under the headline “Property Restitution and the Successor Organization” the JCC homepage has information with respect to:

Overview

Process

Asset Recovery/Compensation/Sales

Goodwill Fund

Current Assets/Pending Claims

Issues Regarding Future Income

The Wertheim Property

An Overview of the future Needs of Survivors

Statement from Survivor Leaders Regarding the Claims Conference Goodwill Fund

Statement on Property List

According to these documents the good will fund was established to help former Jewish owners of property and their heirs, who did not make a claim within the timeframe in accordance with the German Property Law of 1990 and therefore legally were not entitled to the properties or the proceeds of their sale, whereas the JCC did claim in time. The former Jewish owners and their heirs should be able to participate via the good will fund in the proceeds of the JCC less costs of administration. For respective applications the JCC Board of Directors defined a deadline of 31.12.1998. In July 2000 the Board decided to accept certain applications which were made after 31.12.1998.

This declaration does not mention that the good will fund was established only after massive pressure from the concerned heirs and that at the beginning the policy was to pay out only a small percentage of the proceeds (50% max) to the heirs, according to the size of the proceeds where the percentage paid out became lower when the proceeds or compensations received were higher. (This systems reminds us of the heritage tax, where also the percentage of the tax increases when the estate increases.) Only after additional protests were made, a policy was established after which 80 % of the net proceeds were paid out.

It is said that the rules of the good will claim include applicants who made an application to the good will fund not after 31.12.1998 and who can prove that they would have been entitled by the Property Law if they had claimed up to the 1992 deadline.

This would mean that everyone would be included who can prove his right to heritage after German law. Unfortunately this is not the case, because heirs of side lines and testamentary heirs are excluded. (10)

The JCC informed the broad public about the possibility of participation in the good will fund by means of a major ad campaign, but which most certainly could not reach all entitled persons.

The 1998 deadline led to many cases of undue hardship so that a special committee had to deal with these, the so called late-comers, and had to accept exceptions.

Finally the pressure on the JCC became that strong that in September 2003 they had to publish a list of 59.198 names of former owners and their properties in the internet. This list also included objects which were given back to the JCC or for which the JCC got compensation as well as claims that had not yet been decided upon by the offices of restitution.

When this list was published on the internet, the JCC announced in a new media campaign in 100 Jewish publications around the world that the final deadline for applications to the good will fund would now be set on 31.03.2004. This decision was explained by arguing that for ten years applications had been accepted (which is not quite true, as between 1998 and 2003 only exceptions were admitted) and that if there would not be a final deadline, the JCC would be forced to stop funding programs for home care and other social services for needy Jewish victims of Nazi persecution.

This is indeed an important argument, which will be dealt with later. In this context one must also take into consideration that the majority of the members of the board who made that decision consisted of representatives of organizations which receive JCC funding.

In the argumentation for this decision it is said literally:

“The Claims Board of Directors, in making its decision on this subject, took special note of the fact that:

- The Goodwill Fund had been accepting applications for nine years.**
- There was uncertainty surrounding the ultimate number of applications that would be made to the Goodwill Fund.**
- Goodwill Fund applications were frequently for unclaimed properties that the Claims Conference had recovered and sold, with the funds allocated for critical programs to assist needy Nazi victims.**
- Funds not required for the Goodwill Fund needed to be determined with certainty and a decision made regarding the continuation of allocations for homecare and other social services for needy Jewish victims of Nazi persecution.”**

The JCC homepage also gives numbers. “As of December 31.,2006, the Claims Conference has paid approximately € 379 million under the Goodwill Fund. The Claims Conference has also set aside approximately € 146 million for future payments from the Goodwill Fund, and a further € 103 million has been designated for ‘Goodwill Fund and Other Uses’”.

Up to 31.12.2007 JCC paid out approximately EUR 520 million from the Goodwill Fund. For future payments 83 million have been set aside and another 146 million have been designated for “Goodwill Fund and Other Uses”. The difference between the two purposes is not clear, especially since the persons entitled to the goodwill fund do not seem to benefit from the eventuality of other uses.

It would be interesting to know, on what estimates the size of the funds set aside were determined. There are good will applications for which the JCC had already received monies and there are claims for properties which have not yet been decided by the restitution offices and where there it is not known whether there will be proceeds for the JCC at all.

The payments already made and the means set aside for future payments sum up to approximately 750 million EUR. On the other hand the JCC has received 1.6 billion EUR up to the spring of 2008. This figure results from the list published in August 2008 (Statement of property list). Critics of the JCC again and again argue the missing transparency of the activities of this organization which is vehemently countered by the JCC referring to their publications in the internet.

It is indeed impossible to find one's way through the different publications.

So, on 18.07.2008 the "Report on Current Assets/ Pending Claims of the Successor Organization" states, that the total income from sales and compensation up to 31.12.2006 was 1,5 billion EUR. Only a few weeks later, on 06.08.2008 it was stated that up to 31.12.2007 it was 1.862 billion EUR, meaning that the income in 2007 would have been 362 million EUR.

In a way, all the published data does not fit together. In the list published in August 2008, but announced already months before, the income from January 1993 up to 30th of April 2008 is stated as 1.683 million EUR. That means although four months are added more than 180 million are missing. Where did they go? Or was this income before 1993?

The list contains 11.513 objects on 193 pages, of which 93 being under a value of 100 EUR and another 532 objects under 1.000 EUR. Leaders in value are real estate in Berlin, one valued 75.6 million, another 88 million.

Unfortunately the list which contains addresses and monies received is not very user friendly. Not only because the list does not give the names of the former owners but mainly because it is not structured at all and contains in indiscriminate order (or is it in order of receipts of monies?) big cities and small villages, big and small sums, all mixed up.

An American Jewish organization, the Holocaust Survivors Foundation, therefore took the effort, to sort out the list. (11)

The 2003 list contained 59.198 names of former owners. The 2008 list contains 11.000 objects. As for some former owners several pieces of real estate have been claimed and in addition also companies, the number of objects should be much higher.

It is true that the 2003 list also indicates positions for which no monies have been received up to April 2008.

The "Report on Current Assets" states as 13.647 the number of applications to the Goodwill Fund received before 31.03.2004. At the same time it is said that approximately 747 million EUR or 40% of the income has been paid out to persons entitled for the Goodwill Fund or are designated for that purpose. (100% = 1.862 billions)

Also interesting, but unclear are the numbers regarding pending claims and those already decided. There are only small differences between the data published in the internet on

18.07.2008 (as of 06.06.2007) and on 06.08.2008 (as of 14.05.2008). According to these there are 54.742 claims for real estate and 66.364 claims for company assets. (12)

Regarding real estate, it is said that 49.373 cases have been decided, of which 7.546 positively (it is hard to imagine a quote of rejection of 85%), 5.369 are said to be pending. Regarding company assets, 33.926 cases are said to have been decided, of which 4.536 positively (here we have a quote of rejection of almost 87%), 30.438 cases are said to be still pending. (But 66.364 minus 33.926 is 32.438, that means 2000 cases have been lost).

It is hard to understand those figures when they are compared with the statistics of the Bundesamt fuer zentrale Dienste und offene Vermoegensfragen (BADV = Federal Office for central services and unsolved property questions). The BADV publishes statistics every six months of cases regarding section 1 paragraph 6 Property Law and the NS-Verfolgtenechtschaedigungsgesetz (Compensation Law for Nazi Victims). (13)

Not only is there no consistency in timing. The BADV reports 38.112 companies (of which 11.028 with real estate and 27.084 without) as registered properties. In contrast to these numbers the JCC had reported 66.364 companies. As the cases after section 1 paragraph 6 Property Law at the BADV do not only concern claims of the JCC, the BADV should have a bigger number of cases compared to JCC, instead of 38.112 maybe twice this number.

The differences get even more significant, when we compare the numbers of the decided cases. While the BADV has decided 13.756 cases, not all of which could be JCC cases, JCC reports 33.926 cases as decided. Who decided those additional 20.000 cases?

According to the figures of the BADV only 1.816 cases have been rejected. But according to the JCC from 33.926 cases only 4.536 have been decided positively, meaning that 29.390 claims should have been rejected.

Regarding real estate the picture is similar. First of all it should be taken into account that the BADV is talking about lots (Flurstuecke) registered in the land register whereas the JCC is talking about pieces of real estate.

According to the JCC statistics 54.742 pieces of real estate have been applied for, the BADV had registered 142.727 lots. This relation could be a fact as a piece of real estate could consist of more than one lot and not all applications after section 1 paragraph 6 have been made by the JCC. Nevertheless the picture looks different, when one only considers the numbers of decided cases and then again looks at the positive and the negative decisions.

According to the JCC there are 49.373 decided cases, that is 90%, according to the BADV there are 52.529, that is 37%. Is it possible that the JCC had been treated with preference by the offices of restitution, as the BADV figures also include the cases formerly decided by AROV and LAROV. (There were three levels of deciding bodies, on the local level = AROV or Amt zur Regelung offener Vermoegensfragen, on the state level = LAROV, i.e. Landesamt zur Regelung offener Vermoegensfragen, and on the federal level = BAROV, i.e. Bundeamt zur Regelung offener Vermoegensfragen. BAROV later was replaced by BADV.)

The JCC is talking about 7.546 positive decisions, being only 15% of the decided cases. Unfortunately there are no comparable figures of BADV, as their numbers are including 40.949 decision of the states (Laender) without information as to whether those have been negative or positive decisions.

I have talked about this discrepancies with both BADV and the JCC and suggested a consolidation of the numbers without receiving positive responses. The JCC only argued with the different parameters resulting in both statistics not being comparable.

Despite different parameters it should be stated, that one of the two figures must be wrong. JCC has reported per 06.06.2007 48.368 decided cases. That must be at least 48.368 lots, but probably more as one case can concern more than one lot. BADV has decided per 31.12.2007 only applications for 42.964 lots, which could be no more that 42.964 claims.

It would certainly be good for the reputation of JCC if their reports were supported by official figures of the BADV.

The 1,6 billion EURO received by the JCC up to today (and naturally all the future income as well) are partly assets which are really without heirs and partly assets for which heirs have been claimed at JCC or could do so in the future. Nobody knows the size of the respective parts.

If the JCC accepts further claims for the Goodwill Fund, as the late coming heirs are asking for, according to the arguments cited above millions of EUR could be missing for social purposes. This presumption supposes that all further applications are concerning monies which have already been received whereas they could also regard cases which have not yet been decided and therefore nothing has been received up to now. Irrespective of how much would be missing for social purposes, the question remains, is it justified to make other victims of persecution pay for that and not to apply to those who have caused the suffering. Wouldn't that be a task for the special emissary of the JCC, former US special ambassador for questions of the Holocaust, Stuart Eizenstat. (14)

As the JCC has been granted the right to also claim for assets for which there are heirs who could eventually be found, in my point of view the question is valid whether in these cases JCC should only have the role of a trustee. I even say that the legislator would have been obligated to make such a reservation.

This is based on Art. 14 German Constitution. The way section 2, paragraph 1 sentence 3 is formulated and obviously understood by JCC , it is an expropriation of Jewish owners respectively their heirs. Therefore this regulation is unconstitutional as the Constitution guarantees the right of ownership and heritage.

Remarks

- 1) This has been pointed out by Rodenbach in: Herrmann-Josef Rodenbach, Aenderungen im EntschaeDIGungsrecht fuer NS-Verfolgte, Neue Justiz 11/2005, p. 486 ff.**
- 2) Cited after Stefan Minden, Sonderrechtsnachfolge und Praxis der Claims Conference als Nachfolgeorganisation im Vermoegensgesetz, in: Deutsch-Israelische Juristenvereinigung e.V., Mitteilungen aus dem Verein, Ausgabe VII, July 1999, p. 33 ff.**
- 3) idem, p. 34**
- 4) Cited after Elisabeth Link, Stefan Minden, Juergen Roth, Die Berechtigung der Jewish Claims Conference bei Grundstuecken, deren juedischer Alteigentuemmer noch im Grundbuch eingetragen ist – Eine Erwiderung, ZOV 5/1993, p. 323, 325**

- 5) Look at Thomas Mueller-Magdeburg, Andreas Giese, Die Berechtigung der Jewish Claims Conference bei Grundstuecken, deren juedische Alteigentuemern noch im Grundbuch eingetragen ist – oder: Rueckuebertragung an die JCC als Enteignung der rassistisch Verfolgten?, ZOV 3/1993, p.138 ff.
- 6) Fritz Enderlein, Was es mit den Richtlinien und Fristen des JCC-Goodwill Programms auf sich hat, Juedische Zeitung, August 2008, p.2 (see www.j-zeit.de/archiv/artikel.1386.html).
- 7) Regarding this there have been a lot of critical publications in press and TV, especially in Israel, which however partially have been presented not objectively which is the reason why JCC was forced to sue the Jerusalem TV journalists Orly Vilnai-Federbush and Guy Meroz, look up www.haaretz.com/hasen/spages/1024460.html
- 8) Details at Rodenbach, cited above
- 9) BVerwG 23.10.2003, 7 C 62.02; BVerwG 24.11.2004, 8C 15.03, ZOV 2/2005
- 10) Look at remark 6
- 11) <http://hsf-usa.org/restitution.html>
- 12) Report on Current Assets/ Pending Claims of the Successor Organization, www.claimscon.org/index.asp?url=successor_org/current_assets
- 13) www.badv.bund.de. As the above mentioned figures of JCC relate to 14.05.2008, this date is nearest to 30.06.2008
- 14) http://www.focus.de/politik/ausland/juden-us-sonderbotschafter-wird-sonderbeauftragter-fuer-ns-opfer_aid_344582.html
