The Supreme Constitutional Court and § 30a of the Property Act

Prof. Fritz Enderlein, Attorney at Law, Potsdam

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One year ago, I described how § 30a of the Property Act combined with § 2 para. 1 sentence 3 of the Property Act resulted in an unconstitutional expropriation of eligible Jewish persons.[1] This was objected to by the German Ministries of Finance and Justice responsible for restitution and for application of the Property Act.[2]

They claim that § 30a of the Property Act is in conformity with the constitution. This is based on decisions made by the Supreme Constitutional Court. In the following, I will take a closer look at these decisions. I would like to emphasize that I am only interested in claims based on the § 1 para. 6 of the Property Act when the eligible person has missed the deadline and the Jewish Claims Conference (JCC) has filed an application for the same assets.

Germany's Supreme Constitutional Court (Bundesverfassungsgericht) has dealt with § 30a of the Property Act on three occasions times, namely on 20 October 1998, 10 January 2000 and 14 August 2004.

The decision dated 20 October 1998, 1 BvR 1730/98 – ZOV 1999, 23[3] was related to a constitutional complaint against a verdict by the Federal Administrative Court (Bundesverwaltungsgericht) in which a restitution claim was rejected because the application was submitted after the deadline as specified in § 30a para. 1 sentence 1 of the Property Act. This constitutional complaint was not accepted for a hearing by the Supreme Constitutional Court and the explanation given is disappointing.

The Federal Administrative Court has repeatedly expressed the opinion that restitution claims are not covered by the property ownership guarantee in Article 14 of Germany's Basic Constitutional Law (Grundgesetz). This applies to claims submitted on time as well as to those filed late. But even if restitution claims were covered by the property ownership guarantee, this is regarded by the court as a valid ownership regulation in accordance with Article 14 para. 1 sentence 2.

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1) Fritz Enderlein, Enteignung durch § 30a VermG (Expropriation pursuant to § 30a of the Property Act), ZOV 5/2009, 219

2) Fritz Enderlein, Wiedergutmachung, die an den Opfern vorbeigeht: Warum die Bundesregierung endlich handeln muß! (Restitution bypasses victims: Why the German government needs to take immediate action!) ZOV 4/2010, 170, *173*.

3) Quoted here from www.bundesverfassungsgericht.de/Entscheidungen/rk19981020_1bvr173098.html.
Also printed in RGV under G 174.

The complainant was of the opinion that the expiry of the deadlines specified in § 30a of the Property Act does not only lead to a formal and legal preclusion of the application. It also means that the entitlement is lost. The regulation thus aims at a complete withdrawal of concrete subjective legal positions, which constitutes a direct intervention into the substance of the ownership and thus exceeds the limits of the rights of ownership in accordance with Article 14 para. 1 sentence 2 of Basic Constitutional Law.

The purpose of § 30a para. 1 sentence 1 of the Property Act, i.e., to remove investment hindrances, is not put into question, because according to the complainant, investments in the properties under dispute are unlikely. Thus, rejecting the application constitutes an unacceptable hardship.

Unlike the Federal Administrative Courts, the Supreme Constitutional Court believes that restitution claims are protected under Article 14 para. 1 of Basic Constitutional Law – regardless of the fact that restitution entitlements only have their root in the rule-of-law and social state principle. The question of whether this protection applies exclusively to claims submitted on time (according to Fieberg/Reichenbach/Messerschmidt/Neuhaus), or if it also applies to those submitted after the deadline (according to Wasmuth), remains open. In any case, the preclusive period is a valid provision of content and limits of ownership in accordance with Article 14 para. 1 sentence 2 of Basic Constitutional Law.

With regard to my issue, this means that, according to the Supreme Constitutional Court, claims submitted by the JCC on time are covered by the ownership protection of Article 14 of Basic Constitutional Law. But whose assets are being protected? The assets of the persecuted Jew? Based on the wording of the Property Act, these assets are now awarded to the JCC. In other words, the property of the persecuted person or his heirs is expropriated in favor of the JCC.

The Federal Administrative Court (in agreement with the Supreme Constitutional Court) does not regard the application of § 30a of the Property Act as an expropriation. This is because, under the given circumstances, the relevant claim would have to be submitted separately anyway and its forfeiture could be easily prevented by the eligible person within a reasonable period time.

It is clearly acceptable that, in some cases, the right to restitution has to be asserted separately, for example as in the case of a persecuted person being forced to sell the property. The situation is different for expropriations and forfeiture of assets resulting from the implementation of the Reich Citizenship Act (Reichssbürgergesetz)[4]. In this case, an official return without application was conceivable. Besides, an application would not be required if the Jewish owner was still listed in the land register.[5]

[4] One of the Nuremberg Race Laws depriving Jews of German citizenship.
[5] See footnote 2

Let’s look at the issue of a reasonable deadline. Experience has shown that thousands of eligible Jews missed the deadline because they knew nothing about a deadline, nor were they aware of their family’s financial circumstances. Eligible persons from oversees were still coming forward as late as 2010 because they had failed to submit an application – for understandable reasons. Their unawareness, however, is not their fault. It is ultimately due to persecution in fascist Germany. According to the Supreme Constitutional Court, the application deadline is justified due to important reasons that are in the public interest. Apparently, the provisions of § 3 para. 3 sentence 1 of the Property Act that subject the person with power of disposition to restrictions on disposal of the property until the completion of the restitution procedure, led to a significant impairment of legal recourse and therefore hindered investments in Germany's new federal states. Although by means of the investment priority process potential investors had the option to sidestep restrictions on disposal following the filing of a restitution claim, such a process was regarded as too time-consuming (although still much quicker than the process of going through the property offices) and not without risk.

“Under these circumstances, the legislature found it necessary, in the interest of ensuring a prompt conclusion for pending cases and the removal of the associated investment hindrances, to introduce a deadline for restitution claims by ratifying a second amendment to the law governing changes to property rights (Vermögensrechtsänderungsgesetz) from 14 July 1992…”

How could a deadline affect the prompt conclusion of a pending case? Surely what is meant is that a case cannot be concluded if successive applications are submitted for the same assets. This may be true if, after one application is submitted on time, further applications are filed for the same object after the expiry of the deadline. This does not apply in reference to the relationship between eligible Jewish persons and the JCC.

“In the interests of economic development in the new federal states, this deadline is intended to promptly bring about legal clarity and certainty along with assurance for the person with power of disposition that the assets belonging to him, or to which he has the power to dispose of, are no longer subject to disposal restrictions in accordance with § 3 para. 3 sentence 1 of the Property Act after the expiry of the application deadline…” ?

Of course, the assets are still subject to the restrictions mentioned above after the expiry of the application deadline. This is the case until the case is finalized. Experience shows that this can take a long time, especially after, in the interest of speeding things up (!), all proceedings relating to § 1 para. 6 of the Property Act have been placed under the authority of the Federal Office for Central Services and Unresolved Property Issues (BADV).

"…or that at least, in addition to the previously submitted claims, no other claims may be filed that would delay clarification of ownership. This legislative purpose justifies the setting of a suitable deadline as necessary to bring about the desired result."

This does not apply when it comes to the relationship between eligible Jewish persons and the JCC. Allowing applications to be submitted **after completion of a case** that has been decided in favor of the JCC would bring about difficult, but not unsolvable problems. However, I do not see any problem in a case that is still ongoing. When the JCC applies for an asset, it needs to be clarified whether this asset belonged to a Jewish person and whether it was expropriated in conjunction with persecution. A subsequent application by the persecuted person requires no additional clarification and would thus not prolong the proceedings. Even when the focus is on proving a person's right as an heir, all required documents could be furnished while the case is in progress. I know of several cases in which eligible Jewish persons submitted applications in spring of 1993. These applications were rejected because they were submitted after the deadline. Decisions regarding the application(s) submitted by the Jewish Claims Conference are still pending.

The courts make an exception to strict adherence to the deadline period only if in a specific case it was not possible to submit an application on time due to wrongdoing by the state. With regard to eligible Jewish persons, it is not about specific individual cases. Cases of wrongdoing by the state – not the current one, but the one preceding it – obviously include the persecution and murder of millions of Jewish citizens. Although no one though of this when they were setting the deadlines.

In summary, the justification of the deadline (with the restrictions mentioned) may apply to the return of real estate, but it has no bearing on applications for compensation[6] or for business assets. But even in cases where real estate is involved, late applications would not play a role if it was only a question of paying out the proceeds and the real estate was sold in line with the investment priority process.

The Supreme Constitutional Court deals with the constitutionality of § 30a of the Property Act as it applies to compensation in its decision from 10 January 2000 – 1 BvR 1398/99 – and once again justifies the introduction of an application deadline.[7]

This case concerned complainants from France who missed the deadline because, by the end of 1992, they were not certain where the real estate was located and only found out later. The complainants evidently believed that the 31 December 1992 deadline introduced in July 1992 was too short and that it constituted a wrongdoing on the part of the state. What's more, foreigners

[6] Gerhard Brand, Nachsichtgewährung bei Versäumung der Anmeldefrist des § 30 a Vermögensgesetz (Granting allowances when deadlines specified in § 30a of the Property Act have expired), ZOV 1997, 402

[7] Quoted here from www.bundesverfassunggericht.de/Entscheidungen/rk20000110_1bvr139899.html. Also printed in RGV under G 211

should have been given privileged treatment similar to § 8 of the Property Act. The constitutionality of § 30a of the Property Act was also cast into doubt with respect to paragraph 1 sentence 4 (I will return to this later).

All arguments were rejected by the Administrative Court and, following the non-admission complaint by the complainants, by the Federal Administrative Court as well.

In their constitutional complaint, the complainants criticized the violation of Article 2 para. 1, Article 3 para.1, Article 14 and Article 103 para. 1 of Basic Constitutional Law. They maintained that, in particular, the decision from 20 October 1998 cannot be carried over to compensation claims.

As in the previous case, the Supreme Constitutional Court rejected the constitutional complaint on the grounds that it was too unlikely to succeed.

The decision from 20 October 1998 refers explicitly to claims for return of title. In the case of compensation claims, however, the same purportedly applies, because the preclusive period for compensation claims is justified by important reasons of public interest. It is not about removing investment hindrances and ensuring legal relations. The preclusive period is (and now I would like to quote verbatim) "however introduced first and foremost to promote a speedy conclusion of property law proceedings … This equally applies to restitution and compensation claims. Because of the great number of applications submitted before the second amendment to the law governing changes to property rights (Vermögensrechtsänderungsgesetz) and the significant additional workload for the responsible authorities, a preclusive period had to be introduced to ensure that the applications are processed as quickly as possible. Furthermore, with regard to compensation claims, the legislature, for fiscal reasons and for reasons of financial planning, was interested in gaining as precise an overview as possible of current claims for compensation … This purpose, given the strained budgetary situation, justifies the preclusive period for compensation applications, which is suitable and necessary to achieve the desired result." Please excuse the long quotation.

A closer look at this line of reasoning reveals that it cannot hold up against critical analysis. Of course, we are wiser in 2010 than we were in 1992. Would anyone have believed at the time that, by 2010, only 48% of all cases concerning Jewish property would be complete? Compensation claims are still unresolved for more than 83,000 real properties and other assets including mortgages, along with more than 20,000 businesses, some of which include real property.[8] What happened to the speedy resolution of these cases? Setting deadlines obviously didn't help achieve this objective. It is unlikely that additional applications would have made the situation much worse.

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8) According to State Secretary Gatzer from the Federal Ministry of Finance in his talk "Responsibility to history – restitution and compensation for Jewish property in Germany" at the ceremonial event on the occasion of the 20th anniversary of the Claims Conference on 18 March 2010

Applications for new properties submitted after the deadline clearly did not hinder the completion of ongoing cases. If multiple applications were submitted for the same assets, the delay would have been insignificant, since previous processing of the application would have already brought about some degree of clarification, if not a final resolution. When several parties applied for the same property, it was often enough to take a look at the land register to distinguish tenants from previous owners or to determine the chronological order of changes in ownership.

Considerations regarding financial planning were especially misleading. No conclusions can be drawn from the number of applications submitted. Indeed, the number of applications says nothing about how many of them refer to the same asset. In the past, there have been ten applications for the same property. Only after these applications have been processed (and this is the case with some of them!) is it possible to say whether a return of title is possible or if compensation is the only option. Until there is no way to determine whether the first aggrieved party and/or the second aggrieved party has an entitlement. The number of applications also says nothing about the monetary value of a property or how much compensation should be paid. If the number of applications submitted before the deadline served as the basis for estimates, it would have been easy to add, say, 10%, for possible further applications (for properties not yet applied for).

The number of applications says nothing about the eligibility of the applicants. Of the claims for property submitted by the JCC, 41,173 out of 49,092 completed cases (84%) were rejected. The percentage of rejections was even higher for companies (87%): 36,957 out of 42,627 cases were rejected (information as of 1 May 2010)[9]

Regarding the significant additional workload, it is only reasonable to ask whether this would justify withholding Jewish property without compensation. If it is part of Germany's reason of state to stand up for Israel's right to exist and its security, as was noted by Federal Chancellor Merkel, would it not also be part of the reason of state to make sure that reparations are granted to those who suffered a terrible fate and whose possessions were taken away? And those who, through no fault of their own, missed the deadlines?

Germany's Supreme Constitutional Court has also expressed an opinion on the ignorance of the complainants regarding the exact location of the property. Initially, applications that didn't identify the exact location were accepted. But § 31 para. 1 b of the Property Act, which requires authorities to request detailed information from applicants, was only introduced with the second amendment to the law governing changes to property rights (Vermögensrechtsänderungsgesetz). Thus a prior application is regarded as reasonable in all cases.

[9] See www.claimscon.org/index.asp?url=successor_org/current_assets

In this instance, the Supreme Constitutional Court clearly fails to recognize the practices of the property offices. Even before the addition of § 31 para. 1 b to the Property Act, the property offices asked applicants to specify the exact location of the real estate and, after a futile attempt to set deadlines, rejected the applications. An application for “a property on Friedrichstraße in Berlin that belonged to my grandfather Isidor St.” was out of the question.

However, in accordance with § 31 para. 1 of the Property Act, the public authority is formally obligated to clarify the issue. In my years of experience, I have yet to come across a single case in which a property office helped a restitution applicant locate a property. And the idea of searching for the heirs of Jewish properties apparently never occurred to the people working in property offices. In many cases, this would have been easy. The following appeared in a letter from a client from Argentina to the Petitions Committee of the German Federal Parliament: “If one considers the fact that, after their retirement, our parents received a pension from Germany, which required them to go to the German Consulate General in Buenos Aires each year to confirm that they were still alive, it shouldn’t have been difficult for the German authorities to find them.”

According to the Supreme Constitutional Court, having to meet the application deadline was a reasonable request for applicants who lived abroad. Their situation was not, according to the court, essentially different than that of applicants living in Germany. The Supreme Constitutional Court recognizes the fact that “…the introduction of the preclusive period less than two years after German reunification was not reported on, or did not receive the same amount of coverage as in Germany.” However, “…potential applicants abroad can reasonably be expected to ensure, for instance by hiring a lawyer, that they are notified in time about changes to the legal situation in Germany that could affect their claims to assets.”

What the Supreme Constitutional Court considers reasonable is, in fact, so unreasonable that all one can do is shake his head in disbelief. The judges apparently have no idea how difficult it is for lawyers in small towns or rural areas overseas to find out about the legal situation in Germany – never mind the fact that lawyers generally don’t work for free.

The Supreme Constitutional Court realizes that the introduction of deadlines by the legislature unavoidably leads to a certain degree of hardship. But they say that this can be objectively justified. If this justification is nothing more than the additional workload or planning security mentioned above, then I certainly do not share the opinion that § 30a para. 1 sentence 1 of the Property Act meets these requirements. Moreover, I agree with my clients who wrote to the Petitions Committee. “The events in Germany in the nineteen thirties and early forties, the Holocaust, and the actions taken against the Jewish population are crimes against humanity which, according to international law, are not subject to a statute of limitations.” Therefore, the fact that persecuted Jews are expropriated pursuant to § 30a of the Property Act cannot be justified.

The Supreme Constitutional Court considers the introduction of the preclusive period justified because the legislature could assume that "…nearly all of those eligible to apply had exercised this option, or at least had the opportunity to do so. In the interest of legal security and legal clarity, it was acceptable that the relatively few claims not submitted until 31 December 1992 were ultimately excluded."

If there were only a few claims left, why bother making an effort? If there were only a few left, there would have been no need to set a deadline. The decision by the Supreme Constitutional Court does not see it this way. According to the court, even if only a few claims were excluded, if there was an option to submit claims without a time limit, the marketability of many properties would have been limited. In the case of compensation, the amount to be paid would have been unforeseeable. I would argue that this amount was not only unforeseeable at the beginning of 1993 after the deadline, but is still unforeseeable today.

The other lines of argument in the decision adopted on 10 January 2000 with regard to § 8 of the Property Act or Germany's agreement with the U.S. is irrelevant in this context. The Supreme Constitutional Court ultimately confirmed to the Federal Administrative Court that the case in question did not constitute wrongdoing on the part of the state.

The decision of the Supreme Constitutional Court adopted on 14 August 2004 – 1 BvR 1249/04[10] – rejects a constitutional complaint against § 30a paragraph 1 sentence 4 of the Property Act and proffers no further arguments with regard to the previous decisions concerning the constitutionality of the introduction of a deadline.

All things considered, I am still of the opinion that the application of § 30a para. 1 sentence 1 of the Property Act in cases involving Jewish claimants and their expropriation in favor of the JCC[11] is legally, and ethically, unjustifiable.

[10] www.bverfg.de/entscheidungen/rk20040814_lbvrl24904.html

[11] See Fritz Enderlein, Ist § 2 Abs. 1 Satz 3 Vermögensgesetz verfassungswidrig? Gedanken zum Goodwill-Fonds der Jewish Claims Conference (§ 2 para. 1 sentence 3 Property Act: Is it unconstitutional? Thoughts on the Goodwill Fund administered by the Jewish Claims Conference), ZOV 6/2008, 277 ff.