

§ 2, para. 1, sentence 3 of the Property Act: Is it unconstitutional?

Thoughts on the Goodwill Fund administered by the Jewish Claims Conference

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According to § 2, para. 1, sentence 3 of the Property Act, the Conference of Jewish Material Claims Against Germany, Inc. (JCC) is authorized to assume the position of legal successor for injured Jewish parties as defined by § 1 para. 6 of the Property Act if the Jewish entitled persons or their successors did not submit a claim based on the stipulations of the Property Act. This also applies to cases in which there were no heirs because the Nazis murdered all family members, as well as to cases in which, for various reasons, the heirs did not submit a claim prior to the specified deadline(s).

In other words, there are two different categories of claims that can, and should, be treated differently for the reasons outlined below.

The basic idea behind § 2 of the Property Act is to ensure that neither the German state, nor aryanizers should benefit from the properties of persecuted Jews.¹

However, the Property Act was never intended to redistribute Jewish properties as is the case through the practical application of the law and the way in which the JCC deals with it.

As far back as World War II, the idea arose that the Jewish people should make collective claims against Germany. In 1944, a book published by Siegfried Moses in Palestine titled “Jewish Post-War Claims” emphasized that, along with individual claims for restitution, there should be a collective claim based on Jewish individual claims where entitled persons are unknown or whose heirs have died, or claims from Jewish communities and institutions that no longer exist. He said that the Jewish people as a whole should be named as lawful heirs for the heirless properties of murdered fellow-believers.²

It was also been pointed out that the return of looted properties alone is not enough to satisfy the concept of restitution.³

The Federal Republic of Germany took this into account in the treaty with Israel as well as in the laws governing compensation and restitution, and the contracts signed with the Jewish Claims Conference in 1952.

¹ This has been pointed out by Rodenbach in Herrmann-Josef Rodenbach, Änderungen im Entschädigungsrecht für NS-Verfolgte, Neue Justiz 11/2005, p. 486 ff.

² From Stefan Minden, Sonderrechtsnachfolge und Praxis der Claims Conference als Nachfolgeorganisation im Vermögensgesetz, in Deutsch-Israelische Juristenvereinigung e.V., Mitteilungen aus dem Verein, Ausgabe VII, July 1999, p. 33 ff.

³ idem, p. 34

In subsequent negotiations contracts with the JCC, it has always been reconfirmed that Germany bears a special responsibility for the fate of persecuted Jews.

Returning to § 2, para. 1, sentence 3 of the Property Act, according to official explanations, this law is based on the belief that the German state should under no circumstances benefit from the rules outlined in § 1 para. 6. But should this lead to a redistribution of properties and ultimately to expropriation?

Art. 14 of the German Constitution states: “The rights to property ownership and inheritance are guaranteed.”

In my opinion, § 2, para. 1, sentence 3 of the Property Act denies Jewish beneficiaries the right to inheritance and thereby the inalienable right to property ownership as specified in Article 14 of the German Constitution. (The same applies to the rigid application of § 30a of the Property Act).

These problems were previously encountered with restitution laws based on the principle of compensation for those persecuted. Nevertheless, the legislature accepted this infringement of the rights of the injured parties or their heirs by assigning their rights to a successor organization when a claim was not submitted before the specified deadline. (However, this was decided by the Allies before the German Constitution became effective.)

Responding to an appeal of a decision by Germany’s Federal High Court of Justice (BGHZ 16, 350 ff.) the Supreme Restitution Court in Berlin came to the conclusion that the legislature gave preference to granting (collective) restitution to the group of persecuted people to which the persecuted person belonged by granting it the right to claim the looted property. As a result, in certain cases, the legislature failed to focus primarily on the interests of the persecuted individuals.⁴ The injured parties and their heirs disagree with the court’s decision. They regard the JCC simply as a trustee of the property or assets in question and view the denial of their rights as a second or recurrent expropriation. In the literature it has been discussed whether restitution of property claimed by the JCC is an expropriation of the people who were persecuted because of their race.⁵ The rules specified in § 2 para. 1 of the Property Act exclude the rightful heirs – which is why the JCC, reacting to pressure from the interested parties, decided to establish its Goodwill Fund for entitled persons. I have already explained in another article that the JCC did not do this wholeheartedly or without limitations.⁶

⁴ Elisabeth Link, Stefan Minden, Juergen Roth, Die Berechtigung der Jewish Claims Conference bei Grundstücken, deren jüdischer Alteigentümer noch im Grundbuch eingetragen ist – Eine Erwiderung, ZOV 5/1993, p. 323, 325

⁵ Cf. Thomas Müller-Magdeburg, Andreas Giese, Die Berechtigung der Jewish Claims Conference bei Grundstücken, deren jüdische Alteigentümer noch im Grundbuch eingetragen ist – oder: Rückübertragung 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, Jüdische Zeitung, August 2008, p.2 (see <http://www.j-zeit.de/archiv/artikel.1386.html>).

In my opinion, § 2 para. 1 of the Property Act should have been amended. The JCC should be required, if not to search for entitled heirs, to at least let them benefit from the Goodwill Fund when they submit a claim – without imposing a deadline.

There are no rules regarding this. The JCC has no legal obligation (which is why they call it “Goodwill”). The JCC is clearly not required to search for heirs. In many cases there is resentment against the JCC because the organization has gone so far as to take legal action against the heirs in an attempt to gain control of their inheritance.⁷

The objective of § 2 para. 1 sentence 3 of the Property Act is to prevent the German state from gaining control of properties once owned by persecuted Jews. Has this objective actually been achieved in any way?

The German state (including the federal states and municipalities) is only excluded in cases where it would otherwise have been named as the beneficiary. At the same time, it is important to ensure that aryanizers do not benefit from looted Jewish properties. However, § 1 para. 6 of the Property Act applies regardless of who the beneficiary is.

If neither an entitled person nor the JCC submitted a claim before the deadlines on 31 December 1992 or 30 June 1993, property lost as a result of persecution is still granted to the German state and its citizens. This is, indeed, an unfortunate situation!

In many cases – even in statements issued by the JCC – one is left with the impression that, according to the Property Act, the JCC automatically becomes the heir to unclaimed Jewish properties. But this is not true. The JCC can only benefit as the legal successor if it has submitted a claim before the deadline as specified in § 1 para. 6 of the Property Act.

Since the JCC was unable to prepare all of the required documents for their claims within two years time, the organization was given the option to submit a global (unspecified) claim. Shortly before the deadline in December 1992, the JCC submitted three global claims to the Ministry of Justice. The property offices in Germany initially took a relatively liberal approach to dealing with the global claims. The federal and state governments regarded all three of the claims submitted by the JCC as valid. But this situation soon changed as a result of the restrictive practices of the courts.⁸ Global claims 1 and 2 were completely rejected, and global claim 3 was partially rejected by the seventh and eight senates of the Federal Administrative Court.⁹

Unfortunately, I do not have any figures on how many JCC claims rejected due to late or missing details involve private persons and how involve the state. At least in the latter case, based on the intent of § 2 para. 1 sentence 3 of the Property Act, there should have been no rejections. Here we

⁷ This has been the subject of many critical – and biased – reports in the media, especially in Israel. As a result, the JCC decided to take legal action in a Jerusalem court against TV journalists Orly Vilnai-Federbush and Guy Meroz, cf. <http://www.haaretz.com/hasen/pages/1024460.html>

⁸ Cf. Rodenbach above for details

⁹ BVerwG 23.10.2003, 7 C 62.02; BVerwG 24.11.2004, 8C 15.03, ZOV 2/2005

have a contradiction between honorable intentions on one hand, and adherence to the formal requirements of the Property Act on the other.

Had the Federal Republic of Germany been serious about restitution, there would be no requirement to submit a claim when it was clear that the state had gained possession of looted Jewish property. There are entitled persons who did not submit a claim after 1990 because they themselves or their relatives had previously filed claims in accordance with the former restitution laws. At that time, these claims were rejected because the property in question was located outside the territory of the Federal Republic of Germany. These applications are still on file in the Reparation Office (now the Berlin State Archive), the Restitution Office, or in the Federal Archives (on behalf of the Equalization Offices).

If the Federal Republic seriously wanted to keep looted Jewish property from falling into German hands, would it not have been possible and necessary to check the old files, pick up all the cases that had been rejected for the reasons mentioned above, and reopen them without requiring a new application? Perhaps they intended to handle this properly, but no one thought of this option. The earlier claims are not only a point of contention between the entitled persons and the state restitution offices. They also affect the relationship between the entitled persons and the JCC Goodwill Fund, providing the JCC submitted a claim before 1992. All claims submitted after the April 2004 deadline set by the JCC have been rejected regardless of the reasons specified in the individual cases.

The reasons why entitled persons did not submit claims before 1992 to the Office for the Settlement of Unresolved Property Issues (AROV) or later to the JCC include the following:

- a) The original owner was still registered in the land register
- b) A claim had already been submitted in the 1950s or 1960s
- c) The heirs did not receive information about the existence of the properties until after the deadline

The third reason is especially significant today because it plays an important role in applications for compensation from the JCC Goodwill Fund.

Comprehensive JCC information is available on the Internet: www.claimscon.org. Under the heading "Recovered Property and the Successor Organization" the JCC website offers the following:

- 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 Goodwill Fund was established to help former Jewish owners of property and their heirs who did not submit a claim before the deadline specified in the Property Act of 1990 and therefore legally were not entitled to the properties or the proceeds from their sale in cases where the JCC submitted a claim on time. The intention is to ensure former Jewish owners and their heirs receive compensation from the Goodwill Fund in the amount of the actual proceeds, less administration costs. For these applications the JCC Board of Directors set a deadline for 31 December 1998. In July 2000 the board decided to accept certain applications submitted after this date.

The JCC Goodwill Fund was established only after massive pressure from the Jewish heirs. At the beginning, the policy was to pay out only a small percentage of the proceeds (max. 50%) to the heirs, based on the amount received from the sale of the property— whereby this percentage decreased when the sales price or compensation received was higher. (This system is similar to the German inheritance tax, where the percentage amount of the tax increases with the size of the estate.) Following subsequent protests, the policy was adjusted so that 80% of the net proceeds would be paid out.

The Goodwill Fund guidelines purportedly include applicants who submitted claims after 31 December 1998 and who can prove that they would have been entitled by the Property Act had they submitted a claim before the 1992 deadline. This would mean that everyone who can prove his right to inheritance according to German law would be included. Unfortunately this is not the case, since heirs from extended family lines and testamentary heirs are excluded.¹⁰

The JCC ran a major ad campaign to inform the public about the Goodwill Fund. However, the advertising most certainly did not reach all of the entitled persons.

The deadline in 1998 led to many cases of undue hardship. A special committee was formed to deal with these so-called 'latecomers' and exceptions were made in certain cases.

The JCC ultimately yielded to the pressure and, in September 2003, agreed to publish a list of 59,198 names of former owners and their assets on the Internet. This list also included properties that were returned to the JCC, or for which the JCC received compensation, as well as claims that were still pending in the various restitution offices.

¹⁰ Cf. footnote 6

When this list was published on the Internet, the JCC ran a new media campaign in 100 Jewish publications worldwide and announced that the final deadline for applications for the Goodwill Fund would be 31 March 2004. This decision was explained by arguing that applications had been accepted over a period of ten years (which is not quite true, since between 1998 and 2003 only exceptional cases were accepted) and that a final deadline was necessary, because otherwise, the JCC would be forced to stop funding programs for homecare 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 consider the fact that the majority of the JCC board members responsible for the decision were representatives of organizations that received JCC funding.

In making its decision, the JCC Board of Directors was guided by the following considerations:

- The Goodwill Fund had been accepting applications for nine years
- There was uncertainty surrounding the ultimate number of Goodwill Fund applications
- Many Goodwill Fund applications were for unclaimed properties that the JCC had recovered and sold. The proceeds from these properties had already been allocated for critical programs to assist needy victims of Nazi persecution
- Monetary resources 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 website also presents several different figures. As of 31 December 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 allocated for the “Goodwill Fund and Other Uses.

As of 31 December 2007, the JCC has paid out approximately €20 million from the Goodwill Fund. €3 million have been set aside for future payments and another €146 million are designated for “the Goodwill Fund and Other Uses.” The difference between the last two items is unclear. Do the “Other Uses” exclude persons entitled to money from the Goodwill Fund?

It would be interesting to know what estimates were used as a basis for determining the amount of the funds set aside. There are Goodwill Fund applications for which the JCC has already received funds, and there are claims for properties that are still pending a final decision by the restitution offices and it is unknown whether the proceeds will be forwarded to the JCC.

The payments already made and the money set aside for future payments amount to approximately €750 million. On the other hand, by spring 2008, the JCC had received €1.6 billion in funds. This figure is taken from the list published in August 2008 (Statement of Property List).

JCC critics complain about the lack of transparency in the organization's activities. This is vehemently refuted by the JCC citing the information published on the Internet. Indeed, it is difficult to sort through the various published reports.

According to the "Report on Current Assets/Pending Claims of the Successor Organization" published on 18 July 2008, the total income from sales and compensation as of 31 December 2006 was €1.5 billion. Only a few weeks later, on 6 August 2008, it was stated that, as of 31 December 2007, the total cumulative income was €1.862 billion. This would mean that the organization only took in €362 million in 2007.

The published data somehow doesn't match. In the list published in August 2008 and announced previously, the income from January 1993 to 30 April 2008 is stated as €1.683 million. This means that, despite four additional months, more than €180 million are missing. Where did this money go? Or was this income generated before 1993?

The list contains 11,513 properties on 193 pages, including 93 properties valued at less than €100 and another 532 properties valued at less than €1,000. At the top of the list is real estate in Berlin, where one property is valued at €75.6 million and another at €8 million.

Unfortunately the list of addresses and the amounts received is not user friendly. The list does not show the names of former owners and is not clearly structured or sorted in any particular order (or is it ordered by date of money received?). Major cities appear after small villages, large and small sums of money are listed at random.

The Holocaust Survivors Foundation, an American Jewish organization, took the time to sort out the list.¹¹

The list from 2003 includes the names of 59,198 former owners. The 2008 list contains 11,000 properties. Since multiple properties are listed for some former owners, and there are also a number of companies, the number of properties should actually be much higher.

It is true that the 2003 list includes positions for which no money was received as of April 2008.

The "Report on Current Assets" indicates that 13,647 Goodwill Fund applications were received by 31 March 2004. It is also mentioned that approximately €747 million, or 40%, of the income has been paid out or allocated to persons eligible for compensation from the Goodwill Fund. (100% = 1.862 billion)

Also interesting, but unclear are the figures regarding claims still pending and those that have been finalized. There are only slight differences between the Internet data published on 18 July 2008

¹¹ <http://hsf-usa.org/restitution.html>

(valid as of 6 June 2007) and on 6 August 2008 (valid as of 14 May 2008). According to this data, there were 54,742 claims for real estate and 66,364 claims for business assets.¹²

For real estate, it is reported that 49,373 cases have been decided, 7,546 of these were accepted as valid (it is hard to imagine that 85% were rejected), with 5,369 cases still pending. Regarding business assets, 33,926 cases have been decided, including 4,536 that were accepted as valid (here we have a rejection rate of nearly 87%), and 30,438 cases pending. (But 66,364 minus 33,926 equals 32,438, which leaves 2,000 cases unaccounted for).

It is difficult to understand the figures when they are compared with statistics from the Federal Office for Central Services and Unresolved Property Issues (BADV). This organization publishes statistics every six months on cases involving § 1 para. 6 of the Property Act and the Compensation Law for Nazi Victims.¹³

Not only is there a lack of consistency in terms of dates. The BADV reports registered assets from 38,112 companies (including 11,028 with real estate and 27,084 without). Contrasting with these numbers, the JCC reported 66,364 companies. Since the cases based on § 1 para. 6 of the Property Act not only include JCC claims, the BADV should show a higher number of cases than the JCC. Instead of 38,112 cases, this number should be nearly twice as high.

The differences become even more extreme when we compare the numbers of finalized cases.

While the BADV reports 13,756 finalized cases, not all of which are JCC cases, the JCC reports 33,926 finalized cases. The question is, who decided those additional 20,000 cases?

According to BADV figures, only 1,816 cases were rejected. But the JCC maintains that only 4,536 of the 33,926 cases were accepted as valid, meaning that 29,390 claims were rejected.

The picture is similar when it comes to real estate. First of all it should be taken into account that the BADV refers to lots (Flurstücke) registered in the land register, whereas the JCC refers to real estate (Grundstücke).

According to JCC statistics, 54,742 real estate properties have been applied for. The BADV registered 142,727 lots. This discrepancy could possibly result from the fact that a real estate property could consist of more than one lot and not all applications based on § 1 para. 6 of the Property Act were submitted by the JCC. Nevertheless, the picture looks different when one considers the numbers of decided cases and then looks again at the positive and negative outcomes. According to the JCC there are 49,373 finalized cases, which is equivalent to 90% of the total. The BADV reports 52,529 cases, which is equivalent to 37%. Is it possible that the JCC has been given preferential treatment by the offices of restitution? After all, the BADV figures also include cases

¹² Report on Current Assets/ Pending Claims of the Successor Organization, www.claimscon.org/index.asp?url=successor_org/current_assets

¹³ The listed figures from the JCC are from 14 May 2008, this date comes close to 30 June 2008 www.badv.bund.de

formerly decided by the AROV and LAROV. (There were three levels of decision-making bodies. On the local level it was the AROV or Amt zur Regelung offener Vermögensfragen. On the state level it was LAROV, Landesamt zur Regelung offener Vermögensfragen. On the federal level it was BAROV, Bundesamt zur Regelung offener Vermögensfragen. BAROV was later replaced by the BADV.)

The JCC refers to 7,546 validated cases, which is only 15% of the finalized cases. Unfortunately there are no comparable figures from the BADV. Their numbers include 40,949 decisions from Germany's federal states without information as to whether the cases were accepted or rejected. I have discussed these discrepancies with both the BADV and the JCC and suggested that the numbers be consolidated. Their response was not exactly positive. The JCC simply pointed out that the parameters are different and therefore the statistics cannot be directly compared.

Despite different parameters, it is clear that one of the two figures must be wrong. The JCC reported 48,368 finalized cases as of 6 June 2007. This number would logically reflect at least 48,368 lots – and probably more, because one case can involve more than one lot. The BADV processed applications for only 42,964 lots as of 31 December 2007, which could be no more than 42,964 claims.

It would certainly be better for the JCC public image if their reports were supported by official BADV figures.

Part of the €1,6 billion received by the JCC to date (and all future income) involves assets for which there are no heirs. Another part reflects assets for which heirs have already filed a claim with the JCC or could possibly do so in the future. Nobody knows the size of these two parts.

According to the arguments cited above, if the JCC accepts further claims for the Goodwill Fund, which is what the late-coming heirs are asking for, this would result in millions of euros being taken out of the fund for social assistance programs. This is based on the presumption that further applications will be received for money already taken in by the JCC. In fact, these future applications could also involve cases that have yet to be decided and for which no money has been taken in up to now. Regardless of how much money would be removed from social programs, the question remains as to whether other victims of Nazi persecution should have to pay instead of those who actually caused the suffering. This is an issue that could be addressed by the special emissary to the JCC and former U.S. special ambassador for questions regarding Holocaust assets, Stuart Eizenstat.¹⁴

Since the JCC has been granted the right to claim assets for which there are heirs who could eventually be found, I believe the question as to whether the JCC role in these cases should be

¹⁴ http://www.focus.de/politik/ausland/juden-us-sonderbotschafter-wird-sonderbeauftragter-fuer-ns-opfer-aid_344582.html

limited to that of a trustee is valid. I would even go so far as to say that the legislature should have been obligated to set this limitation. This is based on Article 14 of the German Constitution. According to § 2, para. 1 sentence 3 of the Property Act, which is obviously understood by the JCC, the current approach is equivalent to an expropriation of Jewish owners or their heirs. Therefore, this provision of the Property Act is unconstitutional, because the German Constitution guarantees the right to property ownership and inheritance.