

# Expropriation pursuant to § 30a of the Property Act

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In my article "§ 2, para. 1, sentence 3 of the Property Act: Is it unconstitutional?"<sup>1</sup> I expressed my opinion that this passage in the Property Act is indeed unconstitutional because it infringes upon the right to inheritance, which is related to the constitutional right to property ownership (Article 14, German Basic Constitutional Law). Up until now, the reaction to my article has been limited. The opinions expressed by my colleagues were unanimous. They all said, "You are right, but you should have written the article 15 years ago. Today, this issue only has historic relevance." I do not agree, however, and will give reasons for my position further on.

First, I want to present another set of circumstances in which there was an expropriation of Jewish property in favor of the Jewish Claims Conference (JCC) as a result of the Property Act. The focus is on the rigorous application of § 30a of the Property Act in regard to claims submitted by private persons and contemporaneous exceptions for the JCC.

The justification of a preclusive time limit has been argued by legislators as well as in court decisions based on the necessity of legal certainty in real estate transactions. This has been criticized in several cases by commentators. Practical examples cited in this professional journal have shown that this argument is not valid if the case focuses on restitution and not the return of title.<sup>2</sup>

Nevertheless, § 30a of the Property Act is strictly applied in decisions regarding restitution. The policy of the Federal Republic of Germany is completely different when it comes to the loss of art objects. In these cases, a deadline is clearly regarded as unacceptable.<sup>3</sup>

A decision by the BADV (Bundesamt für zentrale Dienste und offene Vermögensfragen / Federal Office for Central Services and Unresolved Property Issues) from 2009 states: "Although an application was submitted by the legal successors of G.M. and W.R. for the return of title for the property and business assets of a former factory, it was rejected by a final decision from the Brandenburg LAROV (Landesamt zur Regelung offener Vermögensfragen / State Office for Unresolved Property Issues) from 21 May 1997 due to an expired deadline. Therefore, according to

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<sup>1</sup> Fritz Enderlein, "§ 2, para. 1, sentence 3 Property Act: Is it unconstitutional? Thoughts on the Goodwill Fund administered by the Jewish Claims Conference", ZOV 6/2008, page 277

<sup>2</sup> Gerhard Brand, Extension for those who missed the application deadline specified in § 30a of the Property Act, ZOV 6/1997, page 402

<sup>3</sup> State Secretary of Culture Bernd Neumann in an interview with the German weekly magazine Der Spiegel: "The government's position is clear: There will be no deadline." <http://www.spiegel.de/international/germany/0,1518,druck-594232,00.html>

§ 2, para. 1, sentence 3 of the Property Act, the JCC is regarded as the legal successor to the injured party and deemed the applicant in this retransfer case.”<sup>4</sup>

In this case, a return of title was excluded for several reasons, i.e., the focus was purportedly “only” on compensation. Legal certainty in real estate transactions is irrespective of whether compensation is paid to the JCC or to the natural heirs.

By now it should be clear to all reasonable jurists that in cases of compensation payments, there is really no need to strictly apply the deadline. But even in cases of return of title, a strict application of § 30a Property Act is not justified in cases where legal certainty cannot be achieved because a competing claim from the JCC has not been finally decided.

The heirs had submitted their claim in early 1993; the JCC claim was submitted on 4 March 1992 with a date specification of 3 March 1994. The JCC claim was not decided until 2007, 15 years after the application was submitted. The claim submitted by the heirs was filed only a few months after the deadline, but the competent authority needed another 15 years to re-establish legal certainty through retransfer.

It is obvious that such an application of the Property Act infringes on the rights of inheritance of the Jewish entitled persons and is regarded by many as unacceptable. It is practically impossible to make the heirs understand why they have been excluded when a final decision took another 15 years time.

Even when Jewish entitled persons submitted their claim on time, the property offices have decided in favor of the JCC if the claimants did not present all inheritance certificates before the deadline. (The State Office for Unresolved Property Issues is not to blame when the JCC sells a retransferred property before the decision is final and binding.) One special aspect of this case was that the original owner was still registered in the land register.

Similar to the compensation cases are the situations in which proceeds have to be paid out. When a property has been sold under the provisions of the Precedence of Investments Act (*Investitionsvorranggesetz*) the entitled person has a right to receive the proceeds of the sale according to § 16. However, in these cases the application must be submitted prior to the deadline specified in the Property Act. I know of several cases that were still pending in 2009 in which the proceeds went to the JCC and not paid out to the heirs who submitted their claim in 1993. This clearly involves expropriation in favor of the JCC.

In 2006, the JCC was again given the option to submit applications for compensation<sup>5</sup>. Natural persons and their heirs were denied this same option, which in my opinion is a violation of Article 3 of Germany's Basic Constitutional Law. As one of my clients stated in a letter to the JCC after his

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<sup>4</sup> C 3.06-2-1867/07

<sup>5</sup> See Hermann-Josef Rodenbach, *Änderung im Entschädigungsrecht für NS-Verfolgte* (Change in the restitution law for NS persecutees), *Neue Justiz* 11/2005, page 486

application for participation in the Goodwill Fund had been rejected: "It wasn't the JCC that was persecuted by the Nazis, it was the Jewish entitled persons and their heirs."

Most Jewish heirs do not understand why their right of inheritance has been denied in this way. Being aware of this situation, and in line with the considerations published in ZOV issue 6/2008, I asked the German Minister of Finance and Minister of Justice to use their influence and encourage the JCC to stop rigorously rejecting applications for participation in the Goodwill Fund simply because of expired deadlines.<sup>6</sup>

Both ministries rejected my proposal saying that they do not want to interfere with the internal affairs of the JCC. Either the ministries did not understand the problem or they did not want to disrupt their peaceful relationship with the JCC. Exerting their influence on the JCC would have at least been an attempt to partly compensate Jewish heirs for the injustice done as a result of the Property Act. It would have given the entitled heirs a chance to possibly recover 80% of their property. I want to thank Mr. Schmidt, Chairman of the German Federal Parliament Legal Committee, who at least talked with JCC executives.

Perhaps another amendment to the Property Act should be proposed (which would be revision number 20). According to JCC statistics, there are more than 30,000 claims still pending.<sup>7</sup> But not all of them are filed by latecomers. (A retroactive revision of decided cases would be difficult in theory, and hardly possible in practical terms. Nevertheless these claims should also be kept in mind.)

According to § 2, para. 1, sentence 3 of the Property Act, "If claims by eligible Jewish persons within the meaning of § 1, para. 6, or their legal successors are not brought forth, then ... the Conference on Jewish Material Claims against Germany, Inc. is considered the legal successor."

The following amendment to the Property Act is conceivable: "Insofar as Jewish entitled persons or their legal successors apply to the JCC after the deadlines of the Property Act, the JCC is deemed a trustee for these entitled persons and must allow them to receive a commensurate share of the proceeds or compensation."

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<sup>6</sup> See Fritz Enderlein, "Was es mit den Richtlinien und Fristen des JCC-Goodwill-Programms auf sich hat" (What the guidelines and deadlines of the Goodwill Program are all about), Jüdische Zeitung, August 2008, page 2.

[www.j.zeit.de/archiv/artikel.1386.html](http://www.j.zeit.de/archiv/artikel.1386.html)

<sup>7</sup> see [http://www.claimscon.org/index.asp?url=successor\\_org/current\\_assets](http://www.claimscon.org/index.asp?url=successor_org/current_assets)