



Fritz Enderlein

Expropriated Heirs

**How property once owned by
Jewish victims of Nazi persecution
is being withheld from rightful heirs**

Expropriated Heirs

**How property once owned by Jewish victims of Nazi
persecution is being withheld from rightful heirs**

Title of the German original
Erben und enteignet werden

Editor

Dr. jur. Dr. sc. oec. Fritz Enderlein
Professor emeritus
Rosa-Luxemburg-Straße 37a
14482 Potsdam
www.raf-enderlein.de

Translation

Michael Hooper

Layout, design, photos

Eike Stedefeldt

Printed by

Druckerei Schmohl, Berlin

Protection charge

EUR 10,00

Orders

E-Mail: RA.F.Enderlein@t-online.de
Telefax: +49-331-7482028

1st German edition 2015

1st English edition 2016

ISBN 978-3-00-051673-3

About this book

For many years, I have been fighting for the victims of Nazi persecution who have lost their property and are being denied restitution by the Federal Republic of Germany. I have also written a number of articles that have appeared in various publications, mainly the “Zeitschrift für offene Vermögensfragen” (Journal of Unresolved Property Issues) and the Jewish newspaper “Jüdische Zeitung”.

All of the appeals to the German Federal Government, the Federal Ministers of Finance Peer Steinbrück and Wolfgang Schäuble, and Federal Ministers of Justice Brigitte Zypries and Sabine Leutheusser-Schnarrenberger have been ignored. An open letter to Chancellor Angela Merkel from an international group of lawyers, of which I am a member, has gone unanswered. The German Parliament refused to support victims of Nazi persecution. Many of these individuals who – in the homeland of the perpetrators – have been practically forced to beg for compensation, appealed to the German Parliament Petitions Committee. Their requests were rejected by a majority of the committee members and this decision was approved by a plenary assembly representing the public.

The main focus of this book is on the Property Act, a set of laws regulating unresolved property issues, and the way this legislation is applied by the courts. In my opinion, the whole matter is clearly unconstitutional. It also violates Protocol 1 of the European Convention on Human Rights (ECHR), which has been ratified by the Federal Republic of Germany.

My published articles deal with the scandalous behavior of the JCC (Conference on Jewish Material Claims Against Germany), which in my opinion acts contrary to its own statutes and moral principles.

These issues are anger provoking – which is why, in one of my articles, I asked the question: “Does Germany deal in stolen property?” But read for yourself. This book is a compilation of my published articles.

Fritz Enderlein

Contents

About this book	3
Contents	4
§ 2, Para. 1, Sentence 3 of the Property Act: Is it Unconstitutional?	6
What the Guidelines and Deadlines of the JCC Goodwill Program Are All About	18
Expropriation Pursuant to § 30a of the Property Act	22
Is the Federal Republic of Germany Responsible for How Compensation Funds Paid to the JCC Are Used?	26
Missed Application Deadlines Correspondence with MP Siegfried Kauder	29
Restitution Bypasses Victims Why the German government needs to take immediate action!	36
The Supreme Constitutional Court and § 30a of the Property Act	49
Does Germany Deal in Stolen Property?	59
The Business Secrets of the Jewish Claims Conference	62
The Jewish Claims Conference and Joint Heirs	65
The Jewish Claims Conference and the Constitution	68
The Claims Conference and German Inheritance Law	70

Still Waiting for Restitution Remarks about the verdict by the Higher Regional Court (OLG) in Frankfurt 3 U 132/11 ¹ from June 26, 2012	73
Heirless and Unclaimed. Unclaimed? A review of § 2 para 1 sentence 3 Property Act	91
Government Misconduct	108
Justice at Last for the Heirs of Holocaust Victims? Questions and comments regarding the Federal Administrative Court decision from April 24, 2013, BVerwG 8 B 81.12	110
Only 25 % for Late Applicants? Comments on an ad run by the Claims Conference in the April 2013 issue of the <i>Jüdische Zeitung</i> : “‘Aryanised’ assets in the former GDR”	118
The Ongoing Expropriation of the Next Generation	120
Open Letter to the Representative of the Conference on Jewish Material Claims Against Germany, Mr. Rüdiger Mahlo	135
Meeting of the Jewish Claims Conference Board of Directors in New York	137
The Jewish Claims Conference – Legal Successor and Trustee?	140
The Mosaic-Talmudic Right of Succession	157
Appendix	
Letter of the Claimants Representative Committee to Chancellor Dr. Angela Merkel	160
About the Author	163

§ 2, Para. 1, Sentence 3 of the Property Act: Is it Unconstitutional?

Thoughts on the Goodwill Fund administered
by the Jewish Claims Conference

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.

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

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 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.

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 Euro 379 million under the Goodwill Fund. The Claims Conference has also set aside approximately Euro 146 million for future payments from the Goodwill Fund, and a further Euro 103 million has been allocated for the “Goodwill Fund and Other Uses.

As of 31 December 2007, the JCC has paid out approximately Euro 520 million from the Goodwill Fund. Euro 83 million have been set aside for future payments and another Euro 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 Euro 750 million. On the other hand, by spring 2008, the JCC had received Euro 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 Euro 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 Euro 1.862 billion. This would mean that the organization only took in Euro 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 Euro 1.683 million. This means that, despite four additional months, more than Euro 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 Euro 100 and another 532 properties valued at less than Euro 1,000. At the top of the list is real estate in Berlin, where one property is valued at Euro 75.6 million and another at Euro 88 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 Euro 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 (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 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 Euro 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 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.

Notes

- 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
- 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 jüdischer 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>).
- 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/spages/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
- 10) Cf. footnote 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) The listed figures from the JCC are from 14 May 2008, this date comes closes to 30 June 2008 www.badv.bund.de
- 14) http://www.focus.de/politik/ausland/juden-us-sonderbotschafter-wird-sonderbeauftragter-fuer-ns-opfer_aid_344582.html

This article was first published in:
Zeitschrift für offene Vermögensfragen, 6/2008, p. 277-280

What the Guidelines and Deadlines of the JCC Goodwill Program Are All About

Response to JZ 07/2008 “We’re not a bunch of greedy scoundrels.” Interview with Georg Heuberger, representative of the Jewish Claims Conference in Germany

In a recently published interview in the “Jüdische Zeitung,” Georg Heuberger, a representative of the Conference on Jewish Material Claims Against Germany, Inc. (JCC), said that the rightful heirs to property located in the former territory of East Germany are receiving compensation through the JCC Goodwill Fund. Unfortunately this is not always the case.

First of all, not every claimant who presents a German certificate of inheritance (*Erbschein*) is recognized by the Claims Conference as the rightful heir to the property in question. This is because significant restrictions on inheritance rights have been established by the JCC to German inheritance law, and secondly, the JCC does not accept claims submitted after 31 March 2004. The following comments deal with these two problems.

According to § 2, para 1 of the Property Act,¹ the German law that deals with the restitution of properties passed on 9 September 1990, the Conference on Jewish Material Claims Against Germany, Inc. (JCC) is the rightful successor to properties without heirs or properties which have not been claimed before the deadline – 31 December 1992 for immovable property, and 30 June 1993 for movable property. Therefore, the JCC could, like any other beneficiary, submit claims within the prescribed timeframe. Unless a timely claim was submitted, the JCC didn’t get anything – although in the media, it was sometimes insinuated that the JCC was automatically named as the proxy for the rightful Jewish heirs. This was the case in an article appearing in *DER SPIEGEL* magazine, issue 23/2008, page 55: “The properties of those who failed to file a claim were legally assigned to the JCC.” This is not true. The JCC was required to document and provide specifics for each property or business asset with the AROV² or LAROV³, later with BAROV⁴ or BADV⁵. In each case, a loss of assets resulting from

Nazi duress had to be proven. Many cases are still pending today, more than 18 years after the Property Act was enacted.

Unlike individual claimants, the JCC also had the option to present global claims within the legally specified time limit. These were dealt with liberally at first, but tighter restrictions applied later (see BVerwG⁶ 7 C 62.02, decision 23 Oct. 2003; 8 C 15.03, decision from 24 Nov. 2004).

In the 1990s, the JCC initially interpreted the legal provisions to mean that, by failing to file an application before the deadline, any claims by heirs of persecuted Jews would be rejected. The JCC based this interpretation on the rigorous application of similar laws in West Germany in the 1950s.

Only after substantial pressure from Jewish families and international Jewish organizations did the JCC introduce its goodwill program. Under this plan, the JCC agreed to pay the rightful heirs who lost their property during the Nazi era initially 50% of the proceeds and later 80% of the profit made by the JCC from the sale of the property. The deadlines set for this program were later extended until 31 December 1998.

After further pressure from Jewish heirs, the JCC decided in 2003 to publish a list on the Internet of the names of original owners of assets recovered by the Claims Conference. The deadline set for goodwill claims was 31 March 2004.

To qualify for the goodwill program, claimants were required to provide conclusive evidence of their inheritance rights. At the same time, they had to declare that, by accepting partial compensation, they would relinquish their right to any further claims against the JCC and would waive any right to legally appeal the JCC decision. Anyone not willing to sign this agreement was refused compensation from the JCC Goodwill Fund.

It was at this time that the JCC set new guidelines regarding who qualifies for the goodwill program. In July 1999 it was decided that anyone who submitted a claim on time to the German authorities as specified in the Property Act would be eligible for payment from the Goodwill Fund. The group of people entitled to a goodwill claim was limited further in July 2003. According to the new guidelines, only the following claimants would qualify for the Goodwill Fund:

- a) The original owner
- b) An immediate heir appointed in the owner's testament
- c) The spouse of the original owner
- d) The direct descendants of the owner, i.e. children, grandchildren, great

grandchildren and their spouses

e) The parents of the original owner (a rather theoretical case)

f) The siblings of the original owner and their spouses

g) The children of the siblings and their spouses, but not their descendants or other offspring

In other words, not all of the persons who would have been entitled according to German inheritance law are included. Since first losses of property resulting from Nazi persecution started occurring on 30 January 1933, and the owners may have died already within that year, it is possible that, in the past few decades, there have been several lines of inheritance. Nevertheless, the new guidelines exclude grand nephews and grand nieces of the original owner. Nephews and nieces are included, but not their children. This leads to an unsatisfactory situation in which the surviving nephews/nieces in a family are entitled, but not the children of a deceased nephew/niece. Of course, the number of cases involving grand nephews/nieces increases over time. Those grand nephews/nieces who lost their parents early are punished a second time. This is not only unsettling for the families, it also results in cases of undue hardship.

According to the new guidelines, testamentary heirs are entitled only if the original owner has declared this in his/her will. If these heirs have also listed heirs in a last testament, these people will only be accepted if they qualify as belonging to the group defined above. Other relatives, friends or legal persons are excluded. There is no reason why, in these cases, the last will of a Jewish decedent is not heeded. And there is certainly no reason to ignore this person's last will by excluding organizations like the American Friends of The Hebrew University or the Jewish Guild for the Blind.

Since § 2 of the Property Act grants the JCC a unique position in German inheritance law, the JCC should adhere to this law as they had done up until to 2003 when it comes to determining who qualifies for the goodwill program. It appears urgent that the JCC should urgently reconsider its current policies and actions.

The other problem is the restrictive adherence to filing deadlines. However, the JCC has in several cases been permitted to file applications after the original deadlines, and even today is still allowed to provide additional details on unclaimed properties. So it only seems fair that the same acquiescence be granted to those heirs who for various reasons did not submit a claim or have only recently become aware of this option. This

would include cases in which the claimant applied for only part of the family's property because they were unaware of the full extent of the inheritance or they believed that restitution was only available for real estate but not business assets. These people are also informed by the JCC that the claim deadline has expired.

The JCC argues that information about the Goodwill Fund and its guidelines has been publicized in the press, radio, and television for many years. But it is obvious that this topic was not covered across all forms of media in every country. Even more importantly, many entitled persons have been unable to clarify their family relations for various reasons and were unaware of any inheritable assets.

Even if one doesn't agree with the critics who say that the JCC has a moral obligation to actively search for heirs, it certainly wouldn't be unreasonable to expect the JCC to forego all deadlines. In cases awaiting a decision by the German authorities, the argument that the funds received by the JCC have already been spent on charity projects is not valid since these cases are still pending.

Notes

- 1) *Gesetz zur Regelung offener Vermögensfragen* (law governing the settlement of unresolved property issues)
- 2) *Amt zur Regelung offener Vermögensfragen* (Office for the Settlement of Unresolved Property Issues)
- 3) *Landesamt zur Regelung offener Vermögensfragen* (State Office for the Settlement of Unresolved Property Issues)
- 4) *Bundesamt zur Regelung offener Vermögensfragen* (Federal Office for the Settlement of Unresolved Property Issues)
- 5) *Bundesamt für zentrale Dienste und offene Vermögensfragen* (Federal Office for Central Services and Unresolved Property Issues)
- 6) *Bundesverwaltungsgericht* (Federal Administrative Court)

*This article was first published in:
Jüdische Zeitung, August 2008, page 2*

Expropriation Pursuant to § 30a of the Property Act

In my article “§ 2, para. 1, sentence 3 of the Property Act: Is it unconstitutional?”¹ 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.²

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.³

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 § 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.”⁴

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 compensation⁵. 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 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.⁶

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.⁷ 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.”

Notes

- 1) 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
- 2) Gerhard Brand, Extension for those who missed the application deadline specified in § 30a of the Property Act, ZOV 6/1997, page 402
- 3) 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>
- 4) C 3.06-2-1867/07
- 5) See Hermann-Josef Rodenbach, Änderung im Entschädigungsrecht für NS-Verfolgte (Change in the restitution law for NS persecutees), Neue Justiz 11/2005, page 486
- 6) 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
- 7) see http://www.claimscon.org/index.asp?url=successor_org/current_assets

*This article was first published in:
Zeitschrift für offene Vermögensfragen, 5/2009, page 219*

Is the Federal Republic of Germany Responsible for How Compensation Funds Paid to the JCC Are Used?

In the 6/2008 issue of ZOV 6/2008¹, I expressed the opinion that § 2, para. 1, sentence 3 of the Property Act is unconstitutional. According to § 1, para. 6 of the Property Act, persons who lost their property (real estate, business assets, etc.) as a result of persecution during the Nazi period are entitled to get their property back under the condition that they submit a claim before 31 December 1992 (for immovable property) and 30 June 1993 (for movable property).

The Jewish Claims Conference (JCC) was legally permitted to submit claims within the same deadlines for any Jewish properties that were expropriated due to Nazi persecution, and for which no heirs existed. The JCC was also authorized to claim properties that were not claimed for various reasons by the entitled persons themselves (former owners or their heirs).

This is where the problems begin. Why did the entitled person(s) fail to submit a claim? Perhaps the owner was still registered in the land register and did not realize that he was nevertheless required to submit a claim. Or perhaps they had filed a claim in the 1950s or 1960s and were rejected because the property was located in the GDR, i.e. outside the jurisdiction of the Federal Republic of Germany. Perhaps the owner believed that the claim would be automatically re-activated. In many instances, entitled persons did not want to have anything to do with Germany.

In the majority of cases, claims were not submitted simply because the heirs had no knowledge of the situation. In many families, financial circumstances and property ownership were not mentioned or discussed – certainly not with children and, in some cases, not even with spouses. In some cases, the children were transported to safety while their parents and other family members were murdered in concentration camps. Obviously, these entitled persons (as legal heirs) would have very limited knowledge of the assets that belonged to their parents, grandparents or other relatives. In many situations, it wasn't until later in life that they became interested in their family situation and as a result, discovered real estate or business

assets that belonged to their families. But by then, the deadlines for submitting claims had long passed.

The heirs basically regard the JCC as a trustee for their property. However, the Property Act favors the JCC. It took several years before the JCC agreed to set up a Goodwill Fund and open it to those entitled persons whose property had been expropriated as a result of the strict adherence to the claim deadlines specified in the Property Act. Participation in the Goodwill Fund was initially permitted until 1998. After this, the JCC latecomer committee in New York only accepted claims in exceptional hardship cases.

After several protests and much international pressure, the JCC reinstated an option in late 2003 that permitted claims to be submitted until March 2004.² After this date, all claims were rejected.

It wasn't until March 2009 that other hardship cases were accepted, for example, situations in which the entitled person was unable to submit a claim before March 2004 due to medical conditions. This exception was of little help to most latecomers.

Eligibility to receive benefits from the Goodwill Fund is restricted by conditions regarded as discriminatory by many people. The entitled person must sign a declaration stating that he or she unconditionally accepts JCC decisions, waives all legal rights, and explicitly relinquishes all rights relating to the property that, under applicable inheritance law, would have been theirs. This starkly contrasts with JCC policies in other situations.

Speaking at the Berlin Symposium for Nazi Looted Art in December 2008, Georg Heuberger, the JCC representative in Germany, said: *"In summary, fair and just solutions demand fair and just proceedings! Without an eye-level dialog with the former owners, no fair and just solutions can be found."*³

The JCC defends its refusal to let more heirs share in the Goodwill Fund program by arguing that funds are required for support programs for needy survivors of the Holocaust. In other words, the JCC practices a policy of redistribution rather than serving the best interests of the originally entitled persons.

What can be done? There is still time to compensate the originally entitled persons for their loss. The JCC would need to agree to allow entitled persons to participate in the Goodwill Fund program without any time limitations. It's not too late. According to information from the JCC, their income for 2008 and later (after the payment of current Goodwill Fund claims) is estimated at \$250-400 million⁴. This does not take into account

the claims still pending with the BADV⁵. As of 14 May, 2008 there were 35,807 pending applications for real estate and business assets. Not included are applications for bank accounts, mortgages and movable properties⁶. Therefore, there is absolutely no way of knowing how much more money the JCC will receive.

I suggest the following supplement to Property Act. Presently, § 2, para. 1, sentence 3 states: “If claims by entitled Jewish persons in the sense of § 1, para. 6, or their legal successors are not brought forth, then ... the Conference on Jewish Material Claims Against Germany, Inc. is regarded as 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 specified in the Property Act have expired, the JCC is deemed a trustee for these entitled persons and must allow them to appropriately share in the proceeds or restitution.”

Notes

1) 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 of the Jewish Claims Conference), ZOV 6/2008, p. 277 2) 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

3) www.claims-conference.de/fileadmin/dateien/Heuberger_Rede_Berlin_12.2008.pdf

4) www.claimscon.org/index.asp?url=successor_org/future_income

5) BADV = Bundesamt für zentrale Dienste und offene Vermögensfragen (Federal Office for Central Services and Unresolved Property Issues)

6) www.claimscon.org/index.asp?url=successor_org/current_assets

This article was first published in:

Berliner Anwaltsblatt, 10/2009, pages 354-355

Missed Application Deadlines

Correspondence with MP Siegfried Kauder,
Chairman of the Legal Committee,
German Federal Parliament

Restitution bypasses the victims

Letter dated 10 December 2009

Dear Mr. Kauder,

§ 1 para. 6 of the Property Act is intended to provide as much compensation as possible to victims of Nazi persecution. However, the provisions of this law are inadequate. § 30a in particular excludes those who discovered too late that they were eligible to submit an application for restitution, or those who believed for various reasons that they were not required to submit (resubmit) applications. Many of these people and their families were scattered all over the world after escaping Nazi terror. Most seriously affected by the Property Act are those who submitted applications in the 1950s and 1960s, or those who were still listed as owners in the land register. By rigorously enforcing the deadlines specified in the Property Act, these people were, in effect, legally expropriated without receiving any form of restitution. (See my article: Expropriation pursuant to § 30a of the Property Act in the *Zeitschrift für offene Vermögensfragen*, 5/2009, p. 219)

Many Jewish victims and their entire families were murdered by the Nazis. As a result, there were no surviving heirs. In these cases, § 2 para. 1 of the Property Act permits the Conference on Jewish Material Claims Against Germany to submit applications for return of title or for compensation. The law also allows the JCC to submit applications for eligible persons who missed the application deadlines. This is where the problems start.

German legislators failed to include a provision in the Property Act that regulates what should happen if an eligible person comes forward after the application deadline (31 December 1992 or 30 June 1993).

Latecomers who are excluded because they missed the application deadline regard the JCC – with a certain degree of justification – as merely a trustee who, on their behalf, has been granted temporary possession of the property or received compensation for it.

The JCC see things differently. As a gesture of benevolence, and following much protest, the JCC set up a goodwill fund and used this to give eligible persons a share of up to 80% of the property value. Unfortunately, this program was not without limitations and was only valid for a certain period of time. (See my article titled “Was es mit den Richtlinien und Fristen des JCC-Goodwill Programms auf sich hat” – What the guidelines and deadlines of the JCC Goodwill Program are all about – in the *Jüdische Zeitung*, August 2008, p. 2)

It is not too late to correct Germany’s legislative oversight. In § 2 para. 1 sentence 3 of the Property Act, it says “If claims submitted by eligible Jewish persons as defined in § 1 para. 6, or their legal successors, are not brought forth, then ... the Conference on Jewish Material Claims Against Germany, Inc. is regarded as the legal successor.” This could be amended to include the following: “However, if eligible Jewish claimants or their successors contact the JCC after the time limit specified in the Property Act has expired, the JCC will be regarded merely as a trustee for the beneficiaries and required to give them an appropriate share of the proceeds or restitution funds.”

Unlike many other legislative proposals, such a provision would not cost Germany anything, but it would certainly help make up for an historical injustice.

I therefore ask the members of the Federal Parliament Legal Committee and the Committee on Human Rights and Humanitarian Aid to appeal to the federal government to ensure justice for the heirs who have been excluded by the restitution laws. (See my article “Ist § 2 Abs. 1 Satz 3 Vermögensgesetz verfassungswidrig?” – Is § 2 para. 1 sentence 3 of the Property Act unconstitutional? – in the *Zeitschrift für offene Vermögensfragen*, 6/2008 p. 277 ff. This would enable Germany to meet its responsibilities regarding the use of the compensation funds paid to the JCC. (See my article under the same title in the *Berliner Anwaltsblatt*, 19/2009 p. 354)

Respectfully yours

Prof. Fritz Enderlein, Attorney at Law

Reply from 20 January 2010

Dear Prof. Enderlein,

In your letter from 10 December 2009 you proposed an amendment to § 2 of the Property Act. As the law stands, the Conference on Jewish Material Claims Against Germany Inc. (JCC) is the legal successor to those eligible Jewish persons or their legal successors who did not submit claims prior to the deadline specified in the Property Act. In your proposal you indicate that the Property Act should be amended so that the JCC would only serve as a trustee for Jewish eligible persons or their legal successors who submit a claim after the deadline has expired.

I don't feel I can support this request. The provisions regulating retransfer of property or compensation are directly related to the reunification of Germany. At the time, the legislature was faced with the difficult problem of finding an appropriate solution for assets that were not claimed by the eligible persons or their legal successors within a reasonable period of time. In line with the restitution concept, the legislature appointed the JCC as the legal successor of these assets. The JCC uses the funds to support Holocaust survivors in need. For example, the money is used to build and maintain nursing homes for Holocaust survivors.

To safeguard against special hardships for the originally entitled persons, the JCC has set up a Goodwill Fund, as you mentioned. The originally entitled persons were given the opportunity to submit applications for payment from this fund to the JCC until 31 March 2004 – this is more than 10 years after the legal application deadlines expired. Last year, to avoid special hardships in certain cases, my predecessor Mr. Andreas Schmidt supported a plan to allow applications for payment from this fund to be submitted after the deadline. The JCC set up an application procedure that went into effect on 1 April 2009.

In my view, there is no need to amend the legislative decision on the restitution regulations approved in the early 1990s. In all due fairness, the JCC has, in my opinion, sufficiently responded to special hardships by reopening the application procedures for the Goodwill Fund on a limited basis. I therefore see no need for the legislature to act and ask for your understanding in this matter.

With kind regards,

Siegfried Kauder, Member of German Parliament, Chairman of the Legal Committee

Claims Conference

*Letter from
8 March 2010*

Dear Mr. Kauder,

Thank you for your letter from 20 January 2010 regarding my proposal to amend the Property Act. I find it very unfortunate that you are unwilling to support my request.

On 18 March you are scheduled to give a talk on the constitutional mandate and constitutional obligation at the “20 years Claims Conference Successor Organization” symposium. This would be a good opportunity to take a stand on the legislative oversights that I described in my articles published in ZOV 6/2008 and ZOV 5/2009. It is with good reason that the subtitle of the conference “Späte Gerechtigkeit?” (delayed justice) includes a question mark.

In your letter you point out that the application procedure that has been in effect since 1 April 2009 and is designed to avoid special hardships. I am aware of this procedure and in several cases I have made applications supported by medical reports. Unfortunately the JCC oppressively ignores medical reasons that kept eligible persons from submitting an application on time – not to mention the unreasonable amount of time it takes the JCC to process the applications.

Many of my clients have personally survived the Holocaust. They are old and many of them suffer from chronic illnesses. But this is not enough for the JCC. Only someone who was more or less in a coma up until April 2004 (or his or her heirs) would stand any chance of receiving compensation from the Goodwill Fund.

This is not a question of fairness. It is one of justice. My clients are not asking the JCC for charity. They want a share of the assets that were initially stolen from them by the Nazis and not returned by either the GDR or the FRG.

Mr. Kauder, I would be very pleased if you could review this issue once again.

*With kind regards,
Prof. Fritz Enderlein*

Reply from
16 March 2010

Dear Professor Enderlein,

The Chairman of the Legal Committee, Siegfried Kauder, MdB, received your letter of 8 March and asked me to reply. You asked Mr. Kauder to review your request once more. You pointed out that your clients are not asking the Claims Conference for charity, they simply want a share of the assets that were stolen from them by the National Socialists. You consider this to be a question of justice, not fairness.

Taking these points into consideration Mr. Kauder still does not see a need to change the legal status of the Claims Conference as successor organization. At the time the return and compensation regulations on former Jewish property were drafted in the Property Act, the legislature faced the difficult task of complying with Germany's historical obligation to provide restitution. At the same time, it was necessary to avoid any delay in the urgently needed investments in the five new federal states through the long and drawn out process of clarifying property ownership issues. For this reason, it was necessary to set relatively tight deadlines for the return of property and compensation claims submitted by originally eligible persons or their legal successors and to establish regulations for assets not applied for on time.

With the appointment of the Claims Conference as the legal successor of assets not claimed in time, the legislature reverted to a reimbursement law from the 1940s and 50s. Firstly, this is intended to keep the assets from going to the Federal Republic of Germany as the legal successor to the National Socialist German state. Secondly, the Claims Conference guarantees that the acquired assets will be used to benefit the victims of persecution. As the successor organization, the Claims Conference is in many cases the primary source of financial support to needy NS victims worldwide.

Along with the constitutional and regulatory/legal considerations and the reasons already mentioned by Mr. Kauder in his letter from 20 January 2010, a revision of the legal status of the Claims Conference would be in conflict with legal certainty and fundamental right of ownership specified in Art. 14 of Germany's Basic Constitutional Law.

Due to the reasons outlined above, Mr. Kauder is unable to support you in this matter. Therefore, your request will not be processed any further.

*With kind regards,
By proxy
Matthias Königeter*

* * *

Claims Conference

*Letter of
28 July 2010*

Dear Mr. Kauder,

Although Mr. Königeter informed me on 16 March 2010 that my request will not be processed any further, I am compelled to write to you once again after reading the speech you gave at the “20 years Claims Conference successor organization” event on 18 March 2010.

You spoke about **Germany’s basic obligation to make restitution and pay compensation** to those who lost their assets as a result of Nazi persecution. This is also my concern. However, it is not the Claims Conference that was persecuted, but the individuals who suffered and whose descendants are still suffering today.

Our Federal Chancellor stated that it is part of Germany’s reason of state to stand up for Israel’s right to exist and for its safety. Would it not also be part of the reason of state to ensure that restitution benefits those who have suffered a terrible fate and whose possessions were taken?

You explain why the Property Act included tight deadlines. It is still a matter of dispute whether these deadlines were necessary in cases that did not concern the return of property but were claims for compensation. Even in cases requesting a return of property, tight deadlines result in unnecessary hardship for the legitimate heirs when clarification in favor of the JCC takes many years. In a recent article published in the ZOV, I pointed out that § 30a of the Property Act constitutes an expropriation of the people who are actually eligible in favor of the JCC.

As you point out, the Jewish Claims Conference successor organization is the **trustee for the persecuted Jews**. What prevented the legislature from including this in the Property Act? This is precisely what I am hoping to achieve with my amendment proposal. And this clause would not have prevented the setting of short deadlines.

Regarding the outlook, you say that the focus is on paying compensation. According to my sources, only 48% of the cases have been completed. I strongly agree with this particular sentence of yours and consider it worthy of emphasis: “...from a constitutional viewpoint, compensation for the victims is not a voluntary act by Germany, but an imperative of material justice that is part of the basic framework of our constitution.” But I would like to call attention to “**compensation of the victims.**”

Regarding future compensation payments, the objection that a change of the legal status of the Claims Conference would be in conflict with its fundamental ownership right in accordance with Art. 14 of Germany's Basic Constitutional Law does not hold water. After all, no one appears to mind that the current regulation and its exclusion of the actual victims of Nazi persecution violates their fundamental ownership right as defined in Art. 14 of Basic Constitutional Law.

I get the impression that no one in our government is willing to go up against the JCC. As Mr. Köngeter said in his letter, “*The Claims Conference guarantees that the assets it acquires are used to benefit the persecuted persons.*” Many of the people concerned strongly disagree. The JCC has been the subject of repeated criticism in the international press. I take the liberty of enclosing two recent articles from Jerusalem. (Not printed here; the editor)

I would like to conclude by citing your final remarks at the conference on 18 March 2010:

“Democracy includes defending better arguments and the courage to say things that may be regarded as unpleasant. The rule of law is a value worth protecting. Politicians must say no to injustice.”

With this in mind, I appeal to you once again to support my request.

Prof. Fritz Enderlein
Attorney at Law

This article was first published in:
Zeitschrift für offene Vermögensfragen, 4/2010, page 174

Restitution Bypasses Victims

Why the German government needs
to take immediate action!

When the first draft of the Act for the Settlement of Unresolved Property Issues (Property Act)¹ was presented in mid-1990, it did not include § 1 para 6. Also the joint declaration for regulating unresolved property issues signed by the German Democratic Republic and the Federal Republic of Germany on June 15, 1990 which, in accordance with Article 41, para 1, constitutes an integral part of the Unification Treaty from August 31, 1990 and is included in this treaty as Appendix III, makes no reference whatsoever to the inclusion of persecution-related property loss suffered by victims of the Nazi regime.

This was explained by the contention of the GDR government that the **illegal offenses** that needed to be settled appeared to be **too diverse**. On the other hand, the victorious Western powers of the Second World War, did not want to leave the question of restitution unsettled, nor did they want to declare their responsibility for Germany to be terminated without a settlement.² This matter is presented differently by the Conference on Jewish Material Claims Against Germany, Inc. (JCC) in its annual reports. It was only after JCC intervention that property losses suffered by citizens and associations persecuted for racial, political, religious or ideological reasons during the period from January 30, 1933 to May 8, 1945 were also included.³

This depiction of the history is not devoid of inaccuracies. For example, it was stated that the Property Act was passed by the “new government of reunified Germany.” However, according to the Unification Treaty, it was actually an ongoing law of the GDR (German Democratic Republic).

The following only relates to **Jewish** eligible persons whose legal successor in certain cases is the JCC.⁴ In retrospect, I believe it was an error to include this group of persons in the Property Act and subject them to its procedural conditions, including the application requirements specified in § 30, and the time limits outlined in § 30a.⁵ It would have been far better to establish

special regulations for this group. The justification for this will be ascertained in the following.

§ 1 para 6 of the Property Act specifies persecution-related property loss as a result of forced sales, **expropriations** or other means and substantiated a presumption in favor of the entitled parties in accordance with Para II of the BK/O (49) 180 Directive of the Allied Commander in Berlin dated July 26, 1949.

The expropriations mainly resulted from the application of the 11th Executive Order from November 25, 1941⁶ of the Reich Citizenship Act (*Reichsbürgergesetz*, one of the Nuremberg Race Laws depriving Jews of German citizenship) passed on September 15, 1935⁷. According to this regulation, the assets of Jews who lost their German citizenship were transferred to the State. This was perfidiously the case when these people were deported to concentration camps outside of German territory. Expropriations also resulted from the 13th Executive Order of the Reich Citizenship Act from July 1, 1943,⁸ which ordered that, after the death of a Jewish person, his or her assets passed to the State.

After the victory over Hitler's fascism, one of the first measures undertaken by the Allied Forces was the rescission of National Socialist law by means of Allied Control Council Law No. 1. All acts and related provisions, regulations or decrees on which the Nazi regime was based, were also rescinded, thereby including all legal settlements directed against Jews.⁹

Court decisions and the literature are in agreement that these National Socialist legislation is invalid. In a resolution passed on February 14, 1968, Germany's Supreme Constitutional Court ruled as follows: "The 11th Regulation ... (must) be regarded as invalid from the very beginning".¹⁰ Previously, in a resolution dated February 25, 1955, the Great Senate for Civil Cases at the Federal High Court of Justice declared as follows: "2. The expiry declaration of § 3 of the 11th Executive Order of the Reich Citizenship Law was ... invalid from the very beginning".¹¹

After the Allies rescinded the Nazi legislation and this was accepted by the former highest legal authorities, the court decisions relating to the Property Act **in effect** reintroduced the Nazi legislation, thereby sanctioning the **subsequent expropriation of Jewish property**. In a judgment by the Federal High Court of Justice on January 1, 2003 on case III ZR 121/02¹², the following was stated: "Because the Property Act also aims specifically at rectifying property divestments by the National Socialist state which *did not*

result in a loss of property" (italics by F.E.). It is true that there was no loss of title in the Nazi era and there was also no loss of title in the GDR period, but there is now a loss of ownership because the "consequence of the applicability of the Property Act on the relevant confiscation of assets is that the entitled party is basically only able to reclaim his/her lost legal position under the prerequisites of the Property Act. ... The Senate concurs with the view of the Federal Administrative Court that § 1, para 6 of the Property Act has for the first time constituted a right to restitution for the persons mentioned in the aforesaid provision (Federal Administrative Court 98, 261,265). In this case, therefore, the defendant and her mother based on their inheritance entitlement were on principle only able to demand the return of their lost property that the property office ruled in their favor in this matter with binding legal effect based on an application submitted before the deadline specified in § 30a, para 1, sentence 1 of the Property Act (§ 34, para 1 of the Property Act). In this respect, it is irrelevant that the property had neither been transferred to state ownership, nor had it been transferred to a third party.... Even in the event of a property divestment being regarded as invalid, the entitled party has not been freed of his obligation to submit a claim in order to protect his rights against possible applicants in accordance with § 2, para 1, sentence 3 of the Property Act." When no application is submitted by the owners entered in the land register, the Federal High Court of Justice and the Federal Administrative Court stand up for an **expropriation in favor of the JCC!** But what happens when no JCC application has been submitted or is not submitted on time? Who is the real owner in this case? Is it the Federal Republic of Germany as the successor to the German Empire?

In the opinion of Germany's Federal High Court of Justice, the persons affected may only receive compensation "basically by means of positively concluded restitution proceedings. If, for example, they failed to comply with the time limit under § 30a, para 1 of the Property Act, they were unable to recover the lost asset. With this clear compensatory ruling in the Property Act would it not be in line, if the legal heir of a persecuted person would be able to regain ownership by means of simple (? F.E.) evidence of his or her inheritance entitlement (why would ownership be regained if there was no loss of the property in the first place? F.E.) because the land register still shows the persecuted person as the owner".

Fortunately, actual practice in many cases proceeds differently from that conceived by the Federal High Court of Justice. It is true that the heirs

submitted no claim for return of title, but the land registry offices effected the rectification of the land register based on the submitted certificates of inheritance, whereupon the JCC waived its own claim (if any claim at all had been submitted).¹³

The persons affected by the jurisdiction of the Federal High Court of Justice and the Federal Administrative Court have a damage compensation claim against the Federal Republic of Germany because they were expropriated as a result of the time limit specified in § 30a of the Property Act and because the Federal Republic had failed to commission JCC to search for and notify the heirs, despite numerous amendments and supplements to the Property Act.

In more recent court decisions it is again assumed that the “forfeiture of assets ordered by the 11th Executive order of the Reich Citizenship Law from November 25, 1941 was invalid and did not lead to a loss of property according to civil law.”¹⁴

If that is the case, would it not have been more appropriate to re-establish the former legal position **without requiring an application** to be submitted by the persons entitled under the Property Act? The following is stated in the cited resolution of the Great Senate from 1955: “the execution of restitution proceedings is not required under such circumstances.”¹⁵

Who was more aware of the expropriations and the land registry status than the German authorities? It is true that the authorities, i.e. the offices responsible for dealing with unresolved property issues, were required to officially determine the actual situation. However, this presupposed a minimum amount of information from the applicants who, in many cases, felt like they were in the position of petitioners. Another fact was that the majority of cases in 1990 involved the children, grandchildren or other relatives of the original owners. Only in a few cases did these people have sufficient information.

The requirement to submit an application in accordance with § 30 of the Property Act is incomprehensible, especially for those entitled persons who repeatedly submitted applications for restitution after the war. These applications were indeed justifiably rejected on the basis of the applicable legislation in the Federal Republic of Germany. This is because they involved property assets that were situated outside the Federal Territory at that point of time. Nevertheless, the applications were submitted. For the descendants of former Jewish citizens living abroad, Germany has always been regarded

as one country, especially when it comes to its responsibility for holocaust victims. If nothing else, the old applications should have been officially taken into account.

Anyone who is following my argumentation with regard to the expropriations carried out by the Nazis may object that in the case of forced sales an examination has been necessary. Especially in these cases the land registry offices should have been more active. In view of the fact that it had to be stated in the sales contracts whether the sellers were Arian, the previous Jewish ownership would have been seen also in cases that were not recognized as Jewish from the very beginning. The Property Act allows the option of refuting the statutory assumption. This alternative could have also been integrated in a special ruling for racially persecuted victims. However, this would not have forced entitled persons to take action, or who were robbed of their rights as a result of the time limits.

According to § 2, para 1, sentence 3, the JCC steps into the position of entitled persons if they or their legal successors have not submitted applications. This assumes submission of an application by the JCC. Nothing happens without an application. There are, however, cases in which the JCC benefits without submitting an application, namely when a successor or heir has submitted an application as a member of a community of heirs. The JCC then takes the position of unnamed co-heirs in accordance with § 2a, para 1a, sentence 1 of the Property Act. But that's not all. The JCC also gets the position of co-heirs who are known by name, although their current address is unknown. Nowhere does it say that the authorities or the JCC are required to search for co-heirs. In these cases, the JCC indeed becomes the legal successor by force of law without being required to submit an application.

The JCC is proud that it has submitted thousands of applications¹⁶, including individual applications as well as three global applications, and has thus rescued numerous assets for the Jewish people. In this way, the JCC claims to have prevented the assets from falling into the hands of the German State or Arians. But what happens to the assets for which no application has been submitted by the JCC due to a lack of relevant knowledge, or in cases in which global applications have been rejected in the absence of a timely specification? Is there a continuation of Nazi injustice against Jewish citizens?

The JCC has submitted three global applications on which the Federal Administrative Court has expressed its opinion on numerous occasions. With its Global Application No. 1, the JCC claimed "all identifiable assets

arising from files and documents held by public authorities, archives, institutions, etc., which have not yet been made available to the Claims Conference". Although these files and documents existed, they were not made available to the JCC by December 1992 when the application period expired. Would it have been conceivable to ask all government authorities, archives and institutions to search through their files listing former Jewish assets? I think so.

With its Global Application No. 2, the JCC claimed "real estate, companies, rights in rem and all other assets being claimed by third parties as defined in § 2, para 2 of the Property Act and for whom it becomes apparent during the processing of restitution claims that there has been a loss of assets as defined in § 1, para 6 of the Property Act and that the Claims Conference in accordance with § 2, para 1 of this law is the legal successor of the original Jewish entitled parties". This application was also entirely logical and justified. As long as an application was being processed, regardless of by whom, the time limits did not play a role for other applicants.¹⁷

Global applications 1 and 2 were rejected as invalid by the Federal Administrative Court.¹⁸ It is significant in this and other cases in which property offices and administrative courts decided in favor of the JCC that subsequent claims filed by Aryan heirs resulted in an overturn of these decisions by the Federal Administrative Court. It cannot be alleged that this fostered the concept of restitution.

Only Global Application 3 withstood the stern approach adopted by federal judges – but only to a certain extent. The following was requested with this application:

"1. Property assets that are identified by files from the following archives (cf. Appendix).

2. Verifiable assets of Jews, whose names are recorded in the files of the German Kinship Office (Reichssippenamt) in the Federal Archive in Potsdam, as well as assets of Jews whose names are identified from the additional sources listed below (cf. Appendix) or listed as persons of Jewish faith and origin in available documents from the residents' registration office or found in available address books.

3. Assets confiscated from Jews by the National Socialist state as a result of the following discriminatory executive orders or any loss in connection with these executive orders (followed by a list of 11 acts and executive orders).

4. Property assets confiscated as a result of divestments by the German

state, which have been incorporated into the assets of the German Reich, the NSDAP or other organizations specified in § 1 of the Federal Restitution Act (*Bundesrückerstattungsgesetz*), more specifically seizures based on the 11th Executive order of the Reich Citizenship Law (shares and securities) in the total amount of RM 186,000,000, seizures based on the 11th Executive order (excluding shares and securities) totaling RM 592,000,000, discriminating special taxes in the amount of RM 900,000,000, Reich Flight Tax, and RM 1,127,000,000 in property tax.”

Application 3 was accompanied by a lengthy appendix that included details from individual files and archives.

The Federal Administrative Court only recognized the first two items listed on Application 3 as possibly valid applications. “The claimed property assets based on the referenced legal grounds for the confiscation of Jewish property (No. 3), or based on the details of the amount of damage incurred as a result of the lost property during the National Socialist period (No. 4) cannot be accurately determined.”

The legal grounds for the loss of Jewish ownership were, however, precisely those that were designated as invalid by legislators and in court decisions. Insofar as reference is made in land registers, commercial registers or similar records to various executive orders of the Reich Citizenship Act, to the Act on the Confiscation of Public and State Enemy Assets from July 14, 1933, or the executive order on the registration of Jewish property from April 26, 1938, it was possible to officially establish the eligibility of the JCC.

Even in the many cases in which an automatic reinstatement of the old property rights was not possible, assistance could at least be provided to applicants in search of Jewish property assets. With regard to Jewish assets lost as a result of persecution and displacement, the authorities failed to carry out what is now generally required with regard to works of art, namely, to quote from the Washington Conference Principles established in 1998: “Resources and personnel should be made available to facilitate the identification of all art that had been confiscated by the Nazis and not subsequently restituted. Every effort should be made to ... locate pre-War owners or their heirs.”¹⁹

The JCC carried out extensive research activities with relatively few employees and achieved astounding results. Things were not made easy for the JCC. Despite the official investigation principles outlined in § 31 of the Property Act, which can be understood to mean that the authorities are

required to assist applicants, JCC staff members were for a long time denied access to files maintained by the Berlin Restitution Office based on a reference to § 8 of the Federal State of Berlin's Archiving Law. Other files, including those from the Berlin Equalization Office, were destroyed before they could be evaluated.²⁰ The fact that the files from the Reparation Office still exist and have been integrated into the Berlin State Archive is a result of the efforts made by long-time Director, Ms. Recknagel.²¹

§ 2, para 1 of the Property Act includes the concept of unclaimed property for which the JCC is authorized to assume legal succession if an application is submitted on time. But is it really unclaimed? Or simply not claimed on time? Thousands of entitled persons have not complied with the time limits specified in § 30a of the Property Act. Afterwards they turned to the JCC, which they regard as their trustee. It is true that the JCC is not legally obligated to search for heirs of former Jewish property owners and share with them any revenues and/or restitution received. The JCC clearly exploits this situation. At the same time, a large number of latecomers justifiably point out that this is exactly what the JCC is morally obliged to do!

This obligation is also outlined in the JCC by-laws. The JCC registered as a non-profit organization with the State of New York Department of State in 1951.²² According to § 2a of the JCC articles of corporation: "The purpose of the corporation shall be solely to voluntarily assist, aid, help and act for and on behalf of Jewish persons that were victims of Nazi persecution and discrimination." Nowhere in the by-laws does it say that the purpose lies in preventing heirs from claiming their justified inheritance. In the supplementary articles from 1994, it says that the JCC is acting as "a successor organization for heirless and unclaimed Jewish property."

The articles of corporation make no reference to the German Property Act. They do not say "unclaimed before the time limit specified by the Property Act." When an heir turns to the JCC for assistance, his or her assets are no longer unclaimed.

The fact that things can be done differently is demonstrated by the Israeli Law for Holocaust Victims' Assets from 2006.²³ This law established the HASHAVA, an organization whose mission it is to identify the property assets of Holocaust victims and to search for the respective heirs. The organization is furnished with the necessary financial and personnel resources.

The Federal Republic of Germany is also **legally and morally** obligated to assist latecomers. In his speech honoring the 20th Anniversary of the Claims

Conference Successor Organization on March 18, 2010, Siegfried Kauder, Chairman of the Legal Committee of the German Federal Parliament, pointed out that it is a fundamental obligation of the Federal Republic of Germany to help those who lost their property and other assets as a result of Nazi persecution. "From a constitutional standpoint, paying restitution to those persons concerned is not a voluntary act by the Federal Republic of Germany. It is an precept of material justice, which is an integral part of our constitution".²⁴

"The Jewish Claims Conference successor organization serves as a trustee for persecuted Jews" (Kauder, *ibid.*). This is also asserted by heirs who turn to the JCC for help, but are rejected because the time limit for submitting claims has expired.²⁵

Unfortunately, the responsible politicians in the Federal Republic of Germany have a lot of nice things to say in public, but no action is taken in everyday practice. A request to support my proposal to legally define the JCC as the trustee for persecuted Jews²⁶ was rejected by Mr. Kauder. It is obviously sufficient for him and other Members of Parliament (including Michael Grosse-Brömer, CDU/CSU party spokesman for legal and political matters, and Marco Buschmann, FDP party spokesman and chairman of the legal rights taskforce) to have the JCC serve as trustee for "**persecuted groups**" and thereby accept the injustice experienced by persecuted individuals.

It is pointed out that the JCC revised its guidelines in 2009 to take account of special hardship cases. Accordingly, applications submitted to the Goodwill Fund after March 31, 2004 can be reviewed on a case by case basis if an application (a) is submitted by an original owner of the property or spouse of the original owner, or (b) is submitted by a child, grandchild or great grandchild of the original owner who can prove, through medical documentation that they were for medical reasons, unable to file an application in the period immediately before the deadline of March 31, 2004.²⁷

Unfortunately, the JCC decisions were extremely arbitrary and autocratic when it came to determining whether or not a doctor's certificate confirming that someone was not healthy enough to personally submit an application was acceptable. This is not to mention the fact that a number of applications remained unprocessed for several months.

Many of the applicants who personally survived the Holocaust are old and chronically ill. But this has no bearing for the JCC. Only someone who

was more or less in a coma up until April 2004 (or his or her heirs) would stand any chance of receiving restitution from the Goodwill Fund.

The persons who were expropriated in favor of the JCC as a result of the Property Act are not willing to accept this. Many of those affected have reported their situation to the Petitions Committee of the German Federal Parliament (Bundestag). After their ancestors were persecuted and murdered, many of the heirs only learned much later about their families' assets. Others assumed that restitution applications had already been submitted before 1990 (and rejected) or the former owners were still listed in the land register. The ill-fated stories of these families – many were murdered in the Holocaust and only very few survived – are enough to fill volumes.

The Petitions Committee promised to carry out a detailed examination of the petitions. This is still taking place. In their commentaries, the Federal Ministry of Finance and the Ministry of Justice continue to repeat their earlier, refuted arguments. They also refuse to grant the victims a legal claim in dealing with the JCC. Instead, they simply close their eyes to the history of restitution rights and the reason for involving the JCC.

Initially, there was no intention to reallocate Jewish property assets. The plan was to assign **uninherited** property to the JCC. The committees involved were unanimously of the opinion that the JCC should only be assigned trustee status for the assets or properties for which there were still heirs. According to an article appearing in the Israeli newspaper Maariv on September 22, 1995, there was no indication that the German government planned to disinherit the lawful heirs from their rights to reclaim illegally confiscated property assets. Quite to the contrary. The German government declared that it would be in agreement if the property was returned to the rightful heirs by the Claims Conference. "We (the German government) have no objection whatsoever if the Claims Conference returns the property assets to the heirs who failed to submit an application before the deadline. This is one of the reasons why the Jewish Claims Conference was named as the legal entity entitled to receive the property assets in question..."²⁸

In their rejection of the request to define the JCC as a trustee, or to persuade the JCC to allow the heirs to share in the revenues and restitution payments through the Goodwill Fund, the Federal Ministry of Finance and the Federal Ministry of Justice uniformly claimed that the JCC needs the funds for assistance programs. These ministries have apparently turned a deaf ear to the ongoing international criticism of the JCC allocation policies expressed

by leading Jewish organizations and especially from Israel. For example the Jerusalem Post headlined an article published on July 14, 2010 with “Scandal at the Claims Conference”. The article reported not only on corrupt employees but especially that substantial sums were still being allocated by the JCC for projects that have no direct relationship to the Holocaust. This was substantiated by examples.²⁹

My doubts regarding the constitutionality of § 30a of the Property Act are not shared by the ministries. In the opinion of the Federal Ministry of Finance, § 30a of the Property Act conforms with the constitution and this had been confirmed on several occasions by the Supreme Constitutional Court.

I am aware of three resolutions passed by the Supreme Constitutional Court regarding § 30a of the Property Act. The resolution passed on October 20, 1998 (1 BvR 1730/98 - ZOV 1999, 23) only relates to claims for return of title and not to claims for compensation. The resolution passed on January 10, 2000 (1 BvR 1398/99 – ZOV 2000, 87) also includes claims for compensation. In the argumentation, however, it does not address the question of parallel applications submitted by the Jewish Claims Conference for the same property assets. The resolution from August 14, 2004 (1 BvR 1249/04 – ZOV 2005, 13) relates to the agreement between the Federal Republic of Germany and the United States of America.

The Supreme Constitutional Court confirms the opinion of the Federal Administrative Court that the restitution claims are not subject to the protection offered by Article 14 of the German Basic Law. In my opinion, all of the related judgments and resolutions are encumbered by the fact that basic principles are established and regarded as conclusive, although they do not apply to all situations and circumstances – especially not to claims based on § 1, para 6 of the Property Act. A dispute of this issue would require a separate article.

The question raised by me regarding the extent to which § 2, para 1, sentence 3 of the Property Act is unconstitutional has to my knowledge not yet been addressed by the Supreme Constitutional Court. Another issue that has yet to be addressed is the question as to what extent the de-facto rescission of § 30a of the Property Act for JCC as a result of the second Supplementary Compensation Act constitutes a breach of Article 3 of the German Basic Law.

Worthy of note is the fact that time limits are applied differently for property and business assets than they are for paintings and works of art.

An international conference on “Holocaust Era Assets” held in Prague on

June 26-30, 2009³⁰ was attended by 46 states, including the Federal Republic of Germany. The Terezín Declaration³¹ adopted by the conference on June 30, 2009 includes the following: “Noting that the protection of property rights is an essential component of a democratic society and the rule of law, ... We consider it important, where it has not yet been effectively achieved, to address the private property claims of Holocaust (Shoah) victims concerning immovable (real) property of former owners, heirs or successors, by either in rem restitution or compensation, as may be appropriate, in a fair, comprehensive and nondiscriminatory manner.”

The Federal Republic of Germany should finally take steps to fulfill its responsibilities and ensure that these basic principles are integrated into the activities of the JCC.

Notes

- 1) *Vermögensgesetz*, law permitting claims to be filed for property lost in the former territory of the German Democratic Republic
- 2) Richard Motsch in: Rädler, Raupach, Bezenberger [publisher] *Vermögen in der ehemaligen DDR* (Assets in the former GDR), Para 2B, page 32 ff.
- 3) Cf. Claims Conference, Annual Report 2008/2009 http://forms.claimscon.org/ar/CC_2008_AR.pdf S. 46 on page 44 of the printed version
- 4) Cf. Fritz Enderlein, *Ist § 2 Abs. 1 Satz 3 Vermögensgesetz verfassungswidrig?* (§ 2 para 1 sentence 3 Property Act: Is it unconstitutional?), ZOV 6/2008, page 277 ff.
- 5) Cf. Fritz Enderlein, *Enteignung durch § 30a VermG* (Expropriation due to § 30a Property Act), ZOV 5/2009, page 219
- 6) RGL. (Reich Law Gazette), Para 1, page 722
- 7) RGL. (Reich Law Gazette), Para 1, page 1146
- 8) RGL. (Reich Law Gazette), Para 1, page 372
- 9) Allied Control Council Law No. 1 relating to the rescission of National Socialist law, dated Sept. 20, 1945, cf. www.verfassungen.de/de/de45-49/kr-gesetz1.htm
- 10) Supreme Constitutional Court 23 page 98 [106]
- 11) Federal High Court of Justice for Civil Cases 16 page 350 ff.
- 12) Federal High Court of Justice for Civil Cases 153, 258 = ZOV 2003, 99
- 13) I have already expressed my critical comments with regard to restitution under the Property Act when the owner is still listed in the land register, cf. ZOV 2002, 263 ff., ZOV 203, 154 f. Neue Justiz Heft 9/2003, page 462.
- 14) Berlin Court of Appeals, judgment from January 28, 2010 – 8 U 56/09, ZOV 2/2010, page 87 ff.

- 15) *ibid.* page 351
- 16) www.claimscon.org
- 17) Cf. e.g. Gerhard Brand, extension for those who missed the application deadline specified in § 30a, Property Act, ZOV 6/1997, page 402
- 18) Judgment from October 23, 2003 – 7C 62.02
- 19) Quoted from “Handreichung zur Umsetzung der Erklärung der Bundesregierung, der Länder und der kommunalen Spitzenverbände zur Auffindung und zur Rückgabe NS-verfolgungsbedingt entzogenen Kulturgutes, insbesondere aus jüdischem Besitz” published in December 1999 by the German Federal Government Commission for Culture and the Media
- 20) Peter Bölke, Erbschein aus dem KZ (Certificate of inheritance from the concentration camp), *Der Spiegel* 21/1997 from May 19, 1997
- 21) www.digberlin.de/SEITE/reckhagel.php
- 22) State of New York, Department of State; available from the County Clerk, N.Y.
- 23) <http://www.hashava.org.il/eng/template/default.aspx?catid=33>
- 24) From the manuscript of the speech
- 25) 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), <http://www.j-zeit.de/archiv/artikel.1386.html>
- 26) Cf. ZOV 5/2009, page 219
- 27) http://www.claimscon.org/index-asp?url=goodwill_announcement_04-22-09
- 28) Quotation from David Rowland’s memorandum to the JCC dated May 13, 1999
- 29) <http://www.jpost.com/International>
- 30) www.holocausteraassets.eu
- 31) <http://www.holocausteraassets.eu/en/news-archive/detail/terezin-declaration/>

This article was first published in:
Zeitschrift für offene Vermögensfragen, 4/2010, page 170

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

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, 23³ 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.

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 (Reichsbürgergesetz)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

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 overseas 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 thought 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 compensation⁶ 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 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.

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.

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 1249/04¹⁰ – 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 JCC¹¹ is legally, and ethically, unjustifiable.

Notes

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.

4) One of the Nuremberg Race Laws depriving Jews of German citizenship.

5) See footnote 2

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.bundesverfassungsgericht.de/Entscheidungen/rk20000110_1bvr139899.html. Also printed in RGV under G 211

8) According to State Secretary Gatzert 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

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

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.

This article was first published in:

Zeitschrift für offene Vermögensfragen, 5/2010, page 212

Does Germany Deal in Stolen Property?

When an ordinary thief steals something and the police manage to recover the stolen goods, the property is promptly returned to its rightful owner. This is not the case for property stolen from the Jews.

Between 1933 and 1945, millions of Jewish citizens in Germany were systematically robbed and murdered. After the War, the Allies declared all Nazi laws that were in violation of the principles of international humanitarian law to be null and void. In 1952, Federal Chancellor Adenauer accepted Germany's culpability for the genocide against the Jews and concluded "restitution" agreements with the State of Israel and the Jewish Claims Conference.¹

In September 1990, the final GDR People's Assembly adopted the Property Act (Vermögensgesetz) which, in accordance with the Unification Treaty, was included in the laws of the Federal Republic of Germany. Up until this point, no equivalent legislation had been passed in the GDR except for the Thuringia Restitution Law (Thüringer Wiedergutmachungsgesetz) enacted during Soviet occupation. However, there was a regulation from 6 September 1951² that governed the administration and protection of foreign property (including seized Jewish assets) in the GDR. If the Jewish owners were still listed in the land register, and if the Nazi regime had appropriated the property for the Reich, the property was marked as "List C" in the land register. State administration would remain valid until other arrangements were made as part of a peace treaty.

In the Property Act, § 1 para. 6 states that property lost between 1933 and 1945 as a result of persecution can be reclaimed.³ This requires an application (§ 30 Property Act) to be submitted before a specified deadline (§ 30a Property Act). Anyone who fails to submit an application before the deadline loses the right to file a claim.

As if asking a theft victim to submit an application for return of his stolen property is not absurd enough,⁴ requiring that the application be submitted within a certain period of time is equivalent to expropriation of property without compensation.⁵

But that's not all. According to § 2 para. 1 sentence 3 of the Property Act, Jewish property for which no claim was submitted, will be assigned to the Jewish Claims Conference if the organization submits an application on time.⁶

In other words, if a third party – in this case the JCC – claims the stolen property after the victim of the theft fails to submit an application, the property will be assigned to them. In my opinion, this meets the criteria of what is commonly known as “fencing,” or dealing in stolen property.

When they passed the Property Act in 1990, the legislature failed to include a passage that corresponds to the statutes of the Jewish Claims

**§ 259 German Criminal Code,
dealing in stolen property**

(1) Anyone who buys, or otherwise acquires or makes available to a third party, sells or aids in the sale to benefit himself or a third party, an object that was stolen by another person or otherwise acquired as a result of an unlawful act against the assets of another, is subject to imprisonment of up to five years or a monetary fine.

Conference, a corporation founded in accordance with U.S. law. According to the articles of corporation, “The purpose of the association shall be *solely* to voluntarily assist, advise, support and *act for and on behalf of* Jewish persons that were victims of Nazi persecution and discrimination” (text highlighted by the author).

The Jewish victims believed that the JCC would act in their best interests

and take possession of stolen Jewish property, sell it at a fair market price, subtract an appropriate administrative fee, and pass on the proceeds to the victims.⁷

My proposed amendment to the Property Act was rejected by the Ministries of Finance and Justice. I therefore contacted the Legal Committee of the German Federal Parliament.⁸ No support can be expected from the committee chairman.⁹ My clients contacted the German Federal Parliament Petitions Committee, which has been brooding since early 2010 over ways to help my clients despite the negative attitude of the federal ministries.

Notes

- 1) An overview in recent literature is provided by Norbert Frei, José Brunner, Constantin Goscshler (editor), *Die Praxis der Wiedergutmachung*, (The practice of restitution), Göttingen 2009
- 2) GBl der DDR (GDR legal gazette) 1951 p. 839
- 3) The provision states: "This law shall also apply to property claims of citizens and associations that between 30 January 1933 and 8 May 1945 were persecuted for racial, political, religious or ideological reasons and consequently lost their property through forced sales, expropriations or otherwise."
- 4) 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, p. 170
- 5) Fritz Enderlein, *Enteignung durch § 30 a VermG* (Expropriation pursuant to § 30a of the Property Act), ZOV 5/2009, p. 219
- 6) Fritz Enderlein, *Ist § 2 Abs.1 Satz 3 VermG verfassungswidrig? Gedanken zum Goodwill-Fonds der Jewish Claims Conference (§ 2 para. 1 sentence 3 of the German Property Act: Is it unconstitutional?)*, ZOV 6 /2009, p.277
- 7) *Besteht eine Verantwortung der Bundesrepublik für die Verwendung als Entschädigung gezahlten Gelder an die JCC?* (Is the Federal Republic of Germany responsible for the JCC's use of compensation funds it receives?) *Berliner Anwaltsblatt* 10/2009, p. 354
- 8) *Versäumte Anmeldefristen – Schriftwechsel mit MdB Siegfried Kauder* (Missed application deadlines – correspondence with MP Siegfried Kauder), ZOV 4/2010, p. 174
- 9) In a letter dated 14 September 2010, Mr. Kauder refused to talk about it with me. Other members of the Legal Committee, on the other hand, have signaled support.

*This article was first published in:
Zeitschrift für offene Vermögensfragen, 6/2010, page 301*

The Business Secrets of the Jewish Claims Conference

The Conference on Jewish Material Claims Against Germany, Inc. (JCC) has been in the headlines again recently. Along with other publications, Germany's "Spiegel Online" ran an article on 10 November 2010 about a "Million-dollar swindle with Holocaust compensation funds." In a report in "Israel Hayom" (Israel today) on 8 November 2010, Isi Leibler once again criticized the way the JCC is managed and expressed his outrage about the fact that a bunch of old men are responsible for managing billions of dollars without external controls. At the annual meeting of the JCC Board of Directors, fears were expressed that Germany could demand accountability for millions of dollars that have somehow disappeared.

Regarding the assets from the sale of returned Jewish properties and the compensation money for Jewish companies, Leibler reports growing unease about the fact that the JCC has failed to protect the interests of the heirs of these assets. Leibler compares the practice of (re)distributing these funds with the tale of Robin Hood. The money is taken away, or withheld, from the rightful heirs and used to finance other programs. As a result, these assets benefit people and organizations who had nothing, or very little, to do with the Holocaust.

The purpose and tasks are defined as follows in the JCC articles of incorporation: "The purpose of the association shall be solely to voluntarily assist, advise, support and act for and on behalf of Jewish persons that were victims of Nazi persecution and discrimination."

How this works in practice can be illustrated by the example of Ms. Judi H. Her mother and grandmother owned property on Berlin's Greifenhagener Straße, which they were forced to sell in 1938. Unfortunately, Ms. H. failed to submit a claim for return of title with the responsible property office before 31 December 1992 as required by the Property Act (Vermögensgesetz). The JCC, however, submitted a claim.

The property was placed under state administration by the GDR in 1963 due to over-indebtedness. In 1990, the Aryanized family applied for

restitution of the property, which was granted in 1993. The property had been sold by the heirs a year earlier for DM 2.2 million.

The JCC filed an appeal to reverse the retransfer in favor of the Aryanized family heirs. The appeals commission decided in favor of the JCC. The heirs then filed a suit in the Administrative Court. This case was dismissed by the court and the plaintiffs were ordered to hand over the sales proceeds. According to a list published by the JCC in 2008, the property was sold at a profit of Euro 512,000.

The case presented here focuses on the disposition of the profit from the sale of the property. Judi H. contacted the JCC, requested a copy of the official decision in favor of the JCC, and asked to be given a share of the restitution as an act of goodwill. The JCC rejected both requests citing the fact that it had set deadlines that had since expired. Ms. H. was unwilling to accept this decision and wrote the following to the JCC on 27 May 2009: "In my opinion, the JCC has a moral obligation to the surviving children (heirs) to allow them to participate in the Goodwill Fund and to recognize and respect their claims. As long as there are surviving children, they are the rightful heirs to any restitution owed to their families. As a direct descendant of Holocaust survivors, there is no statute of limitation on my claim. I found the property that belonged to my grandmother and mother listed on the JCC website. The JCC has no right to keep the money [it obtained for the property]. My mother and grandmother were victims of the Holocaust. Now I feel like I am a victim! It is my understanding that the Claims Conference was set up to represent the victims. It appears that the organization is now fighting against the victims it is supposed to represent! Justice should be the primary concern of the restitution process. In cases where entire families were murdered and there are no surviving heirs, the JCC should have the right to retain the compensation funds received and use them to benefit aging Holocaust survivors throughout the world who need financial and medical assistance. I appeal to the Claims Conference to review my claim, act responsibly, and do what is morally right." But nothing happened. The JCC upheld their rejection of the claim.

At the end of December 2009, Ms. H. contacted the German Federal Parliament Petitions Committee. She explained that neither her brother nor she was ever aware of an application deadline. She demanded that the JCC be obligated to give the surviving heirs a share of the proceeds. Except for an acknowledgment that her letter was received and a registration

number, Ms. H. heard nothing more from the Petitions Committee for nearly a year.

After her claim was rejected by the JCC, Ms. H. wrote to the Federal Office for Central Services and Unresolved Property Issues (BADV) and asked them for a copy of the decision in compliance with the Freedom of Information Act.

The BADV thought that the JCC should be involved in the case. However, without further comment on the case, the JCC repeatedly asked for more time to respond. Finally, the BADV decided to grant Ms. H.'s request, since there was no apparent reason not to surrender a copy of the decision. The JCC appealed against the BADV decision on 25 June 2010 and reasoned that the Freedom of Information Act was not intended to allow persons who missed the application deadline to be retroactively involved in the property law proceedings (a reopening of the property law proceedings was not mentioned in the request submitted by Judi H. or in the BADV decision). Furthermore, according to the JCC, allowing the documents to be seen by a third party not involved in the proceedings was not permissible due to the extent of the many personal details of the case. Indeed, the personal details in question related the mother and grandmother of Ms H.! According to the JCC, the details of the decision, in particular the total amount of compensation paid, are a business and company secret of the JCC.

The BADV was not convinced by this far-fetched argument and the appeal submitted by the JCC was rejected. It remains to be seen whether the JCC will accept this decision or choose to take legal action. After all, as one of the reasons for the appeal, the JCC cast doubt on the constitutionality of the Freedom of Information Act!

Is this case a good example of the way the JCC protects the interests of the Holocaust victims it supposedly represents?

*This article was first published in:
Jüdische Zeitung No. 58, December 2010, page 5*

The Jewish Claims Conference and Joint Heirs

In an article under the headline “The Forgotten,” *Der Spiegel*¹ magazine reported a “bizarre legal dispute between the Federal Republic of Germany and the Jewish Claims Conference in a case presented to the Berlin Administrative Court.” According to *Der Spiegel*, the focus was on the following issue: Was the cousin of Gertrude Monzón Tabares permitted, on her own behalf and on behalf of the rest of her family, to submit an application for compensation 20 years ago? The issue relates to joint heirs, which is regulated in § 2a of the Property Act.

In many cases, a community of heirs is recognized as the legal successor of a victim of Nazi persecution. It is not necessary for all members of such a community to submit a joint request for restitution. According to § 30 of the Property Act, a claim submitted by one member of the community of heirs is automatically valid for all other members, even if they are not specifically named.² In this case, according to § 2a para. 1 sentence 1 of the Property Act, the assets of the joint heirs as such must be retransferred to the designated testator.

An heir who is not party to submission of a claim for compensation is not required to participate in the claim. At the same time, according to § 2a para. 3 of the Property Act, this person can waive his rights associated with the claim within a period of six weeks after he is notified of the pending proceedings (six months if he lives outside of Germany).

However, an heir who is not party to the claim has no legal means of appealing the case if the application is rejected. If the original applicant withdraws his application, the co-heir loses his rights.

According to § 2a para. 1a of the Property Act, if a community of heirs that is the legal successor of a Jewish property owner includes a co-heir who is not known by name, or whose residence is unknown, the JCC automatically becomes party to the claim in this person’s place.

The case reported by *Der Spiegel* involved a community of 18 heirs. Although their names were listed, the place of residence for two of the co-heirs was unknown. In a decision from 8 June 2009, the Federal Office for

Central Services and Unresolved Property Issues (BADV) confirmed the rights of the heirs and rejected the claim submitted by the JCC.³ The lawsuit filed by the JCC alleged a violation of the organization's rights under § 2 para. 1 sentence 3 and § 2a para. 1a of the Property Act. So far, so good.

Sometime later, it was determined that one of the two co-heirs in question had died, and the place of residence for the other co-heir had since been determined. Consequently, all of the joint heirs were accounted for, with no place left for the JCC. But now the JCC raised the issue described above as to whether the application filed by a co-heir on 29 August 1990 was indeed valid for the entire community of heirs, since this potential beneficiary was actually a company owned by several partners. With one exception, these partners consisted of Mr. J.W. and his four sons. In other words, this was a family enterprise and the person filing the claim, a grandson of the company founder, assumed that he was representing the entire family, including all company shareholders and/or their heirs.

This was denied by the JCC, which maintained that, instead of one community of heirs, each of the five shareholders represents a different community of heirs. Therefore, a separate application would have to be submitted by each of these communities.

According to a statement issued on 1 November 2010, the BADV disagreed with the JCC and determined that the submitted application was valid for all parties. A decision on this case by the Berlin Administrative Court is still pending.⁴ The idea here is not to address the question of whether the JCC assumption is perhaps formally correct based on § 6 and §30a of the Property Act.

I can only reiterate and endorse what *Der Spiegel* magazine wrote: "Even if the decision was legally correct, there are still moral doubts. Would it not be reasonable to expect the Jewish Claims Conference to non-bureaucratically support the survivors of a Jewish factory owner who was killed in Theresienstadt and do everything they could to ensure that compensation is paid as quickly as possible? Why would the Claims Conference assess a situation more meticulously, and more heartlessly than a German authority that has already examined the case in detail?"

It has been demonstrated in several cases that the JCC does not take on the task of searching for unknown heirs. But the fact that the JCC has taken action to exclude a co-heir in an attempt to take his place became apparent in a case before the Frankfurt Regional Court⁵ involving a

widespread community of heirs. Applications were filed by a co-heir as well as by the JCC. The co-heir knew the names of the other entitled persons, but not their place of residence.

This is where things become almost unbelievable: In an effort to exclude the co-heir, the JCC suggested that the applicant withdraw his claim, which had been submitted before the cutoff date. The man went along with the JCC's suggestion and withdrew the application. According to a written agreement, "Both parties agree not to take any further action to determine the whereabouts of surviving legal successors."

If the co-heir in question had not followed the JCC's suggestion, the other members of the community of heirs who appeared years later would have been recognized as beneficiaries in accordance with § 2a para. 1 of the Property Act. These co-heirs have since filed a lawsuit against the JCC in the Frankfurt Regional Court claiming a violation of moral principles as defined in § 138 of the BGB (German Civil Code). It will be interesting to see how this litigation plays out.

Notes

- 1) *Der Spiegel* 52/2010, p. 44 ff.
- 2) Federal Administrative Court (BverwG) 8 C 8.08, ruling from 29 July 2009, ZOV 2009, 314
- 3) Official order from 8 July 2009 in case B 4 – 4 -1583-97/03
- 4) 29 K 115.10
- 5) 2-08 O 161/10

*This article was first published in:
Zeitschrift für offene Vermögensfragen, 1/2011, page 10*

The Jewish Claims Conference and the Constitution

Two years ago, I proposed a change to the Property Act.¹ I suggested that § 2 para. 1 sentence 3 of this law be supplemented to read as follows: “However, if eligible Jewish claimants or their successors contact the JCC after the time limit specified in the Property Act has expired, the JCC will be regarded merely as a trustee for the beneficiaries and required to give them an appropriate share of the proceeds or restitution funds.” This proposal is fully consistent with the JCC articles of corporation, which state: “The purpose of the association shall be *solely* to voluntarily assist, aid, help and *act for and on behalf of* Jewish persons that were victims of Nazi persecution and discrimination” (text highlighted by the author). Therefore, many Jewish victims believed that the JCC would act in their best interests by taking possession of stolen Jewish property, selling it at a fair market price, subtracting an appropriate administrative fee, and passing on the proceeds to the victims.

My proposal was supported by many victims² who sent petitions describing the plight of their families to the German Bundestag (parliament). However, it was initially rejected by the Ministries of Finance and Justice, as well as by the Chairman of the Legal Committee of the Bundestag (I’m not ready to give up hope). The rejection of my proposal was based, among other things, on the JCC’s fundamental property rights under Article 14 of Germany’s Basic Constitutional Law.³

Is the JCC protected by Germany’s Basic Constitutional Law? The Federal Constitutional Court addressed this question last year in a different context.⁴ According to a unanimous decision from 18 August 2010: “The Federal Constitutional Court assumes that legal entities domiciled in foreign countries *are not, in principle, protected by the basic rights (Basic Constitutional Law)...*”⁵

The Federal Constitutional Court draws this conclusion from Article 19 paragraph 3 of Basic Constitutional Law, which reads: “The basic rights shall also apply to domestic legal entities, to the extent they are inherently applicable.” The Jewish Claims Conference, however, is a legal entity based

in a foreign country, "...because their place of domicile is not in Germany... (even) if they maintain a branch office here..."⁶

Notes

- 1) Fritz Enderlein, expropriation by § 30a of the Property Act, ZOV 5/2009, p. 219ff.
- 2) Fritz Enderlein, Restitution bypasses victims: Why the German government needs to take immediate action! ZOV 4/2010, p. 170ff.
- 3) Letter written on behalf of the Chairman of the Legal Committee of the German Bundestag (parliament), on 16 March 2010, ZOV 4/2010, p. 175
- 4) Supreme Constitutional Court (BVerfG), 1 BvR 3268/07 from 18 Aug. 2011
- 5) Text highlighted by F.E., Supreme Constitutional Court (BVerfG), 1 BvR 3268/07, para. 33
- 6) Ibid, para. 34

*This article was first published in:
Zeitschrift für offene Vermögensfragen, 1/2011, page 10*

The Claims Conference and German Inheritance Law

The heirs of Holocaust victims are still fighting with the Jewish Claims Conference (JCC) about their rights to compensation from the Goodwill Fund. This fund was set up by the JCC for people who failed to submit a claim for restitution before the specified deadline, which was 31 December 1992 for immovable property (real estate), and 30 June 1993 for movable property. These claims had to be sent to the Office for the Settlement of Unresolved Property Issues in Germany. According to § 30a in the German Property Act, claims submitted after the deadlines are ruled out.¹

The Goodwill Fund directives originally stipulated that, if the victim of Nazi persecution is deceased, his or her heirs as defined by German inheritance law would be entitled to claim the assets – providing they submitted an application before the deadline. In other words, anyone who presents a certificate of inheritance would be entitled to claim compensation. Unfortunately, although it was clearly outlined in the 2010 version of the Goodwill Fund directives,² this situation was severely restricted in practice.³ In particular, the victim's great-nieces and great-nephews were excluded, although in some cases, they were the only surviving descendants of the former owner. The following example illustrates a case in point.

Hermann H. owned property in Berlin. His only surviving heir is his great granddaughter, Ruth W. As a result of the JCC directives she is entitled to only one third of the proceeds from the sale of the property (the JCC recovered the property title and subsequently sold it). This is what happened: Hermann H. had three sons, Julius, Alfred and Willy. Alfred and Willy were murdered in concentration camps. Neither of them had any children. Julius and his wife Rosalie died and were succeeded by their daughter Margot, who also inherited the shares of her two uncles. At this point, the entire estate was in the hands of one person, Margot, the granddaughter of Herman H.

Margot later emigrated to Shanghai and continued on to Palestine where her daughter Ruth was born in 1946. But the hardships Margot suffered led to her early death in Jerusalem at the age of 46.

Ruth, who grew up in an orphanage after her father died, knew nothing of the property once owned by her great-grandfather. And she didn't find out about it until after the application deadlines had expired. This is when she submitted a claim to the JCC for compensation from the Goodwill Fund. According to the JCC, Ruth was entitled to the share owned by her grandfather Julius, but not to the shares owned by her great uncles Alfred and Willy who had been murdered by the Nazis.

The expropriation of the property took place in 1938. Had it occurred after the death of brothers Alfred and Willy, when her mother Margot was listed as the sole owner, Ruth would have, according to JCC directives, been entitled to inherit the entire estate.

Another example of the ruling out of a direct descendant is the case of Siegfried J. Prior to World War II, Siegfried J. owned a hat factory in Berlin. After the Nazis started excluding Jews from business life in Germany, his company's income went down and Siegfried J. was forced into bankruptcy. Overburdened by the pressure, he died in 1940 in Berlin.

His son Harry managed to escape to England where, penniless, he joined the British army to fight against the fascists. Several years later he was involved in a car accident. The resulting injuries caused him endless suffering until his death in April 2003. Harry was survived by his wife Ursula and a daughter, Eva.

After the War, the family sought restitution for their family's lost assets. They received nothing because the business once owned by Siegfried J. was located in East German territory.

Following German reunification in 1990, the family was unaware that they needed to submit a new application for restitution. However, the JCC applied for, and received compensation for the factory.

Harry had failed to apply for compensation from the JCC Goodwill Fund before the final deadlines expired in April 2004. In April 2009, the JCC announced an option for survivors to apply for compensation when an entitled person was unable to do so due to medical reasons. The family regained hope and submitted an application for the Goodwill Fund. They included medical reports verifying that, in the years before his death, Harry was unable to manage his personal affairs. According to JCC directives, his death (in April 2003) did not occur in the "period immediately preceding the specified deadline on 31 March 2004."

Harry's wife, Ursula, who had suffered years of deprivation, had also

become ill and was in need of medical care. The family submitted a medical certificate for her as well verifying that she was unable to personally submit a claim before the April 2004 deadline. This request was also rejected by the JCC on the grounds that, although spouses of the original owners are eligible, the spouses of the owner's children are not.

Harry's daughter Eva, the granddaughter of the former owner, is not eligible to submit a claim because she will not become an heir until after the death of her mother. But even then, her claim would be rejected for the reasons described above. Although Eva's parents clearly qualify as medical cases, according to JCC directives, she will get nothing. Eva sees this situation as a terrible injustice and has turned to the Petitions Committee of the German Bundestag (Lower House of German Parliament) for help. She is still waiting for a response.

Notes

1) Further reading: Expropriation pursuant to § 30a of the Property Act, ZOV 5/2009, p. 219; The Supreme Constitutional Court and § 30a of the Property Act, ZOV 5/2010, p. 212; Restitution bypasses victims. Why the German government needs to take immediate action! ZOV 4 / 2010, p. 71

2) Goodwill Fund Guidelines as approved by the JCC Board of Directors on 19 July 2000 and incorporating decisions of the Executive Committee from November 2000, the JCC Board of Directors on 19-20 July 2005, the Executive Committee on 2-3 November 2005, the Executive Committee on 7 March 2006, the Board of Directors on 27 April 2006 as forwarded to the Board of Directors on October 9, 2006 and incorporating the decisions of the Executive Committee on 31 March 2009 and the Successor Organization Committee on 5 January 2010. Updated Guidelines as of June 2010.

3) What the guidelines and deadlines of the JCC Goodwill Program are all about, Jüdische Zeitung, 2008, p. 2

*This article was first published in:
Jüdische Zeitung, September 2011, page 20*

Still Waiting for Restitution

Remarks about the verdict by the Higher Regional Court (OLG) in Frankfurt 3 U 132/11¹ from June 26, 2012

The Frankfurt Higher Regional Court (hereinafter OLG) has missed an opportunity. It remains stuck in its tracks and cites verdicts by the Federal Administrative Court (hereinafter BVerwG) and Federal Constitutional Court (hereinafter BVerfG), although in the meantime, and in light of more recent literature, a review of the previous legal positions would have been a more suitable approach.

This is about judiciary responsibility in the interpretation of laws and the question of the court's role in ensuring justice for the victims of the Holocaust. The verdict discussed here once again provides good reason to deal specifically with the content and interpretation of the Property Act.

I have already mentioned the case in question in ZOV issue 1-2011.¹ This case focused on the following situation. A joint heir from a widely spread-out community of heirs filed a claim in accordance with § 1 paragraph 6 of the Property Act. The JCC did likewise. This co-heir knew the names of the other co-heirs, but not their current addresses. According to § 2 para 1 of the Property Act, the claim application should benefit all of the other co-heirs. The JCC reached an agreement with the applicant whereby this person agreed to withdraw his application. As a consequence, the co-heirs lost their rights because they did not file a claim within the specified registration period.

Later, the co-heirs who were left empty handed reached a settlement with the JCC, which promised them money from the Goodwill Fund. However, the co-heirs were apparently unsatisfied with this settlement. They felt they were wrongly advised and deceived by the staff of the JCC. Consequently, they filed suit with the Regional Court (Landgericht) in Frankfurt am Main. No verdict had been reached by January 2011², which is why I wrote: "It will be interesting how this case turns out."³

The Regional Court dismissed the case and this was subsequently appealed by one of the co-heirs. This resulted in the verdict cited here: the court dismissed the appeal.

The Court of Appeals (OLG) dealt with the following issues:

1. Refutation due to fraudulent misinterpretation (§ 123 BGB)
2. Was the action taken by the JCC immoral (§ 138 BGB)?
3. Does the JCC have an obligation to provide information and advice?
4. Is the JCC required to seek out heirs?
5. Was the action taken by the JCC illegal (§ 823 BGB) and did the JCC unjustly receive financial benefits (§ 812 BGB)?
6. Are § 2 (1) sentence 3 and § 30a of the Property Act unconstitutional?
7. Was Article 14 of Basic Constitutional Law violated?

1. Refutation due to fraudulent misinterpretation (§ 123 BGB)

The joint heirs felt they were fraudulently deceived by the JCC and/or their representatives at the time the settlement was reached in 2007. They argued that the defendant maintained that the claim filed by one of the joint heirs would not have benefitted them. They also asserted that they had been informed that if they refused to sign the contract they would get nothing. They therefore challenged the settlement on grounds of fraudulent deceit.

The Regional Court had already denied the validity of the appeal regarding the settlement with the following statement (court documents quoted in *italics*):

A fraudulent misrepresentation of facts by the defendant cannot be ascertained, because according to information from the plaintiffs, the defendant merely stated a legal assessment and thus expressed only an opinion and/or identified their negotiating position. (I.)

The Regional Court did not deny the fact that defendant said exactly what the plaintiffs alleged. If this is true, the JCC representatives, against their better judgment, lied to or misled the plaintiffs. One could expect that JCC representatives are familiar with the Property Act in detail and for them to provide a legal assessment contrary to the legal situation, cannot be described as anything other than fraudulent.

The appeal regarding the alleged deception of the plaintiffs at the time the settlement was concluded in 2007 and the scope of the appellant's legal rights through the defendant appears doubtful, because the agreements from 1993 and 1997 in which, according to the statement by the appellant, the facts related to the deception (and possibly intentional immoral behavior at to the detriment of the plaintiffs)

were unquestionably present at the conclusion of the settlement in 2007. As a result, the plaintiffs and their attorney have factual knowledge that this enabled an assessment of their prospects for success in the disposition of their claim. A deception by the defendant was therefore not present in terms of the case history leading to the settlement. In accordance with the Property Act, the legal succession of the appellant and his co-heirs, combined with the material exclusion of their restitution claims corresponds to the legal situation (BVerwG 8 C 8/08) and does not constitute deception. (II.1.a)

In the agreements from 1993 and 1997, there was nothing about how a claim filed by an individual heir would affect the other joint heirs. In 1993, the applicant agreed to withdraw his claim, there was no mention of any co-heirs.⁴ In 1997, an agreement was reached with other joint heirs who had appeared in the meantime. In this agreement, both parties agreed to “refrain from taking any steps to locate other surviving successors” (§11).⁵

2. Was the action taken by the JCC immoral (§ 138 BGB)?

In the eyes of the plaintiffs, the agreement not to look for joint heirs is immoral. However, the courts do not see it in the same way. According to the Regional Court: *The issue raised by the applicants regarding moral standards could be left open, because in any case, § 3 para 1 of the agreement in conjunction with the assignment clauses contained therein purportedly makes it clear that the settlement should also have a final effect. (I.)*

In other words, let’s just let bygones be bygones?

According to the OLG:

Whether, as alleged by the appellant, the moral standards of the previous treaties of 1993 and 1997 are included in the agreement between the parties reached in 2007 appears to be problematic because the appellant has been informed about the previous contracts by the defendant through his representative (attorney ...). Therefore, the plaintiffs had the option to initiate a legal review of previous contracts or to consider the prospects of success of such an approach. (II.2.a))

The OLG therefore does not consider it impossible that the previous agreements from 1993 and 1997 were immoral, but says that the plaintiffs had the opportunity to check on this. Is a violation of moral standards no longer a violation if the plaintiffs failed to check? Should it not be the responsibility of the court to consider this issue?

There is not sufficient evidence to determine immoral action on the part of the defendant. This is because the loss of the plaintiffs’ rights is a result of the statutory

provision. The fact that the filing deadline required to enforce their claim was not met is undisputed. (II.2.b)

This is undoubtedly true, but also quite formal. The statutory provision was only able to succeed because the first applicant had withdrawn his application based on the initiative of the JCC. The loss of the legal position of the co-heirs through the statutory provision was the result of the immoral actions of the JCC.

But, like the Regional Court (LG), the OLG believes that a settlement heals all previous shortcomings:

Moreover, the parties to the settlement from 2007 included possible inconsistencies (including moral standards) related to the previous agreements from 1993 and 1997 in the provision. (II.3.c))

In other words the obligation, in terms of failing to seek out co-heirs and exclude them, is only an inconsistency?

The plaintiffs referred to a verdict from the Federal Court of Justice (hereinafter BGH) in 2001. This was rejected by the OLG:

Contrary to the opinion of the appellant, the factual and legal situation in the present case does not correspond to the BGH VIII regarding ZR 51/00 on May 23, 2001.⁶ (II.3.b)

The verdict concerned the abuse of a position of trust by the defendant. According to the opinion of the BGH, these duties went “far beyond the clarification and disclosure obligation required of a contractual partner in an exchange contract”.⁷ The OLG could therefore only arrive at an assessment that this verdict is not relevant to the present case, because it only looks at the JCC in relation to the plaintiffs as “competing claimants.”

In view of the express appointment of the defendant as the assignee by law (§ 2 of the Property Act), denying full payment to the plaintiffs, is not deemed to be immoral. (II.1.d)

I will come back to this issue in point 6.

3. Does the JCC have an obligation to provide information and advice?

*The defendant has not violated any obligation to provide information and advice. ... The defendants were not obligated to provide additional information and advice, because in the present case, they merely stood against the plaintiffs as **competing claimants**, like in any ordinary exchange contract. (II.3.b), (underlined by F.E.).*

But the plaintiffs see this differently, as do all other heirs who failed to meet the deadlines specified in the Property Act. They refer to the founding statute of the JCC from 1952, which states:

1. *The name of the proposed Corporation shall be, The Conference on Jewish Material Claims Against Germany, Inc.*

2. *The purposes for which it is formed are:*

*a) to voluntarily assist, aid, help, **act for and on behalf of Jewish persons**, organizations, cultural and charitable, funds, foundations and communities, who were victims of Nazi persecution and discrimination, in matters relating to compensation and indemnification arising out of loss or damage suffered by them in consequence of such persecution and discrimination ...*⁸ *(underlined by F.E.)*

There is no mention of the JCC dealing with victims of Nazi terror as competing claimants. Instead, it obliges the organization to act on behalf of these victims, which clearly includes an obligation to provide information and advice.

4. Is the JCC required to seek out heirs?

Of course it would have been the duty of the German authorities in the first place to look for the heirs.⁹ According to § 31 of the Property Act, the heirs must be included ex officio. And in many cases that would not have been difficult, since the files from the various Equalization, Restitution and Reparation Offices were still available. In many cases, these files revealed claims that were only rejected in the past because the assets were outside the scope of the Basic Constitutional Law. In addition, many of the addresses on file related to ongoing pension payments.

With regard to the JCC, the OLG sees no *legal basis for requiring the defendants to locate the heirs*. Ostensibly, *an obligation on the part of the defendants to identify other heirs, e.g. as specified in their guidelines ... was neither presented nor otherwise made apparent by the plaintiffs*. (I.1.b).

Indeed, no such obligation is specified in the guidelines.¹⁰ In fact, the heirs who wanted to participate in the Goodwill Program were required to submit a statement. This was often met with criticism and resistance, because they were forced to relinquish any legal entitlement vis-à-vis the JCC and agree to surrender any right of appeal to JCC decisions.

Stegemann¹¹ regards the JCC as a legal trustee on behalf of the heirs. In terms of the internal relationship, he intends to analogously apply the rules

of the German Civil Code. He thus concludes that the JCC has an obligation to actively search for heirs. The JCC likes to cite the fact that it has published information on recovered property assets on the Internet and, beyond this, has diligently attempted to draw attention to the Goodwill Program in hundreds of Jewish newspapers “across the world.”¹² According to Stegemann, this does not constitute “sufficient efforts to actually locate the heirs. This would necessitate more concrete efforts and investigations in individual cases.”¹³

An obligation to actively search for heirs could also be derived from the JCC statutes. But if they do not search for the heirs, they should at least be obligated to refrain from preventing a search for the rightful heirs.

Contrary to its basic mandate, the JCC continues to more rigorously see itself as the legal successor, without any obligations to the rightfully entitled parties. In fact, the organization goes so far as to file lawsuits against the heirs or contractually prevent a search for possible heirs.¹⁴

5. Was the action taken by the JCC illegal (§ 823 BGB) and did the JCC unjustly receive financial benefits (§ 812 BGB)?

The plaintiffs based their claims, among other things, on illegal action on the part of the JCC. The lawsuit *contends that the defendants unfairly assumed the rights of the plaintiffs and other co-heirs by entering into immoral agreements with E. and E.H., who did not belong to the community of heirs ... despite having knowledge of the existence of members of this community.* (I.)

In this regard, the OLG issued the following statement:

The prerequisites for claims based on unjust enrichment or an infringement of rights (§§ 812, 823, 826 BGB) have not been sufficiently established by the plaintiffs in the first instance, nor by the appellants in the second instance. (II.1.)

If the JCC is required to act on behalf of the victims of Nazi persecution and it receives property assets or compensation for these victims, but fails to forward these assets to the entitled parties, this is unjust enrichment. At least that's how the heirs see it.

According to the JCC statutes, the organization is obligated to act for, and on behalf of, the heirs. Nowhere in the statutes does it say that the purpose is to prevent the heirs from receiving their rightful inheritance.

However, § 812 BGB states that “Anyone who gains through the efforts of others, or in any way at their expense, *without legal grounds*, is obliged to make restitution”. The OLG sees these legal grounds in the Property Act.

And it always comes back to the fact that the plaintiffs themselves undisputedly failed to submit a timely request for restitution.

Thereby, in accordance with § 2 para 1 sentence 3 of the Property Act, the defendant is the legal successor to the appellant and his co-heirs with regard to their originally rightful restitution claims by ... This corresponds to the legal position and does not constitute unjust enrichment of the defendant. Following the material loss of legal position by the appellant due to late registration of his claims and the ensuing legal succession of the defendant, the legal reasoning excludes any unpermitted action on the part of the defendant. This corresponds to the legal position that the "rightfully entitled parties" in a case of late registration of their claims relinquish their entitlement. (II.1.a, underlined by F.E.).

Not excluded based on legal reasoning would obviously be the idea that there must be something wrong with the legal position.

To determine an immoral approach on the part of the defendant, there is not sufficient evidence, because the loss of the plaintiff's rights incurred as a result of the statutory provision, in that it is undisputed that the deadline required for the enforcement of their claims has not been met and the relevant provision is not unconstitutional. (II.2.b).

This brings us to the key question:

6. Are § 2 (1) sentence 3 and § 30a of the Property Act unconstitutional?

6.1. The German state is not entitled to Jewish property

Based on more recent literature, the plaintiffs are of the opinion that § 2 para 1 sentence 3 of the Property Act is unconstitutional. The OLG sees this differently.

The explicit naming of the defendant as the legal owner as specified by law (§ 2 of the Property Act) ... instead of the entitled party who failed to take action on time ... is intended to prevent the German state from exercising usufructuary rights to the assets of Jewish victims who were persecuted or murdered ... (II.2.d)

Usufructuary rights to Jewish assets exercised by the German state (or the Aryanizers) are also excluded when the JCC is simply named as a trustee. One situation clearly does not exclude the other!

Unfortunately, the Property Act does not exclude usufructuary rights to Jewish property exercised by the German state (or the Aryanizers). This

is because the JCC was not generally named as the successor to assets for which there are no heirs. This requires a claim to be submitted within the time limits specified in § 30 of the Property Act.¹⁵ Global applications by the JCC have, for the most part, been rejected.¹⁶

Although the assignment of rights to the JCC *does not directly benefit the heirs, it can at least help other needy Jewish citizens who receive support from the defendant's organization, which provides partial funding for various social programs supported by the defendant ... (II.2.d).*

The social programs sponsored by the JCC, which are clearly in line with the organization's founding principles, are financed with funds that are withheld from the rightfully entitled parties. The advantage for the Federal Republic of Germany lies in the fact that the more money the JCC contributes at the expense of those descendants of murdered Jews who were cheated out of their inheritance, the less the German government has to contribute to relief funds, such as the one specified in the agreement between the GDR and the FRG for the implementation and interpretation of Article 2 of the JCC Unification Treaty.¹⁷

The JCC however, does not only support social programs. For years, criticism of the JCC distribution practices has been voiced by major Jewish groups, especially from Israel.¹⁸ I therefore share the opinion expressed by Johannes Wasmuth that Germany is responsible for the use of the money paid to the JCC.¹⁹

6.2. The position of the JCC as trustee

§ 2 para 1 sentence 3 of the Property Act is not unconstitutional per se. But its application up until now is unconstitutional in combination with § 30a of the Property Act. The interpretation of the Property Act in a way that ultimately includes the expropriation of those affected is equivalent to accusing the German state of intending this expropriation or at least regarding it as acceptable.

Such a legal consequence, which completely obliterates the legal positions of the entitled claimants, cannot be intentional. "The rightful heirs would be immediately deprived of all rights without their knowledge. This interpretation would defeat the purpose of the law."²⁰

I have written several articles recommending that § 2 para 1 sentence 3 of the Property Act be supplemented as follows: "If, however, a Jewish

claimant or their successor appeals to the JCC after the application deadline specified in the Property Act, the JCC should only be named as a trustee on behalf of these beneficiaries and be required to appropriately share the proceeds or compensation with them.”²¹

Stegemann indicates that such a supplement of the Property Act is unnecessary, since the unequivocal application of the existing rules would lead to the same result. Accordingly, § 2 para 1 sentence 3 already specifies who the rightful beneficiary should be. The wording of the legislation may lead to the conclusion that the legislators assume a priority ranking among the beneficiaries. The provisions specify that the JCC can only be regarded as the entitled party if the victims of persecution, or their heirs (primary beneficiaries), have failed to file a claim.

The application of § 2 para 1 sentence 3 should not lead to a reversal of the relationship between the entitled parties. The principal obligation of the Federal Republic of Germany to ensure restitution and compensation is primarily aimed at those who have lost their property as a result of Nazi persecution. The JCC is not the victim of persecution. The real victims are those individuals who have suffered, as well as their descendants who are still suffering today.²²

The wording of § 2 para 1, sentence 3 of the Property Act assumes “...merely a fiction of legal succession in favor of the JCC. The JCC is regarded as the legal successor only ‘in conjunction with claims filed under the Property Act,’ i.e., only in connection with the provisions of the Property Act. Conversely, this means that the unwarranted claim is actually limited to the application of § 2 section 1 sentence 3 of the Property Act and that, outside of this application, the JCC is neither the actual successor, nor can it be regarded as such.” “The legal status of the actual heirs is thus not affected by § 2 para 1, sentence 3 of the Property Act and, from a legal standpoint, these people remain the rightful legal successors to the expropriated victims.”²³

In addition, “In the application of § 2 para 1, sentence 3 of the Property Act, it (must) be maintained that the heirs, according to German law, are the legal successors as defined by § 1922 BGB (German Civil Code). With the property assets, or compensation, the JCC receives something that it would not have been entitled to, due to a non-existent right to succession (this is only a fiction).” Therefore, pursuant to § 2018 of the Civil Code, the rightful heirs could reclaim what was assigned to the JCC.²⁴

If there were no fiction of legal succession, the unclaimed assets would (initially) go to the German national treasury. Once the heirs become aware of this, they would have a right to claim the assets. This would place the entitled heirs in a better position – if it were not for § 2 para 1 sentence 3 of the Property Act! (This obviously does not apply to property for which there are no heirs.)

The BGH pointed out in an earlier decision that the Jewish Restitution Successor Organization (JRSO), a predecessor of the JCC, only serves in the role of a trustee. “The displacement of the entitled heirs by the Jewish Restitution Successor Organization would basically mean that the burden from the Nazi injustice would be fully borne by the persecuted victims. The underlying concept of justice that is used for reparation and restitution laws is, in principle, only fulfilled if compensation were to be awarded to the person who actually suffered the loss.”²⁵

Originally, there was no intention to reallocate Jewish property assets. The plan was to assign uninherited Jewish property to the JCC. The stakeholders involved unanimously agreed that the JCC should only be assigned to the position of trustee for assets or properties for which there were still heirs. According to an article appearing in the Israeli newspaper *Maariv* on September 22, 1995, there was no indication that the German government planned to disinherit the lawful heirs from their rights to reclaim illegally confiscated property assets. Quite to the contrary. The German government declared that it would be in agreement if the property was returned to the rightful heirs by the Jewish Claims Conference. “We (the German government) have no objection whatsoever if the Claims Conference returns property assets to heirs who failed to submit an application before the deadline. This is one of the reasons why the Jewish Claims Conference was named as the legal entity entitled to receive the property assets in question...”²⁶

Based on the Property Act system, Wasmuth²⁷ is of the opinion that the JCC should clearly be regarded as a trustee, even though the duties associated with the trustee position are not explicitly defined. “Legislators apparently assumed that JCC compliance with this function is to be expected.” But due to the actions taken by the JCC, Wasmuth calls on legislators to define the position of the JCC in detail.

Until this happens, courts are likely to continue interpreting the Property Act in a way that is contradictory to the concept of restitution.

6.3. Time limits specified by § 30a of the Property Act

According to the verdict by the OLG: *“On July 30, 1998, the BVerwG already declared the time limits specified under § 30a paragraph 1 sentence 1 of the Property Act to be consistent with article 14, paragraph 1, sentence 1 Basic Constitutional Law. The Property Act ostensibly serves to redress the injustice suffered. Instead of being based on singular rights, the normalized claims stem from the rule of law and social state principle (BVerfGE 84, 90). (II.4.a)*

When the Federal Republic of Germany acknowledged the culpability of the German people as a whole vis-à-vis Jews and signed the Luxembourg Agreement with the State of Israel and the JCC in 1952, there was no talk of a rule of law and social state principle. Instead the focus was on the responsibility of the German state for reparations.

The rule of law and social state principle of the Property Act is a specific consideration within the context of German reunification. The following statement is from the joint declaration on unresolved property issues between the governments of the GDR and FRG from June 15, 1990: “In resolving the property issues, both governments agree that a socially acceptable balance between various interests must be established. [...] This is the only way to avoid legal disputes in the future of Germany.” At that time, no one thought of including the persecution that took place from 1933 to 1945 in the future Property Act. Despite the principle “return of property takes precedence over compensation,” the idea at the time the GDR acceded to the FRG was to strike a socially fair balance between East and West Germans, and not to reverse all changes in ownership.

Establishing a “socially acceptable balance between various interests” should not play a role in conjunction with § 1 para 6 of the Property Act.²⁸ When it comes to the victims of the Holocaust, the goal is not to maintain a social balance, but to offer comprehensive reparations, not only to the Jewish people as a whole, but to individually compensate the survivors or their heirs.

In a subsequent decision from April 29, 2004 (7 B 85/03), the BVerwG once again rejected concerns about the constitutionality of § 2 para 1, sentence 3 of the Property Act and stated that the fiction of legal succession based on § 2 para 1 sentence 3 of the Property Act is solely dependent on the question of whether the former Jewish owners or their heirs have filed a claim. Otherwise, their claim is nullified with the expiry of the time limit(s) specified in § 30a para 1 sentence 1 of

the Property Act and only the fictive successor is entitled – providing this party has filed a claim before the deadline. In this respect, it doesn't matter why a claim was not filed (BVerwG 7 C 64.02). (II.4b, underlined by F.E.)

And if the JCC does not file a claim on time, or its global applications are not accepted, the beneficiary remains the German state.²⁹

According to Wasmuth, “Due to Germany’s historical responsibility, the provisions in § 30a para 1 sentence 1 of the Property Act represent a serious, unjustifiable mistake on the part of the legislature.”³⁰ In this context, Wasmuth pointed out that the time limits were introduced in 1992. This was also based on an initiative and pressure from the JCC.

In the eyes of the BVerfG and the OLG, the reasons for failure to file a claim are irrelevant. However, misconduct on the part of the state was the cause in many cases.³¹

The naming of the JCC as legal successor to the assets of Holocaust victims usually involves uninherited and unclaimed assets. The JCC statutes supplemented in 1994 also refer to the JCC as “a successor organization for uninherited and unclaimed Jewish property.” These statutes make no reference to the German Property Act. Nowhere does it say “unclaimed within the time limit specified by the Property Act.” From the moment an heir petitions the JCC, the property is no longer unclaimed.

Uninherited and unclaimed were originally regarded as equal terms. In other words, since there were no heirs, there could be no claim filed by an individual. But the property assets should under no circumstance go to the German government³² or remain in the possession of the “Aryanizers.” The idea was to compensate the individual survivors or their heirs. There was certainly no intention to expropriate them, which is what happened as a result of an incorrect interpretation of the Property Act.

In accordance with its statutes, the JCC was to act on behalf of the Jewish heirs, i.e. as a trustee. At least that was the understanding at the time – especially among Jewish survivors and their descendants.

The arguments presented by the plaintiffs indicating the time limits specified in § 30a of the Property Act negatively affect their inheritance rights and, for constitutional reasons, should be omitted because the intended purpose, i.e. to speed up the process, is not borne out by the result. In the eyes of the court, this argument is not constitutionally relevant. (II.4.c)

In my opinion, it is very important to determine whether or not a legal standard serves its intended purpose. In the case of § 30a of the Property

Act, the issue is very clear. All arguments that attempt to justify the time limits are either invalid or do not stand up to critical analysis.³³ The considerations regarding financial planning, aimed at justifying the deadlines, were completely illusory. In this context, I find the argument about reducing the workload of government authorities to be especially bizarre. I have already noted that, when it comes to the heavy workload, it is surely reasonable to ask whether this justifies expropriation of Jewish heirs. If, as Chancellor Merkel has pointed out, it is in the best interests of Germany to stand up for the right of existence and the security of Israel, would it not be equally important to ensure that compensation for Nazi injustice goes to the people who suffered this terrible fate and whose property was stolen? Doesn't this include the people who failed to meet the deadlines?³⁴

7. Was Article 14 of Basic Constitutional Law violated?

7.1. National law

Article 14 paragraph 1 of Germany's Basic Constitutional Law states: "Property and inheritance shall be guaranteed. Content and limits are determined by law." Citing the BVerwG and BVerfG, the OLG – unlike the claimants – does not see a violation of this fundamental right and asserts that § 30a of the Property Act adequately defines the limits of property.

My proposal to supplement the Property Act to preclude expropriation was rejected by all relevant offices – with different reasoning. I received a statement from the Federal Parliament Legal Committee that refers to Article 14 of Basic Constitutional Law: "Aside from the constitutional and legal considerations and the grounds outlined by Mr. Kauder in his letter from January 20, 2010, a legislative revision of the Claims Conference legal position would contradict the principle of legal certainty and the fundamental right to property under Article 14 of Basic Constitutional Law."³⁵

While the courts join the Ministries of Justice and Finance in their opinion that the expropriation of Jewish heirs is not in violation of Article 14 of Basic Constitutional Law, protection under Article 14 is afforded to the JCC. The fact that the JCC is protected by the Constitution is, however, denied by the BVerfG.³⁶

Beyond a violation of Article 14, Basic Constitutional Law, the strict application of the Property Act in combination with § 2 para 1 sentence 3

and § 30a would infringe on the principle of equality under Article 3 paragraph 1 of Basic Constitutional Law, which states: “All persons are equal in the eyes of the law.” This clearly refers to all laws and not to any one single law.

While individual victims were required to file their claims by December 31, 1992 or June 30, 1993, the JCC was granted the right to submit claims in accordance with the Nazi Persecution Compensation Act up until June 30, 2007 (§ 1 para 1a). Other victims were given the option to submit applications until December 31, 2019: § 9 para 3 VwRehaG (administrative rehabilitation law), § 7 para 1 StrRehaG (criminal rehabilitation law), § 20 BerRehaG (occupational rehabilitation law).

Many clients turned to the Federal Parliament German Bundestag Petitions Committee already in 2010 and 2011. The petition requested an amendment to the Property Act to the effect that the JCC would only be named as a trustee for the legitimately entitled persons and would be required to give them a fair share of the proceeds if they contact the JCC after the application deadline specified in the Property Act. The Petitions Committee took a long time to return a recommendation for resolution.³⁷ The recommendation relied on a statement by the Federal Ministry of Justice and repeats all the old arguments: that the application deadline specified in § 30a of the Property Act is a substantive time limit, that § 2 para 1 sentence 3 of the Property Act is required to prevent the assets of Nazi victims from falling into the hands of those who benefited from the persecution or subject to the German treasury. As explained above, this objective would not be hindered in any way if the JCC was appointed solely as a trustee for the returned assets. Therefore, these arguments lack any trace of logic.

The Petitions Committee however, is concerned about the freedom of disposition of the Claims Conference. “The trustee model requested by the petitioners would mean that the JCC would have to administrate the proceeds in the interest of the Jewish victims.”³⁸ This is exactly what the heirs expect from the JCC and support for this has been refused. Despite the countless stories about the fate of Nazi victims in Israel, the USA, Argentina, Chile, Great Britain, Austria and Australia, the Petitions Committee saw no reason to take action. The Bundestag followed the recommendation from the Petitions Committee and decided to close the petition process on March 22, 2012.

7.2. *International law*

The right to property is not only established in Germany's Basic Constitutional Law. It is regarded as a form of natural justice and is included in the European Convention for the Protection of Human Rights and Fundamental Freedoms and in Protocol No. 1. According to Article 1, "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."

One most certainly could not claim that any public interests are served by the expropriation of Jewish victims of Nazi terror. But under the general principles of international law, even an expropriation would require reasonable compensation.

By refusing to grant restitution to individual victims, the Federal Republic of Germany is failing to fulfill its international obligations specified in Protocol No. 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

This was verified by a judgment of the European Court of Human Rights (ECHR) on December 8, 2011.³⁹ This verdict states that the scope of this article includes inheritance rights based on § 1 para 6 of the Property Act, regardless of whether and when a claim was filed. The ECHR referred to protected "legitimate expectations."⁴⁰

In closing, I would like to cite the international conference on "Holocaust Era Assets" held in Prague on June 26-30, 2009⁴¹ and attended by 46 states, including the Federal Republic of Germany. The Terezín Declaration adopted by the conference on June 30, 2009 includes the following: "*Noting that the protection of property rights is an essential component of a democratic society and the rule of law, [...] we consider it important, where it has not yet been effectively achieved, to address the private property claims of Holocaust (Shoah) victims concerning immovable (real) property of former owners, heirs or successors, by either in rem restitution or compensation, as may be appropriate, in a fair, comprehensive and nondiscriminatory manner.*" (underlined by F.E.)

The court decisions should help make sure the Federal Republic of Germany fulfills its international responsibilities.

Notes

- 1) Included in this issue
- 2) The Jewish Claims Conference and joint heirs, ZOV 1/2011, p. 10
- 3) Judgment reached on April 15, 2011 (2-08 O 163/10)
- 4) See footnote 2, p. 11
- 5) The preamble to the agreement includes an interesting detail that characterizes the operation of certain property offices. The JCC filed restitution claims on March 31, 1991 and received a ruling in their favor on May 7, 1992 – i.e. *before the registration deadline*. They then sold the land without waiting until December 1992 to determine whether or not the entitled heirs also filed a claim.
In other cases, property offices have decided in favor of the JCC when the applicants failed to submit all of the certificates of inheritance in time. Further details are included in my article, “Expropriation due to § 30a of the Property Act” ZOV 5/2009.
- 6) The preamble is also interesting in this respect. The Dresden District Court issued a certificate of inheritance on behalf of an original owner on April 30, 1996, which was challenged by the JCC. There are also known cases in which appeals have been filed against decisions made by property offices in favor of the rightful heirs, in which the proceedings were delayed, to the detriment of the heirs, by several years.
- 7) Printed in RGV under F 75.
- 8) Previously cited, p. 140
- 9) 1. The name of the proposed Corporation shall be, The Conference on Jewish Material Claims Against Germany, Inc.
2. The purposes for which it is formed are:
 - a) to voluntarily assist, aid, help, **act for and on behalf of Jewish persons**, organizations, cultural and charitable, funds, foundations and communities, who were victims of Nazi persecution and discrimination, in matters relating to compensation and indemnification arising out of loss or damage suffered by them in consequence of such persecution and discrimination ...
- 10) This opinion is shared by 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 rassisch Verfolgten? (The entitlement of the Jewish Claims Conference to property for which the Jewish former owners are still registered in the Land Register, or: Retransfer of title to the JCC as a means of expropriating victims of racial persecution?” ZOV 3/1993, 138 ff.
- 11) Fritz Enderlein, What the guidelines and deadlines of the JCC Goodwill Program are all about”, Jüdische Zeitung, August 2008
- 12) Stegemann, The Conference on Jewish Material Claims Against Germany as a legal trustee on behalf of the heirs or property owners expropriated by the Nazis. <http://www.opinioiuris.de/>

- 13) www.claimscon.org Recoveries By Claims Conference Successor Organization for Which It Has Received Funds, January 1, 1993 – April 30, 2008, http://www.claimscon.org/index.asp?url=successor/recoveries_080608
- 14) Stegemann, previously cited
- 15) See footnote 2
- 16) I argue this point in my article “§ 2 para 1 sentence 3 of the Property Act: Is it unconstitutional? Thoughts on the Goodwill Fund of the Jewish Claims Conference” published in the *Zeitschrift für offene Vermögensfragen* (ZOV), issue 6/2008.
- 17) See also Johannes Wasmuth, “Global applications submitted by the Jewish Claims Conference and the time limits specified by the Property Act” in ZOV 4/2003, p. 225 ff
- 18) For an overview of all funds, see Fritz Enderlein, “The Jewish Claims Conference in Court?” ZOV 5/2011
- 19) Examples are cited in the article “Restitution bypasses victims: Why the German government needs to take immediate action!” in ZOV 4/2010. Wasmuth also criticized the allocation of funds, source previously cited, p. 229
- 20) Fritz Enderlein, “Is the Federal Republic of Germany responsible for the allocation use of the money paid as restitution to the JCC?” *Berliner Anwaltsblatt* 10/2009, p. 354; Wasmuth, *ibid*
- 21) Stegemann, previously cited
- 22) See footnote 20, also in ZOV 5/2009
- 23) See “Missed application deadlines – correspondence” ZOV 4/2010, letter from July 20, 2010; also Wasmuth, p. 229: “The JCC was never subjected to persecution”
- 24) Stegemann, previously cited
- 25) Previously cited
- 26) BGH verdict from February 28, 1955, GSZ 4/54, quoted by Stegemann
- 27) Cited from a memorandum written by David Rowland for the JCC on May 13, 1999
- 28) Previously cited, p. 228
- 29) This is why there is something to be said in favor of separate legislation, Wasmuth, *prev. cited*, Fritz Enderlein, see footnote 19
- 30) See details on global applications in “Restitution bypasses victims: Why the German government needs to take immediate action!” previously cited
- 31) *ibid*
- 32) I have described the many different reasons in ZOV 6/2008, see footnote 2
- 33) The following was included in the information used to prepare for the Luxembourg Conference: “Following the mass extermination by the German Reich, there is a large number of claims for which there are no individual heirs. Our focus here is on the rights of the survivors and the millions of people killed. They are longer alive – but their property should not be given away. Germany should under no circumstances be named as the beneficiary for unclaimed assets resulting from the

thoroughness of the Nazi extermination policies.” These assets were earmarked for “Jewish organizations that support surviving victims of Nazi terror.” Document CC 8081 from March 21, 1952; courtesy of the Central Archives for the History of the Jewish People (CAHJP) in Jerusalem.

34) Details are provided in the article “The Supreme Constitutional Court and § 30a of the Property Act” ZOV 5/2010

35) *ibid*

36) See footnote 23, letter from March 16, 2010

37) See article “The Jewish Claims Conference and the Constitution”, ZOV 1/2011

38) Bundestag bulletin 17/8911

39) *ibid*

40) German translation in ZOV 1/2012, p. 32

41) See article by Stefan von Raumer, “Elimination of inheritance-related competing demands through ‘late filing’ of preferential restitution claims by the Federal Republic of Germany in accordance with § 30a para 1 sentence 4, 2. Alt. of the Property Act is contrary to the convention agreement, ZOV 1/2012, p. 2

42) www.holocausteraassets.eu

This article was first published in:

Zeitschrift für offene Vermögensfragen, 4/2012, page 181

Heirless and Unclaimed. Unclaimed?

A review of § 2 para 1 sentence 3 Property Act¹

The 60th anniversary of the signing of the Luxembourg Agreement has been commemorated many times this year, most recently on the occasion of the signing of a new compensation agreement on November 15, 2012 in Berlin. On this day, German Finance Minister Schäuble pointed out, „Beyond the Luxembourg Agreement, the Claims Conference has consistently supported the restitution legislation and closely monitored its implementation.“¹

This offers a good opportunity to look back on JCC negotiations with the German government in 1952, examine their stated task and purpose, and take a closer look at the motives and objectives on the German side.

The Luxembourg Agreement

At the time, negotiations were held with the State of Israel as well as with the JCC – although the interests of these two parties were not always the same. While the State of Israel could only speak for itself and its citizens, the JCC represented Jews from Germany and the occupied territories all over the world.

The views of the JCC are documented in the Central Archives for the History of the Jewish People in Jerusalem.² This is where, in the 1970s, the JCC sent all documents related to the conference held from March to August 1952 in Wassenaar/The Hague in the Netherlands.

The following is stated in the § 2 para 1, sentence 3 of the Property Act (law regulating unresolved property issues):

*If **claims** by entitled Jewish heirs, as defined in § 1 paragraph 6, or their successors, **are not filed**, the Property Act stipulates that the successor organization shall be awarded restitution rights. If this organization does not file a claim, the legal successor is deemed to be the Conference on Jewish Material Claims Against Germany, Inc.*

(Emphasis: F.E.)

In addition to background materials related to Jewish claims, the files contain the official documents of the German delegation, along with records and reports from the working groups and conferences in Wassenaar and related correspondence.³

In autumn 1945, a few months after the end of World War II, Chaim Weizmann, who later became the first President of Israel, appealed on behalf of the Jewish Agency for Palestine to the Four Powers, France, Great Britain, Soviet Union and the United States, to include Jewish claims in the reparation negotiations with Germany.⁴

Working in close cooperation with the Government of Israel, the Conference on Jewish Material Claims Against Germany was founded in New York in October 1951. This was to be the organization that would represent the interests of Jewish claimants all over the world. Dr. Nahum Goldmann was the organization's first president.

The government of the Federal Republic of Germany expressed a commitment to German Parliament in September 1951 to compensate for the immense material damage caused by the Nazi regime to the extent possible within the scope of German capabilities. In a letter to the government of Israel in December 1951, Dr. Konrad Adenauer declared the willingness of the German government to enter into negotiations with Israel on the basis of claims submitted in March 1951.

In Israel, „The majority of the Jewish public ... vehemently rejected all negotiations with Germany because they did not want any political or human contact with the representatives of a state that caused the destruction of millions of Jews and supported the idea of destroying the Jewish element.“⁵ After three days of fierce debate in the Knesset, Israel's parliament, a narrow majority (one vote!) finally agreed to participate in the negotiations.

These negotiations started on March 2, 1952 in the town of Wassenaar, near The Hague in the Netherlands. Along with the two government delegations, a delegation from the Jewish Claims Conference attended. These delegates were responsible for the negotiation of **individual** compensation claims.

The following types of claims were differentiated: claims against private persons or companies, and claims against Germany. The latter included individually and collectively verifiable claims or estimated claims.⁶ For provable losses by individuals, the person who suffered persecution or his/

her successor was regarded eligible to file a claim. In cases in which there was no persecuted claimant or successor still alive (heirless), a recognized successor organization was eligible to file a claim.

At the start of negotiations with Germany, the Claims Conference issued a statement: „Following the mass extermination by the Third Reich, there is a huge number of claims for individuals who no longer exist. They are dead – but their property should not be surrendered. Germany must not be named as the beneficiary of assets ??that resulted from the thoroughness of the Nazi extermination policy. Jewish property that is heirless and not been claimed should be returned to the Jewish organizations that support the surviving Nazi victims.“⁷

The stated aim of the Claims Conference was to secure assets for which there are no heirs. This property went unclaimed because there were no surviving beneficiaries. Heirless and unclaimed were thus originally regarded as identical conditions. But there were also cases in which claimants decided against filing a claim under the applicable laws of the occupying Western powers. Many Nazi victims wanted nothing more to do with Germany. They were „... afraid that the restitution process would reawaken memories of the painful suffering experienced in the concentration camps. Others did not want to appear as beggars in the eyes of German authorities or to be involved in any way with the former oppressors.“⁸

In his opening speech, the German delegation chairman quoted a statement made by German Chancellor Konrad Adenauer to the Bundestag (parliament) on September 27, 1951: „Unspeakable crimes have been committed in the name of the German people, calling for moral and material indemnity *for damage suffered by individuals, as well as for Jewish assets for which there are no surviving beneficiaries...*“⁹

The focus was always on compensation for individuals. This was also in line with JCC interests. In paragraph 2 of the organization's bylaws filed on November 21, 1952, the purpose and goals of the JCC are explained as follows: The corporation is established exclusively for religious, charitable, literary and educational purposes. Its purpose is solely to voluntarily assist, support, help and act for and on behalf of the Jewish people, cultural and charitable organizations, funds, foundations and communities who are victims of Nazi discrimination and persecution, (i) in matters relating to compensation and restitution for losses resulting from persecution, including the distribution of funds provided by the Federal Republic of Germany, (ii)

in matters relating to the restitution of property and property rights of any kind, (iii) to act on other matters of relief, rehabilitation, support, assistance, resettlement and emigration, and (iv) as a successor organization for heirless and unclaimed Jewish property...¹⁰

Once again, the focus was on restitution for individuals. Unclaimed assets were presumed to be without heirs.¹¹

The relationship between individual restitution and global compensation played an important role in the negotiations. In a meeting on June 25, 1952, the German side expressed concerns that disproportionate global compensation to Israel or to the JCC could reduce the options for individual compensation as prescribed by law.¹²

In a hearing on 26 June 1952, the JCC presented a memorandum on the status and purpose of the organization. Emphasis was placed on the premise that the JCC was founded in response to Adenauer's wish to meet with Jewish representatives all over the world. With its 23 member organizations, the JCC represented a majority of Jews outside Israel. The JCC made it clear that the organization did not rule out individual claims and pledged to ensure that funds received for heirless assets would be used solely to support needy survivors.¹³

The JCC demanded that the different laws in the three Western occupation zones be standardized and influenced the formulation of the different restitution and compensation laws from the very beginning.

After months of sometimes difficult, repeatedly interrupted negotiations,¹⁴ an agreement between the Federal Republic of Germany and the State of Israel was reached on September 10, 1952.¹⁵ At the same time, Protocols 1 and 2 were signed by Konrad Adenauer on behalf of the Federal Republic of Germany and Nahum Goldmann for the Jewish Claims Conference.¹⁶

The negotiations focused on „expanding reparation legislation valid in the Federal Republic of Germany.“ The main emphasis was on standardizing current legislation in the three Western zones and extending it across Germany by passing a federal amendment and framework law based on the most-favored principle.

Agreement was reached on the principles of **compensation** for confinement, for physical and psychological harm, for damages to personal livelihood and economic advancement, as well for **restitution** of identifiable property assets (Protocol 1) and for the creation of a fund of DM 450

million (Protocol 2), payable to Israel on behalf of the Claims Conference (Article 2 Fund).¹⁷

Military government legislation

Even before the Federal Republic of Germany was founded, compensation and restitution laws were passed in the Western occupation zones. These included the American Military Government Law No. 59 (REG) on the restitution of identifiable property in 1947, and the nearly identical British Military Government Law No. 59 (BREG) from 1949. In the French zone, Regulation No. 120 specifying the return of looted assets was adopted in 1947. In West Berlin, regulation BK/O (49) was adopted on July 26, 1949 (REAO).¹⁸ These laws already specified that heirless assets would be assigned to the successor organizations JRSO, ITC, ATO and to the French department of the ITC to keep them from falling into the hands of the German Treasury.

These legal provisions included a number of differences that still need to be addressed. Above all, the focus was on securing heirless Jewish property. According to § 1936 of the German Civil Code, the German Treasury would become the legal successor to heirless assets. For this reason, Article 10 of the American REG specified „In the case of § 1936 BGB, instead of the German government, the heir to the estate of a persecuted victim will be a successor organization determined by the military government.“

Whether an estate is, in fact, heirless, was subject to careful examination. „In any case, prior to the application of the provision, it must be determined whether heirs, relatives, spouses or testamentary heirs of entitled persons are still alive. If necessary, unidentified heirs must be located by public notice.“¹⁹ „Only when an in-depth investigation determines that no entitled private person is available, will the successor organization be considered on the basis of Article 10 REG.“²⁰ In the context of the Property Act, state property offices no longer make such an effort.

There are also regulations specifying that restitution claims not filed before specific deadlines should be transferred to the successor organizations. According to Article 11 REG, entitled persons were allowed to file claims from the time the law went into effect (November 10, 1947) until December 31, 1948. The successor organization was also entitled to submit claims until December 31, 1948, but these had to be submitted after May 10, 1948. In other words, the entitled claimant was given a head start and the

successor organization did not achieve legal status as beneficiary before December 31, 1948. (The Property Act contains no such provision. There have been cases in which title was transferred to the JCC before the registration deadline expired!). The British regulations and the REAO conformed with the American regulations, albeit with different deadlines.

In any case, preference was given to the individual claimants, even if they filed a claim later than the successor organization.

Claims filed by ineligible parties (unlike the Property Act) were nonetheless handled in favor of the true heirs (Article 50 paragraph 4 REAO). However, this did not apply if the successor organization also filed a claim.²¹

The successor organizations were not assigned claimant rights when the entitled party expressly waived, in writing and within a specified time-frame, the right to restitution (Article 11, paragraph 3 REG, Article 9, paragraph 3 BREG, Article 10 paragraph 3 REAO). No waiver was possible after the registration period expired.²² The fact that, despite a waiver by the true claimant, restitution was awarded to the successor organization in 1953 was criticized by Walter Schwarz as a „terrible mistake.“²³

There is nothing in the cited laws about the relationship between the successor organizations and the entitled persons in the event that the latter filed a late claim. These cases already played a significant role at that time. In the comments, the successor organizations were, for the most part, assigned the position of a trustee²⁴ and the true heir was entitled to demand return of the property from the successor organization.

It is understandable that the successor organizations saw things differently. The JRSO expressly stated that it was not „the representative of individual interests, nor the mandatary for entitled individuals. On the contrary, the organization represents the entire group or class of Jewish victims of Nazi persecution.“²⁵

The issue of competition between a properly filed claim by a successor organization and a late claim filed by an entitled party was decided with quasi-legal authority in the CORA legal opinion No. 1 from July 27, 1950.²⁶ This emphasized „the intention of lawmakers to relinquish the rights of the entitled party who was too late in filing a claim.“²⁷

The court decisions on this issue differed widely and, in some cases, were diametrically opposed. The German Federal Court of Justice (BGH) also saw things differently. In a decision dated February 28, 1955, the court came to the conclusion that the role of the JRSO is only that of a

trustee. „The displacement of the real heirs by the Jewish Restitution Successor Organization would essentially mean that the burden of Nazi wrongdoings would be fully borne by those persecuted. The idea of justice, which is the basis of the reparation and restitution laws would, in principle, only be fulfilled if the person who actually suffered the loss would be compensated.“²⁸

In the dispute it was criticized that claiming private property for collective purposes would be a form of nationalization. The failure to file a claim on time is not always based on the reasons mentioned above or on negligent default. In many cases, it is a result of unawareness of the (repeatedly extended) statutory limitation periods, or because heirs were not aware of the existence of confiscated property.²⁹

Those in favor of protection of private legal interests eventually reached an agreement that required the successor organizations JTC and JRSO to set up so-called „equity boards“ and that defaulting applicants would be compensated with at least 90% of their accrued assets.³⁰

The courts were well aware that the exclusion of the claimant in favor of the successor organizations would present a hardship that would however, have to be taken into account. The entitled claimants could only be directed to „use the assignment procedure (BK/O 53/14) provided by lawmakers for such cases.“³¹ Within the context of BK/O (53) 14, the successor organizations were expressly „authorized to honor restitution claims, or return or assign assets based on such claims to those persecuted or to their successors for whom they assumed legal status or representation.“³²

German Federal Restitution Act

A unified regulation was not adopted until 1957 with the **Federal Restitution Act**,³³ which specified new deadlines (§ 27 para 2). This even permitted legally rejected or withdrawn applications to be resubmitted (§ 29 para 1). In such cases, the transfer of rights to a successor organization was treated as if it never took place (§ 29 para 3). Here once again we see **priority placed on individual** instead of collective restitution. The law did not address the issue of whether the successor organization would be required to return any collected funds to the entitled claimant.

In the American occupation zone, the Süddeutsche Länderrat (State Council) enacted a law in April 1949 that required compensation for Nazi

injustice. After the founding of the Federal Republic of Germany, this legislation was integrated into the federal law and redrafted in 1953 as the **German Restitution Law**.³⁴

According to the Restitution Law, compensation for property-related damage is authorized not only for those persecuted, but also for the successor organization. However, the compensation to individuals takes precedence. „If those persecuted or their heirs file a compensation claim for the same property prior to a determination in accordance with § 51 or before a legally binding court decision has been made, the successor organization’s right to compensation must be awarded to the persecuted party or their heirs at the time the claim was submitted“ (§ 53 BEG). This is also the case when the deadline for filing a claim has already expired and no claim has been submitted. The entitled party is even granted reinstatement rights when he or she was prevented, through no fault of their own, from complying with the deadline.

It took decades to process the claims. Many cases were still ongoing in 1990.

Legal position after 1990

After the accession of the GDR, there was deliberation on whether the restitution laws should be extended to the new federal states. This idea was rejected and instead, the Property Act was passed in the final weeks of the GDR and integrated into the unification agreement as an ongoing law.

The agreement from September 12, 1990 about the final ruling with respect to Germany³⁵ does not contain any provisions for compensation. The Joint Declaration of the Governments of the German Democratic Republic and the Federal Republic of Germany for Outstanding Property Issues from June 15, 1990³⁶ also does not say anything about the victims of the Nazi era but refers in its introductory sentences to the fact that „the division of Germany, the resulting migration from East to West and the different legal systems in both German states ... led to numerous pecuniary problems that have an impact on many citizens of the German Democratic Republic and the Federal Republic of Germany.“ „In resolving the pending property issues, both governments believe that a reconciliation of the various social interests can be achieved.“ A reconciliation of social interests is also highlighted in the agreed benchmarks (3.b).

The focus here is on the relations between the citizens of the two German states. A reconciliation of social interests does not relate to the victims of Nazi persecution. However, a reconciliation of social interests is brought into play in the rulings of the Federal Administrative Court and the Federal Constitutional Court related to the justification of the application deadlines in § 30 of the Property Act. This also applied to Jewish claims.³⁷ The courts apparently lack sensitivity and historical understanding.³⁸

Property that was looted in the period from January 30, 1933 to May 8, 1945 was not listed in the Application Regulation³⁹ from July 11, 1990. These assets were only included in the revised edition of the regulation from October 5, 1990 with (§ 1, para 2).⁴⁰ Corresponding claims can also be registered by the successor organizations in line with the intent of the restitution laws or by the JCC (§ 2 para 1).

The JCC is not mentioned in the Property Act of 1990, which includes claims on the basis of persecution between 1933 and 1945 in § 1, para 6. It wasn't until the 2nd Property Rights Amendment from July 14, 1992, that the JCC was assigned new duties as the successor organization. According to § 2 para 1 of the Property Act, the JCC is deemed the legal successor for claims not submitted ??by entitled Jewish claimants or their successors (or cannot be submitted because there are no entitled survivors). Here once again we have unclaimed property for which there is no heir.

The main objective of the 2nd Property Rights Amendment was to speed up the investment process and assign priority to investment, as well as to introduce a claim deadline. This is the point at which the JCC was named in the Property Act.

As with post-war legislation, the JCC exercised its influence and was included in 1992 in the negotiations of the Bundestag Interior Committee and the Legal Affairs Committee.⁴¹ On March 10, 1992, the JCC expressed its opinion on the draft law from January 21 1992. „We can not help but conclude ... that the Property Act is a law that, within the scope of its intention and objectives, exclusively applies to the loss of assets during the period of GDR existence. The wording of § 1 para 6 will not change this and thus, disregards the interests of those persecuted.“

The JCC was undoubtedly right in its assessment. The proposed changes to the Property Act focused almost exclusively on issues related to investment priority and contained passages that were unacceptable for a group of people of which 90% live abroad.

In further comments from March 23 and from June 1, 11, 16 and 23, 1992 the JCC proposed a supplement to § 1 para 6 that was integrated into the Property Act. These included a reference to the REAO and the assumption that the property was lost.

The vast number of individual proposals cannot be addressed in the scope of this article. Therefore, the following comments focus exclusively on issues related to heirless and unclaimed assets.

The JCC vehemently opposes proposals to grant exemptions to the limitation period outlined in § 30a. The organization suggested the following: „Unless the Jewish claimant or his successor personally submits a claim prior to December 31, 1992, the successor organizations or the Claims Conference assumes the rights of the Jewish victim in accordance with § 2 of the Property Rights Amendment and thus claims title as the legal successor. The filing of a claim by a person not entitled works in favor of the true claimant or successor organization or the Claims Conference in accordance with § 2 para 1 of the Property Rights Amendment. The investigations are carried out in accordance with § 31 para 2 Property Act ex officio. Should there be any indication of a seizure of a Jewish victim's property, the Claims Conference must be notified.“ At the same time, the JCC was concerned that the late coming heirs would be included in line with § 31 para 2 of the Property Act.

Those actually entitled to compensation would, of course, have been happy to have benefited from claims submitted by the JCC. They would have also liked to be informed of any property seizures. Unfortunately, § 31 para 2 of the Property Act lags behind the allied laws.⁴²

Similar to the military legislation, the JCC demanded that claims submitted by ineligible parties should benefit the JCC. This and other proposals were not included in the second Property Rights Amendment.

At the meeting of the Reparation Subcommittee of the Internal Affairs Committee on June 4, 1992, Dr. Brozik explained the JCC concerns. He urged that there should be no exceptions to § 30a. He said that no applications should be accepted after December 31, 1992. Other parties „should not be given an opportunity to file a follow-up claim after an invalid claim had been submitted. This must also apply to the CC.“ In the interest of completing the application process, the JCC would have to bite the bullet. (The treatment of global claims⁴³ and, ultimately, the option to submit new applications later changed the way this was handled in practice.)

But at the same time, the JCC demanded the rejection of the substantiation requirement and the recognition of global applications. They claimed that the rejection of applications due to lack of clarification, in accordance with § 31 paragraph 1b, was unacceptable. According to the JCC, the transfer of heirless property assets that were not claimed in time to their benefit should not be called into question, because the JCC would not be able to use the funds for Holocaust survivors and would have to build up capital reserves. The organization was concerned that it would receive later claims by heirs and was quasi not in a position to serve as bank.

Regarding the relationship between the JCC and entitled claimants, the JCC referred to the many legal decisions of the ORG (Higher Restitution Court).

Payments made to entitled claimants through the JCC Goodwill Fund had not been thought of at the time. On the contrary: in the early postwar years, the Higher Restitution Court rigorously rejected late applications and awarded assets to successor organizations even when the original owners were still listed in the land register,⁴⁴ or when securities were deposited in a portfolio with their name. Consequently, the JCC was of the opinion that all funds from unclaimed property assets should be used to improve living conditions for Holocaust survivors.

The JCC supported the idea of integrating the REAO regulation into the Property Act, but also suggested that the rulings of the Higher Restitution Court in Berlin be binding. This proposal was, however, rejected.⁴⁵

The JCC complained that the exclusion of state succession was missing in the draft. This was corrected in the finalized regulation. It was claimed that the rights of the JCC were also limited by the provisions relating to the maintenance of heirless property assets.

The approved regulations and their practical application led to an expropriation of those who were too late in filing their claims.⁴⁶ Was this the intention of the Federal Republic of Germany? In a parliamentary meeting on April 29, 1990, Federal Justice Minister Dr. Kinkel said that the focus should be on individual justice in the rule of law. In accordance with the rule of law under Article 20 of Germany's Basic Constitutional Law and the right to own property under Article 14, the heirs of Holocaust victims are demanding acceptance of their claims.

When is a property asset unclaimed? In § 2, the Property Act speaks of claims, „which have not been filed by Jewish claimants ... or their successors.“

At this point, nothing is said about when the claims would need to be filed. A time limit was then included in the newly integrated § 30a. The idea was to regulate claims by entitled Jewish victims or their successors that were not submitted *within the time limits set out in the Property Act*.

But what about the claims that have been filed in the past? Would they not have to be reactivated? There have been numerous cases in which those persecuted filed claims for restitution or compensation immediately after the war, or in the 1950s, but were rejected because these assets (real estate, businesses) were located outside the Federal Republic of Germany. The failure to reactivate these cases is regarded as governmental wrongdoing.⁴⁷ The court rulings in such cases indicate doubt as to whether there was governmental wrongdoing.⁴⁸

Another category of claims that had no chance of settlement at the time they were filed are the claims for compensation under the U.S. Foreign Claims Settlement Program. These claims were not settled until after the lump-sum compensation agreement between the FRG and the USA on May 13, 1992. The JCC was excluded as a legal successor when entitled claimants opted for compensation under this agreement, even though the claim was not filed in accordance with the Property Act.⁴⁹ When, on the basis of this decision, an entitled claimant is not permitted to file any further claims under the Property Act, then this should most certainly apply to the JCC as a mere subordinate claimant.⁵⁰

In a ruling dated March 16, 2012, the Federal Court of Justice agreed with the views expressed in the literature that „the restitution law primarily serves the interests of the injured party.“⁵¹

In contrast to the preceding legal regulation, the Property Act contains no similar provision for a waiver by the entitled claimant. For whatever reason the claimant waived the right to file a claim,⁵² subsequently withdrew a claim, or did not appeal the rejection of a claim,⁵³ this had no bearing on the admission of the JCC as a claimant. In fact, property assets were even transferred to the JCC against the will of the entitled claimant.⁵⁴

§ 2 para 1 sentence 3 of the Property Act does not directly mention the relationship between the JCC and Jewish claimants, nor does it say that the JCC serves as a trustee for the entitled claimant.⁵⁵ Although this clarification has been frequently called for, perhaps it is superfluous. Because it can be concluded from the intent and purpose of the regulation. A reasonable interpretation would regard the JCC as a trustee.⁵⁶

Looking at things from this perspective, there have been entitled claimants rejected by the JCC who filed a lawsuit against the JCC in Israel. These cases are still pending.

Entitled claimants have sued the Federal Republic of Germany because the structure of the Property Act and its practical application encroach upon the right to own property in accordance with Article 14 of Basic Constitutional Law and therefore violates a basic human right.⁵⁷ The property looted by the Nazis belongs to the families from which it was stolen.⁵⁸

After the Second World War, the Allies were intent on safeguarding any remaining Jewish property assets – not only heirless property, but also property unclaimed before specified deadlines in order to use these assets to alleviate suffering of survivors. But the situation has changed dramatically since the 1940s and 1950s. The times in which claims were not followed up on, because of sentiments toward Germany are over. „In the meantime, the historical distance has grown larger. The sentiments (of the time)... can hardly be understood today.“⁵⁹ There are now well-established relations between the Federal Republic of Germany and Israel. Today's beneficiaries are, for the most part, already in the next or subsequent generations.

In the years immediately following the Second World War, Germany was economically not in a position to pay compensation. This changed with the economic boom after the currency reform and was expressed in the Luxembourg Agreement. Over the decades, several agreements have been concluded and a growing number of people have become eligible for support programs.⁶⁰ The most recent convincing example was an agreement concluded in July 2012 and ceremoniously signed in November to support 80,000 Jewish Nazi victims living in the former Soviet Union.

A close collaboration has developed between the JCC and the German government. As part of the annual consultations, the JCC presents a report on the use of the funds provided. The more money that is made available for these funds, the less entitled claimants will be forced to fight for their rights to ownership.

The JCC statements supported the Terezín Declaration⁶¹ demanding the return of confiscated property to former owners or their heirs. Nevertheless, it required sustained international pressure before the JCC was ready to set up the Goodwill Fund in line with the equity scheme. This fund was used (intermittently) until 2004 to support Nazi victims or their heirs with (ultimately) 80% of their entitlement.⁶² According to the Berlin

Administrative Court, the possibility of obtaining money from the fund excludes forbearance for those who missed the deadline.⁶³

Under international pressure from the British Board of Deputies and other organizations, along with many entitled claimants who filed too late, the JCC decided in July 2012 to launch a new Goodwill Fund containing EUR 50 million. The „Late Applicants Fund“ is valid for a period of two years, until December 31, 2014.⁶⁴ Unlike the old regulation, this fund would pay only 25% instead of 80% of the claim, and only up to EUR 50,000 per property. An additional payment is possible if there is money left in the fund after the application period has expired. It is already foreseeable that no additional payments will be forthcoming unless the amount of the fund is not at least doubled.

The entitled claimants regard the settlement proposed by the JCC as unsatisfactory. The justification offered by the JCC, i.e., that the organization needs the funds from retransferred property or other compensation to support Holocaust survivors, appears less and less credible. Especially since the Federal Republic of Germany is providing more and more funds to the JCC for special assistance programs.

Conclusion: It is high time for the JCC to rethink its policies. At the same time, the German Federal Government should use its influence on the JCC to ensure that the few remaining heirs who were previously excluded receive their rightful inheritance.

Notes

1) <http://www.bundesfinanzministerium.de/Content/DE/Reden/2012>

2) In November 2011, the author visited the Central Archives for the History of the Jewish People (CAHJP) on the Giv'at Ram campus of the Hebrew University of Jerusalem and researched the materials.

3) An analysis was conducted by Nana Sagi in „German Reparations – A History of the Negotiations“, Jerusalem 1980

4) Document CC 8004

5) Stefan Minden, „Special legal succession and practice of the Claims Conference as a successor organization of the Property Act,“ German-Israeli Lawyers Association, October 1998 in Weimar.

6) Document CC 8006

7) Document CC 8079 or 8081

- 8) <http://de.wikipedia.org/wiki/Bundesentschädigungsgesetz>
- 9) Document CC 8080, italics F.E.
- 10) Quoted from a document submitted by the JCC (defendants) in a U.S. court case.
- 11) Document CC 8141
- 12) Document CC 8091
- 13) Document CC 8142. The fact that the JCC distanced itself from this commitment and later allocated funds for other purposes has been repeatedly criticized in recent years.
- 14) The CAHJP contains 171 documents related to the negotiations.
- 15) Bundesgesetzblatt (Federal Law Gazette) Section II 1953 p. 35
- 16) Ibid p. 85 and 94
- 17) See information on this and other funds in the article „The Jewish Claims Conference in Court?“ by Fritz Enderlein, ZOV 5/2011, p. 202
- 18) Verordnungsblatt für Groß-Berlin (Official Gazette for Greater Berlin) Section I, 1949, p. 221
- 19) Kohlhammer Kommentare, Peter Goetze, Die Rückerstattung in Westdeutschland und Berlin, Stuttgart und Köln, 1950, p. 180 (Kohlhammer comments, Peter Goetze, Restitution in West Germany and Berlin, Stuttgart and Cologne)
- 20) OLG (Higher Regional Court) Frankfurt, October 6, 1953, 2 W 894/52, RzW (Rechtsprechung zur Wiedergutmachung / Jurisdiction for Restitution) 1954, p. 5
- 21) ORG Berlin, 19.03.1956, ORG/A/1352, RzW 1956, p. 173; also ORG Berlin, 22.12.1958, ORG/A/1966, RzW 1959, p. 209 (ORG = Higher Restitution Court)
- 22) CORA (Court of Restitution Appeals) Nuremberg from 08.05.1953, RzW 1953, p. 316 and 1954, p. 5
- 23) Walter Schwarz, Rückerstattung nach den Gesetzen der Alliierten Mächte, C.H.Beck München, 1974, S 115 (Walter Schwarz, „Reimbursement under the laws of the Allied Powers,“ CH Beck Munich, 1974, p. 115)
- 24) Kohlhammer comments, ibid p. 351
- 25) Betrachtungen zum Rückerstattungsrecht, Humanitas-Verlag (Reflections on the restitution law, Humanitas Publishing)
- 26) According to Article 3 Paragraph 3 of the Regulations of the United States High Commissioner for REG, judgments and advisory opinions of the CORA were binding for all German courts. RzW 1949/50 p. 364
- 27) CORA Nürnberg Rechtsgutachten v. 27.07.1950, RzW a.a.O. Dazu Friedrich Biella u.a., Das Bundesrückerstattungsgesetz, C.H. Beck, München 1981, S. 751 f. (CORA Nuremberg legal opinion from 27.07.1950, RzW ibid. Frederick Biella et al, the Federal Restitution Law, CH Beck, Munich 1981, pp. 751)
- 28) Cited from Stegemann, the „Conference on Jewish Material Claims Against Germany“ as legal trustee of the heirs of property owners expropriated by the Nazis <http://www.opiniojuris.de>. Reprinted in this issue)

- 29) Biella *ibid* p. 765
- 30) Jürgen Lillteicher, *Raub, Recht und Restitution*, Wallstein Verlag, p. 377 (Jürgen Lillteicher, *robbery, law and restitution*, Wallstein Verlag, p. 377)
- 31) ORG Berlin from 22.12.1958 – ORG/A/1966, *RzW* 1958 p. 209
- 32) BK/O (53) 14, *Gesetz- und Verordnungsblatt für Berlin* 1953 S. 323 (BK/O (53) 14, *Law and Ordinance Gazette for Berlin* 1953 p. 323)
- 33) Bundesgesetz zur Regelung der rückerstattungsrechtlichen Geldverbindlichkeiten des Deutschen Reiches und gleichgestellter Rechtsträger – BrüG (German Federal Restitution Law) from 19.07.1957, *BGBI* (Federal Law Gazette) I p. 734)
- 34) Bundesergänzungsgesetz zur Entschädigung für Opfer der nationalsozialistischen Verfolgung (Federal Supplementary Law for Restitution to Victims of Nazi Persecution) from September 18, 1953 (*BGBI* I S. 1387)
- 35) The so-called 2+4 Treaty, (*BGBI* II 1990, p. 1317)
- 36) *GBI DDR* (Law Gazette of the GDR) I, No. 64, p. 1977
- 37) This is the basis of criticism in my article „The Federal Constitutional Court and § 30a of the Property Act,“ *ZOV* 5/2010, p. 212
- 38) An absolute necessity according to Brozik in a letter to the President of BAROV. BAROV series, issue 6, p. 96
- 39) *GBI DDR* I, 1990 p. 718, revised version from August 3, 1992, *BGBI* I 1992, p. 1481
- 40) Third regulation on the filing of property rights claims, *BGB* I 1990, p. 2150
- 41) The following observations are based on materials from the National Archives, the Archives of the Bundestag and the Federal Ministry of Justice.
- 42) Unfortunately, in practice, the official investigations did not include the files of the earlier restitution proceedings.
- 43) See article by Fritz Enderlein, „Restitution bypasses victims: Why the German government needs to take immediate action!“ *ZOV* 4/2010 p. 170
- 44) ORG judgment from December 9, 1957, *RzW* 1958, 97
- 45) The Federal Administrative Court has repeatedly made reference to the REAO rulings.
- 46) Fritz Enderlein, *Expropriation due to § 30a of the Property Act*, *ZOV* 5/2009, p. 219
- 47) Fritz Enderlein, „Governmental wrongdoing“ *Jüdische Zeitung* September 2012 p. 4. Reprint in the *Berliner Anwaltsblatt* November 2012, p. 392
- 48) Federal Administrative Court (BVerwG), 01.03.2010, 8 B 87/09
- 49) Federal Administrative Court (BVerwG), 29.11.2001, 7 C 9/01
- 50) Leipzig Administrative Court, 20.04.2001, 1 K 1118/96
- 51) Federal Court of Justice (BGH) V ZR 279/10
- 52) Federal Administrative Court (BVerwG), 29.04.2004, 7 B 85/03
- 53) Federal Administrative Court (BVerwG), 28.04.2004, 8 C 12/03
- 54) The case of the Egyptian collection, Berlin Administrative Court 29 K 126.09,

judgment of 26.05.2011, received substantial press coverage. See *Süddeutsche Zeitung* article from June 20, 2011: „Unverzeihliche Groteske“ (unforgivably grotesque)

55) Perhaps this is one of the „unclear aspects“ of the Property Act that are attributed to the time constraints in preparing the law. Burkhard Hess, *Intertemporales Privatrecht*, Mohr Siebeck 1998, p. 264

56) Stegemann, *ibid*; Hannes Hartung, *Kunstraub in Krieg und Verfolgung* (The looting of art during the war and persecution), p. 174 regards the JCC as a trustee.

57) Fritz Enderlein, Still Waiting for Restitution, *ZOV* 4/2012, p. 9

58) Fritz Enderlein, Does Germany deal in stolen property? *ZOV* 6/2010, S. 301

59) Dr. Schäuble, *ibid*

60) The JCC published the following overview valid as of October 2012 (in millions of euros):

Hardship Fund: 924.375

Article 2 Fund: 2,952.046

Central and Eastern European Fund: 422.620

Holocaust Victim Compensation Fund: 4.328

Program for Former Slave and Forced Laborers: 1,147.861

Fund for victims of medical experiments and other injustices: 17.417

These figures total approx. 5.5 billion euros

61) Guidelines and Best Practices for the Restitution and Compensation of Immoveable (Real) Property Confiscated or Otherwise Wrongfully Seized by the Nazis, Fascists and Their Collaborateurs During the Holocaust (Shoah) Era Between 1933-1945, Including the Period of World War II, <http://forms-claimscon.org/restitution/property-document-plenary.pdf>

62) For subsequent exceptions made for so-called medical cases, see www.claimscon.org

63) Berlin Administrative Court from 29.04.2009, 22 A 141.06

64) www.claimscon.org/?url=LAF

*This article was first published in:
Zeitschrift für offene Vermögensfragen, 6/2012, page 324*

Government Misconduct

Restitution claims filed in accordance with the Property Act (§ 30a) are subject to a strictly defined time limit that is basically without exceptions. This provision was added to the Property Act two years after it was passed into law following requests by the Jewish Claims Conference (JCC) and others. The JCC thus wanted to ensure that assets awarded to them could no longer be claimed by third parties.

The claim deadline was the subject of a case recently heard by the Berlin Administrative Court. The plaintiffs were of the opinion that § 30a of the Property Act is contrary to Basic Law in the Federal Republic of Germany, and is therefore unconstitutional.

Provision § 30a of the Property Act is applied very stringently. Even when the applicant fails to file a claim through no fault of his/her own, a reinstatement of (property) rights is ruled out. According to a ruling by Germany's Federal Administrative Court, leniency can be granted for exceptional cases in which a failure to meet the deadline can be attributed to government misconduct and when acceptance of the late claim is in keeping with the intended purpose of § 30a of the Property Act.

Government misconduct is very narrowly defined in court decisions and professional literature. Cited examples include a restitution claim that was submitted on time to the wrong government agency and was not promptly forwarded to the right office. Another example is a case in which a probate court provided inaccurate information about a claimant's right to inheritance.

Those who have been directly affected by the time limits regard "government misconduct" in a much broader sense.

Government misconduct No. 1: After millions of Jews were persecuted, murdered and robbed of their assets, many of the survivors were scattered around the world and had no record of the financial status of their families or relatives. The persecution and murder of millions of Jews was the most despicable form of government misconduct in German history – and it was the reason why restitution claims were not submitted on time after 1990.

Government misconduct No. 2: In many cases, victims managed to submit claims in the postwar years. This resulted in thousands of cases presented

to the different equalization, restitution and reparation offices in Germany. In cases where assets were located in East German territory, the applications were rejected on the grounds that the property is outside the jurisdiction of the restitution laws.

The plaintiffs in this case were of the opinion that after 1990, the Federal Republic of Germany should have been required to reopen previously rejected requests and process them without requiring applicants to submit a new claim. The files were still available and the addresses of the persons concerned were known. But these cases were never reopened.

Government misconduct No. 3: § 31 Sect. 2 of the Property Act requires government property offices to include all third parties whose legal interests may be affected by the outcome of proceedings. This specifically includes those persons who are legitimately entitled to the assets in cases where the JCC has submitted a claim for the property in question. These parties were never included. In some cases, claims filed by the legitimate owners were ignored, for example, because a certificate of inheritance was not submitted on time. The property assets were then transferred to the JCC.

Government misconduct No. 4: The justification for the time limit, i.e. to keep Jewish property assets from falling into the hands of the German government with legal security following immediately thereafter, is deceiving and illogical. The specified objective could have been fulfilled even if the JCC had only been appointed as a trustee in charge of the transferred assets. Incidentally, this well-intended objective was not fully achieved. The JCC could only assume the legal status of the injured party upon timely submission of a claim – although in many cases, it would have been possible to retransfer the rights without requiring applicants to submit a new claim.

*This article was first published in:
Jüdische Zeitung, September 2012, page 4*

Justice at Last for the Heirs of Holocaust Victims?

Questions and comments regarding the
Federal Administrative Court decision from
April 24, 2013, BVerwG 8 B 81.12

Over the years, this magazine has published numerous articles about the rights of the heirs of Holocaust victims who, for various reasons, failed to comply with the deadlines specified in the Property Act.¹ These articles expressed the viewpoint that the JCC should only be regarded as a trustee² and is obligated to share proceeds from property assets or compensation with the entitled parties. As a means of supporting this, I proposed further clarification of § 2 para 1 sentence 3 of the Property Act³. This proposal was supported by more than thirty petitions submitted to German Parliament (Bundestag). Unfortunately, the Bundestag rejected all of the petitions as recommended by the Petitions Committee.⁴ The Bundestag Legal Affairs Committee also refused to support the proposals.⁵

Numerous letters to the responsible federal ministers of finance and justice failed to change the situation. Germany's Federal President expressed compassion, but nothing more.

In my published articles I expressed constitutional objections to Property Act regulations that led to an expropriation of heirs who did not file a claim on time. Now, as a result of an appeal against denial of leave to appeal with constitutional objections, the Federal Administrative Court has addressed several issues, including the following:

1. Time limits specified in § 30a para 1 sentence 1 of the Property Act
2. Legal succession of the Jewish Claims Conference pursuant to § 2 para 1 sentence 3 of the Property Act
3. Article 3 para 1 of Basic Constitutional Law
4. § 30 para 1 sentence 4 of the Property Act
5. Article 14 of Basic Constitutional Law and Article 1 of the first ECHR protocol

=Citing a number of earlier decisions, the Federal Administrative Court dismissed the appeal against denial of leave to appeal. At the same time, the court came to a notable decision with yet unforeseen consequences. (Quotations from the Federal Administrative Court decision shown in italics. Text highlighted in bold by F.E.)

The sole asserted reason for accepting the fundamental importance of the case (§ 132 para 2 No. 1 of the German Code of Administrative Procedure – VwGO) is not present.

A legal matter shall be of fundamental importance within the meaning of § 132 para 2 No. 1 of the German Code of Administrative Procedure {VwGO} only if within the scope of the appeal proceedings clarification of an unsettled legal issue of appealable law by the highest court may be expected, which in its significance goes beyond the individual case on which the complaint is based.

What about cases in which new information becomes available? When previous decisions have been repeatedly criticized because they contained untenable arguments and weak justification? For example, the idea that destitute and impoverished heirs living in far off lands should hire a lawyer to keep an eye on German federal legislative actions to determine whether new restitution laws have been passed and filing deadlines established?⁶

The issues are fundamentally important and go far beyond individual cases. This is made obvious by the fact that, up until December 31, 2011, the JCC paid out approximately EUR 637 million to heirs who filed claims too late⁷ and other heirs waiting for compensation from the Goodwill Fund. In the following discourse, I will focus on the first two issues.

1. Time limits specified in § 30a para 1 sentence 1 of the Property Act

*To the extent that claims based on the Property Act are protected within the context of Article 14 of Basic Constitutional Law, § 30a para 1 sentence 1 of the Property Act clearly presents a **limitation of content and scope** as defined by Article 14 para 1 sentence 2 of Basic Constitutional Law.*

Instead of determining the content of the rights, § 30a para 1 sentence 1 of the Property Act states that there are no rights, there is no content left. And the limitation barrier? Indeed, you have a right, but there is no way to overcome the barrier.

Claims under the Property Act are restitution claims. If Nazi legislation is regarded as null and void, or has been repealed by the Allied Powers and through subsequent legislation, the original owners have not lost the legal rights that have been passed on to their heirs. These property claims are clearly subject to Article 14 of Basic Constitutional Law.

*This {limitation of content and scope} is admissible because the deadline for property claims is justified by substantial **reasons of public interest** and also complies with the constitutional principle of proportionality.*

Substantial reasons of public interest? Is the expropriation of Jewish heirs in the public interest? Is this not contradictory to Germany's obligation to provide restitution? Even if expropriation was necessary for some reason, according to Art.14 of Basic Constitutional Law, suitable compensation must be awarded. Where is it?

*The ... loss of the right to a return {of property} or compensation is still commensurate with the ... purposes of **legal certainty and legal clarity**, as well as with the **removal of investment barriers**.*

This does not require expropriation. The effect of expropriation results from the interplay with § 2 para 1 sentence 3 of the Property Act. Legal certainty and clarity are also achieved when the JCC is only treated as a trustee for the entitled heir.⁸

It further states that the legislature is entitled to *introduce deadlines, even if these inevitably result in **hardships***.

These hardships are by no means inevitable. If the JCC was relegated to the role of a trustee, there would be no more hardships for entitled heirs who have missed the deadline.

*The hardships associated with the introduction of the deadline are in any case **suitably justified** by the purpose of § 30a para 1 sentence 1 of the Property Act.*

This is in no way justified vis-à-vis Nazi victims and has been demonstrated as unnecessary.

2. Legal succession of the Jewish Claims Conference pursuant to § 2 para 1 sentence 3 of the Property Act

The complaint also states that there is a basic need to clarify whether the restitution precept for severe Nazi-related injustices as well as Article 14 of Basic Constitutional Law are compatible with the JCC being regarded as the legal successor pursuant to § 2 para 1 sentence 3 of the Property Act, ... without creating a legal framework

that gives the heirs of Jewish victim a legal claim against the JCC in cases where the heirs have missed the deadlines set by the JCC.

Is the JCC making the laws? True, the JCC asked for this deadline, but it was actually set by the German Parliament.

Purportedly, laws should be passed to ensure that the JCC serves only as a trustee authorized to apply on behalf of the legal heirs or simply act on their behalf in court proceedings. This question does not lead to permission for an appeal because it can be answered on the basis of the Act and in the context of case law.

So what is the answer? Do the Jewish heirs already have a legal claim against the JCC?

When the entitled Jewish claimant or legal successor fails to submit a claim before the specified deadline, the claim expires.

The claim against the federal government expires, but it should not expire against the trustee.

The legal heir's right to property is not violated by the fiction of the JCC as legal successor.

Very nice. According to the Property Act, this applies to the property ownership rights of all entitled heirs. In contrast, the JCC clearly limited those eligible for the Goodwill Fund.⁹

But, what can the entitled heir do with these property ownership rights?

The restitution claim of the claimant regulated in § 1 para 6 Property Act is a determination of the content and limits of the property owner, which cannot be constitutionally challenged.

Has anyone ever tried to object to the restitution rights specified in § 1 para 6 of the Property Act? What does this have to do with the limitation of content and scope for the **property owner**? Which limitations apply? Perhaps this doesn't pertain to the entitled property owners but to the party with disposal rights who is facing the property restitution claim of the entitled heir. As it pertains to the party with disposal rights, there was no objection to this limitation of content and scope in the appeal against denial of leave to appeal.

The JCC is tasked with asserting restitution claims on behalf of Jewish victims who have not filed claims themselves, and is required to use the proceeds for collective restitution to the Jewish people.

Up until now, this has been communicated in all official statements. This is also how the Bundestag Legal Affairs Committee and Federal Ministries see things. Of course, the Jewish people have a right to restitution.

But the individuals who have been persecuted and injured are also entitled to restitution.

*§ 2 para 1 sentences 3 and 4 of the Property Act are also intended to ensure restitution for Jews persecuted by the Nazi regime. However, since the JCC was neither persecuted nor does it assume the function or tasks of those actually persecuted, the JCC is **not entitled to freely dispose of the assets** assigned to the organization on the basis of its eligibility pursuant to § 2 para 1 sentences 3 and 4 of the Property Act.*

This is exactly how my clients see it. But Germany's Federal Ministries see things differently!

On April 16, 2009 the Federal Ministry of Justice wrote: „You certainly agree that comprehensive authorization of the JCC is indispensable“ ... „The JCC is solely responsible for deciding how the funds are used.“ On November 16, 2009 the same Ministry wrote: „In particular, it does not seem necessary or politically feasible for the legislature of the Federal Republic of Germany to influence the Goodwill program administered by the Jewish Claims Conference.“

Regarding the legal position of the JCC, the Federal Ministry of Finance wrote the following on April 7, 2009: „The use of the funds acquired in this way is up to the discretion of the JCC ... The Federal Ministry of Finance is not authorized to make demands on the JCC in this respect or set guidelines regarding the way the funds are administered.“

Nevertheless, on January 11, 2013, the Head of Division V of the Federal Ministry of Finance, acting on behalf of Federal Minister Dr. Schäuble, wrote: „... Prof. Dr. Enderlein, appealed to both ministries and to the German Bundestag Petitions Committee to establish for Holocaust survivors or their heirs who failed to file restitution claims under the Property Act within the prescribed time limits a legal claim against the JCC forcing the organization to hand over formerly owned assets or to relinquish sales proceeds from these property assets. He further supported his idea by publishing articles in professional journals. The Federal Ministry of Justice and the Federal Ministry of Finance repeatedly rejected proposals to amend the Property Act.

„In accordance with § 2 para 1 sentence 3 of the Property Act, the JCC has been designated the legal successor to all claims not asserted by entitled Jewish heirs or their legal successors. The JCC has acquired the full rights to the transferred assets and does not merely serve as a trustee. This legal

position has been challenged by Prof. Dr. Enderlein in his efforts to retroactively reclaim the assets in question.

„How the JCC uses the funds obtained from the restitution of property assets is entirely their own affair ruled by the organization’s bylaws.“¹⁰ (Please pardon the long quotation.)

My clients are very pleased that the Federal Administrative Court sees things in a completely different light!

*Moreover, {the JCC} is **only authorized to serve as a trustee for those Jews or their heirs who were persecuted by the Nazi regime and who are either not entitled to compensation, or have failed to meet the time limits requested by the JCC pursuant to § 30a para 1 of the Property Act.***

The JCC is therefore not only a trustee for the Jewish people, including those persecuted or murdered who have no natural heirs, but also a trustee for entitled survivors who failed to comply with the deadlines specified in the Property Act.

However, the JCC sees things differently and, at the same time, has the support of the German Government and the German Parliament.

Although, according to the Property Act, people who are ‘genuinely entitled’ are disqualified and unable to assert claims against the JCC.

But it must be possible to file a lawsuit against the JCC in a civil court. As a trustee, the JCC is obligated to return the assigned assets.¹¹

*By using a fictitious legal succession, the legislature only intended to create **temporary authorization** for the JCC (this authorization thus expires when the heirs demand a return of the assets) to prevent the German state from becoming the legal heir.*

An indirect inheritance by the German state is not prevented when the Jewish Claims Conference can freely dispose of the assets and use the money that actually belongs to the heirs to finance assistance programs that should actually be funded by the German government. The less the JCC pays out to the entitled heirs, the more the state saves. If, as recently, the German Federal Ministry of Finance increases relief funds, the JCC can no longer argue that its assistance programs were threatened by the continuation of the Goodwill Fund.

*The legal status of the entitled heirs is therefore not affected by § 2 para 1 sentence 3 of the Property Act. These individuals remain the legal successors. Accordingly, **in several decisions**, the Federal Administrative Court assumed that this is **merely a fictitious legal succession** in favor of the JCC.*

That's right. But so far, no practical conclusions have been drawn from these decisions.

The fact that, according to the Property Act, the excluded „entitled heir“ has no right to assert a legal claim against the JCC...

Although the entitled heir and rightful property owner has no legal claim under the Property Act, he does have rights under civil law. The question remains as to why this could not be clarified in the Property Act. Is it because this is related to administrative law? The priority investment law is also an administrative law, yet it regulates civil claims in § 16.

... is a legal consequence that corresponds to the Allied restitution laws.

This is true, but times were different back then. Yet there was overwhelming agreement that the assets should be returned to the entitled owners by the successor organizations.¹²

In the implementation of the Federal Administrative Court decision discussed here, in contrast to their previous stance, the Federal Government is obligated to take action and demand that Goodwill Fund established by the JCC be continued in its entirety. Since 1998, this fund has only been used to pay compensation in special hardship cases.

Notes

1) For example, Fritz Enderlein: „§ 2, para. 1, sentence 3 of the Property Act: Is it unconstitutional?“ ZOV 2008 [6] 277, and „Restitution bypasses victims: Why the German government needs to take immediate action!“ ZOV 2010 [4]. 170

2) Stegemann: „The Conference on Jewish Material Claims Against Germany as legal trustee of the heirs of property owners expropriated by the Nazis“ ZOV 2012 [6] 313

3) Fritz Enderlein: „Is the Federal Republic of Germany responsible for the JCC's use of compensation funds it receives?“ Berliner Anwaltsblatt 10/2009, p. 354

4) Bundestag publication 17/8911

5) „Missed application deadlines – Correspondence“ ZOV 2010 [4] 175

6) Fritz Enderlein: „Expropriation resulting from Federal Constitutional court decisions and pursuant to § 30a of the Property Act“ ZOV 2010 [5] 212

7) <http://www.claimscon.org/about/successor/goodwill-fund/>

8) Fritz Enderlein: „Still Waiting for Restitution“ ZOV 2012 [4] 9

9) Fritz Enderlein: „What the guidelines and deadlines of the JCC Goodwill Program are all about“ Jüdische Zeitung, August 2008, p. 2 and „The Claims Conference and German inheritance law“ Jüdische Zeitung, September 2011, p. 20

10) The JCC bylaws specifically state that the organization is required to support individual victims of Nazi persecution. These bylaws are extensively quoted in ZOV 2012 [6] 324 pp.

11) There is no record of a successful lawsuit against the JCC. See Fritz Enderlein: „The Jewish Claims Conference in court?, ZOV 2011 [5] 202

In a decision to reject a case dated September 4, 2012, the District Court of the Southern District of Florida essentially stated that, with respect to the German legislation, the JCC is not required to surrender the assets. The lawsuit is thus directed against the system established in Germany. (Case No. 11-80719-CIV-Marra/Hopkins)

12) Heirless and unclaimed. Unclaimed? ZOV 2012 [6] 324 pp.

*This article was first published in:
Zeitschrift für offene Vermögensfragen, 2/2013, page 53*

Only 25 % For Late Applicants?

Comments on an ad run by the Claims Conference
in the April 2013 issue of the *Jüdische Zeitung*:
“‘Aryanised’ assets in the former GDR”

This ad appeared simultaneously in several languages in many different countries. Many readers felt a sense of relief when they read the news that the CC had set up a “Late Applicants Fund” and is accepting new claims requests. But that’s the end of the good news.

Less encouraging is the fact that, in the context of the erstwhile Goodwill Fund, the CC stopped accepting new applications (except for special cases based on medical reasons) in the spring of 2004. The former Goodwill Fund paid out 80% of the revenues received by the CC to the legitimate heirs. This amount will now be much less, because the EUR 50 million allotted for the Late Applicants Fund (LAF) is not nearly enough to cover the claims already filed. The CC is initially planning to pay out only 25% of the revenues up to a maximum of EUR 50,000 per property asset – regardless of the number of heirs. The final amount to be paid to heirs will not be determined by the CC until after the application deadline, in other words, not before spring 2015.

The insufficient amount of money allocated for the LAF has also already led to protests from heirs who have been left empty-handed. It has also prompted inquiries from prominent persons, including members of the British Parliament. The heirs are of the opinion that the role of the CC is limited to that of a trustee. 1 (See the article “Still waiting for restitution,” *Jüdische Zeitung*, October 2012, p. 12)

It is very annoying that the CC insists on placing limitations on the rights of the heirs they plan to include in the LAF. Most people can understand that distant relatives are not to be considered, as they would be under German inheritance laws. But the exclusion of grand nieces and nephews has resulted in much dissention among the different communities of heirs. This restriction of inheritance rights results in the exclusion of direct descendants of former owners, even though they are sole survivors. But

according to the intentions of the CC, grand nieces and nephews of the former owner's children who were murdered in Nazi concentration camps, are not regarded as eligible claimants. (See "What the guidelines and deadlines of the Goodwill Program are all about", Jüdische Zeitung August 2008, p. 2 and "The Claims Conference and German inheritance law", Jüdische Zeitung September 2011, p. 20)

The CC is also continuing its policy of providing pseudo-information in the publication of lists. Many Nazi victims have complained about a lack of transparency. This is now the third list published on the Internet. The first list published in 2003, but soon taken off the net, contained 59,198 names and addresses, but no asset values. The next list published in 2008 included 11,000 assets with values, but no names. Now, in 2013, we have a 158-page list with thousands of names and addresses, but once again without values.

This list also includes assets that have been registered by the CC, but not yet assessed in accordance with the Property Act. Therefore, these claims could also be rejected. According to statistics published by the CC [see http://www.claimscon.org/index.asp?url=successor_org/asset] as of December 2012, there were 56,080 real estate properties claimed and 51,162 cases decided to date, 8,307 of which were positive. This means that 84% of all real estate claims were rejected for various reasons. Many properties were registered two or three times. There was also some confusion regarding the names of property owners. In some cases, the alleged owners were only tenants.

There were even more rejections of business claims: 67,011 businesses were claimed. 50,944 cases were decided, but only 6,854 of these decisions were positive. 86 % of the business claims were rejected.

*This article was first published in:
Jüdische Zeitung, May 2013*

The Ongoing Expropriation of the Next Generation

Restitution legislation in Germany is far-reaching, starting with the Allied postwar laws and continuing with the German reparation and compensation laws and the Property Act, which was approved by the GDR parliament and integrated into the German unification agreement. Nevertheless, a large number of Nazi victims and their heirs have been denied compensation for their losses. This is a direct result of the rigorous time limits set for filing claims.

According to the legislation mentioned above, anyone who misses the filing deadline loses the right to submit a claim.¹ To keep Jewish assets from falling into the hands of the German government or the aryanizers, the Allies appointed successor organizations. Their duties were later assumed by the Conference on Jewish Material Claims Against Germany, Inc. (aka Jewish Claims Conference or JCC).²

The role of these organizations was to take possession of uninherited or unapplied for assets and use the proceeds to benefit all Jewish people. The fact that some surviving owners or heirs were denied their rights was regarded as acceptable in order to alleviate the widespread hardship and suffering in the early post-war years.

Today, many decades after the Second World War, we have a very different situation.³ Initially, the German options for financial restitution were limited by the Reparations Agreement between Israel and West Germany signed in Luxembourg in 1952. In the meantime, the growing economic strength in the Federal Republic of Germany enabled the country to make increasingly higher sums of money available for aid programs. In 2013, EUR 772 million was earmarked for the years up until 2017.⁴

Therefore, expropriation and redistribution of Jewish assets is no longer justifiable today. But this is the case in what I believe is an improper application of the Property Act.⁵

Theoretically, the focus should be on the restitution of individual claimants. However, in practice, these people are most often placed at a disadvantage vis-à-vis the JCC. For example, the Nazi Victim Compensation

Act (2. EntschRErgG) from September 1, 2005 allowed the JCC to continue filing claims until June 30, 2007. But the deadline set for claims filed by entitled individuals remained unchanged (1992).

The discrimination against individual claimants becomes especially clear when we take a closer look at § 31 para 2 of the Property Act.

According to § 31 para 2 sentence 1 of the Property Act, “The responsible authority is **required to duly inform and involve in further proceedings** the affected legal entity or government administrators, along with any **third parties whose legal interests may be affected by the outcome of the case**. This applies to all claims filed. If *requested* a copy of the claim application and all attachments must be sent.”

According to a commentary by the German Parliament (Bundestag):

“Third parties also include the successor organization as defined by restitution legislation if there are any indications that the specific case is regulated by § 1 para 6 (of the Property Act). This must always be examined by the responsible authority.” In this respect, “...the authority has no discretionary power ... and is required, not only upon request, to officially involve the persons referred to in § 2 (Property Act) in the proceedings.”⁶

In other words, the Bundestag wanted to officially include the JCC, but says nothing about the former owners or their heirs – who were the victims, i.e. the ones who actually suffered losses. The fact that restitution is intended to compensate for injustices suffered by individuals is something the Bundestag has simply “forgotten”.⁷

It is unclear how this ‘inclusion’ should work in practice. Should the JCC be invited to submit an application for restitution? Will they be compensated for a property without submitting their own application, or will compensation be awarded without filing a claim?

As interested third parties, shouldn’t the former owners or their heirs also be notified when the JCC has filed a claim?

In “Vermögen in der ehemaligen DDR” (Assets in the former GDR), a loose-leaf compilation published by Rädler/Raupach/Bezenberger, opinions were expressed by Redeker/Hirtschulz (14th supplement) and by Denes (24th supplement). In their view, the obligation to notify third parties is valid only until the end of the period specified in § 30a of the Property Act, because no new applications were accepted after this date.⁸

Practically speaking, the property offices can check old land registry records to determine whether there is a possible case corresponding to § 1

para 6 of the Property Act. But since January 1, 1993, they are no longer required to notify former Jewish owners – or the JCC – when an application is submitted by heirs of the aryanizers.

Thus, the requirement to involve third parties is practically useless. This is because the processing of claims dragged on for many years and only in very few cases was it possible to send a notification before the end of 1992.

The case law regarding § 31 para 2 of the Property Act is therefore very limited. As far as I could determine, there were no cases in which the JCC or a Jewish claimant was properly informed. Instead, in most cases, the person with power of disposition was notified.

According to information from the JCC, the organization filed several thousand claims for property and businesses. In all cases, the property offices checked records provided by the compensation and reparation authorities in former West Germany and found that the previous owners or their heirs had already submitted restitution claims in the 1950s or later. In these cases, it is obvious that the property offices had the names and addresses of the entitled parties. However, there is probably not one single case in which these beneficiaries were involved in the process, because applications were no longer accepted after the deadline (1992).

Two options would have been possible: either the old applications could have been officially reactivated, or the entitled parties could be asked to submit a new application. Both would have been feasible, because the requirements of the application time limits were already fulfilled by the JCC.

In the 1950s, the courts were still very eager to involve the entitled parties. According to a ruling by the Higher Regional Court in Frankfurt on October 6, 1953,⁹ the successor organizations only come into play if, after an **exhaustive investigation** and public notification if necessary, it was determined that no entitled private person could be found.

The Supreme Restitution Court of the British Zone also pointed to “...the importance of finding missing heirs, because it would be extremely unfortunate if a missing heir appeared after the confiscated property was already awarded to a trustee.”¹⁰

Many entitled parties who are now fighting with the JCC in an effort to obtain compensation from the Goodwill Fund or the Late Applicants Fund cannot understand why their previous applications were not reactivated by

the authorities, or why the property offices failed to notify them – although their addresses were known.

The following blatant cases are outlined here for the purpose of illustration:

The case of Siegfried J.

Siegfried J., a Jewish businessman, set up a textile company in Berlin in 1908. Trading under the name M.K., the business gradually became one of the leading production sites in the industry. In 1939 the company was aryanized under force and sold. The resulting stress, coupled with the fact that he was denied the right to leave Germany, led to a serious heart condition for Siegfried J., who suffered a fatal stroke in August 1940. His son Harry J. emigrated to England shortly before the war to join the British forces and fight against the fascists. Siegfried's wife Elise remained in Germany until she moved to England in August 1946 to be with her son. Elise died on December 11, 1957 in London.

Shortly after the war, Elise J. filed a claim with the municipal authorities in Berlin on May 29, 1946. She requested compensation for the financial loss incurred as a result of the actions taken by the Nazi regime. The value of the family business was estimated at RM 500,000. Her case was assigned the file number V 13855.

Harry J. also filed a claim for compensation with the Berlin Restitution Office (file number 162 601) on October 30, 1952.

On December 23, 1992, the JCC filed a claim to recover the business assets of the company formerly known as M.K. In a decision dated July 7, 2009, the BADV (Federal Office for Central Services and Unresolved Property Issues) approved the request and granted EUR 335,310.53 in compensation to the JCC. Interest in the amount of EUR 110,652.47 was later approved to bring the total amount awarded to EUR 445,963.00.

In an effort to determine the facts, BFG files from the Cologne Equalization Office (# 786 559 and 785 529) and case files from the Berlin Restitution Office (# 162 601 and 265017) were used. These documents clearly showed the names and addresses of those entitled to claim restitution.

Harry J. was seriously injured in a car accident in 1990. This resulted in a long illness that led to his death in April 2003.

Neither Harry J., nor his wife Renate were aware that they would need to file a new claim after 1990. They assumed that the well-known thor-

oughness of German authorities would ensure that the claims submitted earlier would be further processed.

In the 1990s, the JCC created a Goodwill Fund for entitled claimants¹¹ who had failed to meet the application deadlines specified in the Property Act. This fund was used to pay up to 50%, and later 80% of the assets received by the JCC. Unfortunately, this information was not passed on to the J. family. They were also not informed that the JCC had opened another time window from late 2003 until April 2004 in which new claims could be submitted. Harry's wife, Renate J., was unable to file a claim: after her husband's death, she fell into a deep depression and required nursing care.

On June 21, 2010, Renate J. submitted an application for compensation from the JCC Goodwill Fund. This was in line with the supplemental regulations issued by the JCC in April 2009.¹² However, the JCC rejected her claim: the supplemental regulation excluded the spouses of heirs and did not consider them as entitled claimants.

As a blood relative and direct heir to her grandfather, Harry and Renate's daughter, Eva L., could have indeed been regarded as an entitled person. However, she was not permitted to apply for benefits from the JCC in 2004 because she did not officially become an heir until after her mother died on May 7, 2012.

The JCC offered a limited group of people the chance to submit late applications for compensation from the Goodwill Fund. However, these applications were only accepted if the entitled person was, due to medical reasons, unable to personally submit the required paperwork prior to April 2004. Although this was a good opportunity for some, the case of the J. family shows how arbitrary and grotesque the consequences of the regulation could be. Had Harry J. died as a widower one year later, his daughter Eva could have submitted an application as a direct heir.

An amendment to the JCC guidelines¹³ issued in November 2010 repealed the rule that excluded the spouse. The J. family once again kindled hope that they could be included under the new rules. But their application was once again rejected. This time because Harry J. died in April, 2003 and was unable to file a claim before April 2004.

In 2012, Eva L. was offered a chance to submit an application for the Late Applicants Fund, which only pays 25% of the total property value, or a maximum of EUR 50,000 (equivalent to 11% of the asset value instead of the 80% specified in the Goodwill Fund).¹⁴

Since the JCC application was submitted in December 1992, the commentators were of the opinion that it was too late to involve Harry J. in the process. But this case dragged on for 15 years! In other words, for a period of 15 years it would have been possible to honor the claim of Harry J. or his heirs.

The case of Gl. and Gr.

Gl. and Gr. jointly established a textile factory in Berlin in 1907. Gr. was later murdered in a concentration camp. Gl. died after the war in England. The heirs of these two business partners had no contact with each other after the war.

In 1955, the daughter of Gr. submitted a restitution claim for damages in accordance with the BK/O from July 26, 1949. The application was rejected because the company was located in East Berlin.

After 1990, the heirs of Gl. submitted a claim – as did the JCC. The heirs of Gr. failed to submit a new application.

The proprietary proceedings dragged on for many years. During this time, the heirs of Gr. could have been included, since they were listed in the Berlin Restitution Office file (# 57273).

The JCC received half of the compensation and turned over 80% of this money to the heirs of Gr.

The case of Moritz G.

This case deals with a plot of land that belonged to Moritz G., a Jewish businessman. He was forced to sell the property to a member of the NSDAP in 1936. Soon afterwards he developed a serious heart condition, escaped to Poland, and died in early 1939. His son Fritz G. fled to England, where he joined the British Army to fight against fascist Germany.

After the war, Hertha G., the widow of Moritz G., and their son Fritz filed applications for compensation. These documents were processed by the authorities in Cologne under Reg. No. II-2a-648 700.

Both of these heirs died before the Property Act was passed. Nicola A., the daughter of Fritz G., failed to submit a claim for restitution. Her family's financial situation in pre-war Germany was rarely discussed. Consequently, Nicola A. was unaware that her grandfather had owned a large piece of property in East Berlin. She also assumed that – even after reunification – the German authorities would continue to process all previous claims so that a new application would not be required.

On July 23, 1992, the heir to the aryanizers (who received the property from the Nazis) submitted a claim for return of title. The JCC filed a general application in December 1992, which was revised and more precisely formulated in 1994. The JCC subsequently became involved in the process. Once again, it is only logical to ask why the heirs of the former owner were not notified in accordance with § 31 para 2 of the Property Act. It took another 17 years before the restitution process was decided – in favor of the JCC!

The JCC received proceeds from the property totaling Euro 3,355,867.87.

Nicola A. was not informed about the JCC Goodwill Fund, which paid 80% of the proceeds to the heirs. Her only remaining choice was to apply for the Late Applicants Fund. In accordance with JCC guidelines, she received EUR 50,000 – a mere 1.86% of the total proceeds.

The case of M.

It is especially outrageous when the entitled heirs are excluded, even though they submitted a claim after 1990. In this case, M., a Jewish businessman, owned a factory and several parcels of land in Potsdam. His heirs in the U.S. filed a claim in December 1992. The JCC submitted an application in Frankfurt around the same time. The only difference was that the JCC application reached the AROV in Berlin (Office for the Settlement of Unresolved Property Issues) shortly before the end of the year. The claim submitted by the heirs didn't arrive until the beginning of January 1993 – and was rejected because it exceeded the deadline! The process dragged on for **twenty-two years** and wasn't finalized until 2014.

The heirs could consider themselves lucky: the JCC paid out 80% of the proceeds for the liquidated assets from the Goodwill Fund.

I could fill several more pages with similar examples.

The assumption that the obligation to involve entitled Jewish heirs ends when the application deadline is reached is incomprehensible. The purpose of the time limit is fulfilled when the first claim is filed. As soon as the JCC submits a claim, the suspension effect of § 3 of the Property Act comes into play. Incidentally, for compensation requested for business enterprises, the argument of legal certainty in land transactions is no longer valid.

In the case of Siegfried J., the heiress filed a suit in the Berlin Administrative Court against the Federal Republic of Germany after her request for compensation of July 22, 2011 was rejected because it was received after

the deadline. The BADV regarded the application for compensation as inadmissible because it was not submitted in the time period specified by § 30a of the Property Act. The ostensible purpose of § 30a of the Property Act is to achieve legal clarity and legal certainty as quickly as possible. This purportedly serves the interests of economic development in the new federal states (Länder), and is therefore also in the national interest.

I have taken a critical look at this reasoning several times in the past: § 30a of the Property Act is unconstitutional because it violates the property ownership right described in Article 14, para 1 of Germany's Basic Constitutional Law.¹⁵ The Federal Constitutional Court ruled that restitution claims under the Property Act are protected under Article 14 para 1 of Basic Constitutional Law. If the Federal Constitutional Court nevertheless considers the limitation period as a valid determination of the content and limits of property within the meaning of Article 14 para 1 of Basic Constitutional Law, this is not covered by the above reasoning.

In the opinion of the Federal Constitutional Court, the claims asserted within the time limits by the JCC are covered by the property ownership guarantee defined in Article 14 of Basic Constitutional Law, while the persecuted Jews are expropriated in favor of the JCC by the interplay of § 30a and § 2, para 1, sentence 3.

The elimination of investment barriers as justification for the strict time limits may be relevant for real estate (which would not have prevented the JCC from being named as a trustee on behalf of those persons actually entitled). But when it comes to compensation for a ruined Jewish business enterprise, this justification is absolutely irrelevant.

Nevertheless, the Constitutional Court has affirmed the constitutionality of § 30a of the Property Act¹⁶ stating that the limitation period is justified for compensation claims by substantial reasons of public interest. Apparently the time limit was (literally) "...introduced primarily in the interest of promptly resolving property rights. ... This interest is applies to both restitution and compensation cases. Because of the large number of applications received prior to the inception of the second Property Rights Amendment and the resulting workload for the responsible authorities, it was necessary to introduce a deadline as a means of speeding up the application process. Regarding the applications for compensation, the lawmakers also pursued a fiscal interest to facilitate financial planning and to gain a more accurate overview of pending compensation claims. ... In the face of a

tight budgetary situation, this purpose also justifies a time limit for filing compensation claims, one that is both suitable and necessary for achieving the desired result.”¹⁷

This argument has nothing to do with reality. In 2010, only 48% of all JCC applications had been completed. As of December 10, 2013, some 4,743 compensation claims for real estate and 12,890 for businesses were still pending.¹⁸ This has nothing to do with a prompt resolution of pending cases. The time limit has obviously not achieved the stated objectives.

The idea of facilitating financial planning is especially illusory. It is impossible to arrive at any valid conclusions based on the number of applications submitted. This number also says nothing about how many applications relate to the same property. In the past, up to ten claims have been filed for one single asset. Only when an application is processed (which is still ongoing!) is it possible to determine whether a return of the property is feasible, or if financial compensation is the only option. Only then is it clear whether the first and/or second injured party is entitled to compensation. The number of applications says nothing about the value of a property, a business, or the amount of compensation. Besides, for the purposes of financial planning, is it not irrelevant whether the compensation goes to the JCC or to the victims of Nazi persecution?

The number of applications also says nothing about whether they are justified. From the claims decided by the JCC for real estate (as of December 10, 2013), 51,542 were rejected (nearly 84%!). The rejection rate for business enterprises was as high as 87%.¹⁹

As for the heavy workload, one of the reasons the Federal Constitutional Court used to justify a time limit; it is certainly within reason to ask whether this explains the expropriation of entitled Jewish heirs. If, as Chancellor Merkel once said, it is part of the German *raison d'état* to stand up for the Israeli rights of existence and security, would this not include ensuring that financial compensation goes to those who have suffered a horrible fate and been robbed of their property? And what about those who, through no fault of their own, failed to meet the application deadlines?²⁰

An exception to the stringent time limits should be allowed in cases where submitting an application on time was prevented by government misconduct. Case law specifies strict limitations in this respect. The victims of Nazi persecution regard the failure to comply with § 31 Section 2 of the Property Act as a form of government misconduct. Added to this is the

failure of the former government responsible for the persecution and murder of millions of Jewish citizens.²¹

The events that took place in Germany in the 1930s and early 1940s, the Holocaust, and the crimes committed against Jewish people are crimes against humanity that are without a statute of limitations within the framework of international law. The application of § 30a para 1 sentence 1 of the Property Act in respect to entitled Jewish heirs and the resulting expropriation in favor of the JCC is neither legally nor morally justified.

The Petition

After the JCC closed the Goodwill Fund and refused to accept any further applications, many entitled heirs from Israel, the U.S. and other countries turned to the German Parliament Petitions Committee to ask for help. They sought an amendment to § 2, para 1, sentence 3 of the Property Act to the effect that the JCC would only be regarded as a trustee and required to share any recovered assets with those who are actually entitled.

The Petitions Committee requested opinions from the Federal Ministries of Justice and Finance, both of which were negative. The majority of committee members then recommended that the Bundestag reject the petitions. An explanatory memorandum²² repeated the well-known position stating that § 30a of the Property Act is a substantive limitation period and that including the JCC in cases involving heirless or unclaimed assets is intended to keep Jewish property from falling into the hands of the German government. The Petitions Committee saw no reason to influence the JCC through legislative action in order to avoid hindering the organization's freedom of disposition.

The opinions expressed by the ministries were clearly unsatisfactory. Not a word was said indicating that the same objective could also be achieved if the JCC were explicitly placed in the position of a trustee. Years of attempts to initiate a public debate focusing on this issue failed. Letters to the ministers were left unanswered. The Petitions Committee rejected the idea of scheduling a hearing for the petitioners.

In the literature, the opinion is expressed that the trustee status of the JCC is clear based on a consistent interpretation of the Property Act. As far as I can see, this has not been disputed.²³

Wasmuth is also of the opinion²⁴ that the JCC, as a trustee for entitled Jewish heirs who missed the deadline, is required to hand over assets.

However, this lacks legal clarification.

Wasmuth's commentary on § 2 of the Property Act in the "Rechtshandbuch Vermögen und Investitionen in der ehemaligen DDR" (Legal handbook regarding assets and investments in the former GDR) was quoted in the ruling handed down by the Federal Administrative Court on April 24, 2014.²⁵

I have expressed in detail my position on this decision in a series of commentaries²⁶ and would like to quote the following (text from the decision is in italics):

*The fiction of the JCC as legal successor **does not infringe on the property rights of the entitled claimant.***

This applies to the ownership rights of all entitled persons as defined by the Property Act. However, by restricting access to its Goodwill Fund, the JCC limits the number of entitled persons.²⁷

The role of the JCC is to assert the restitution rights of those Jewish victims who do not file claims for the purpose of collective compensation for the benefit of the Jewish people.

This is what has been declared in all statements thus far. And this is also how it is viewed by the Bundestag Legal Affairs Committee and the ministries. Of course, the Jewish people have a right to restitution. This right is primarily intended for those individuals persecuted and expropriated, as well as to their heirs.

*Since § 2 para 1 sentences 3 and 4 of the Property Act also serve the purpose of providing restitution and compensation for injustice committed through the persecution of Jews by the Nazi government, and since the JCC itself was neither persecuted nor does it assume the function or duties of those actually persecuted, it **is not entitled to freely dispose** of the assets received based on its entitlement under section § 2 para 1 sentences 3 and 4 of the Property Act.*

But the federal ministries see things differently!

On April 16, 2009 the Federal Ministry of Justice wrote: "You certainly agree that comprehensive authorization of the JCC is indispensable" ... "How the funds are used is up to the discretion of the JCC." On November 16, 2009 the same Ministry wrote: "In particular, it does not seem necessary or politically feasible for the legislature of the Federal Republic of Germany to influence the Goodwill program administered by the Jewish Claims Conference."

Regarding the legal position of the JCC, the Federal Ministry of Finance wrote the following on April 7, 2009: "The use of the funds acquired in

this way is up to the discretion of the JCC ... The Federal Ministry of Finance is not authorized to make demands on the JCC in this respect or set guidelines regarding the way the funds are administered.”

On January 11, 2013, the Head of Division V of the Federal Ministry of Finance, acting on behalf of Federal Minister Dr. Schäuble, wrote: “... Prof. Dr. Enderlein, appealed to both ministries and to the German Bundestag Petitions Committee to establish for Holocaust survivors or their heirs who failed to file restitution claims under the Property Act within the prescribed time limits a legal claim against the JCC forcing the organization to hand over formerly owned assets or to relinquish sales proceeds from these property assets. He further supported his idea by publishing articles in professional journals. The Federal Ministry of Justice and the Federal Ministry of Finance repeatedly rejected proposals to amend the Property Act.

“In accordance with § 2 para 1 sentence 3 of the Property Act, the JCC has been designated the legal successor to all claims not asserted by entitled Jewish heirs or their legal successors. The JCC has acquired the full rights to the transferred assets and does not merely serve as a trustee. This legal position has been challenged by Prof. Dr. Enderlein in his efforts to retroactively reclaim the assets in question. How the JCC uses the funds obtained from the restitution of property assets is entirely their own affair ruled by the organization’s bylaws.”²⁸ (Please pardon the long quotation.)

My clients are, of course, very pleased that the Federal Administrative Court sees things in a completely different light!

Moreover, the JCC is only entitled in its capacity as a trustee on behalf of the Jews who were actually persecuted by the Nazis and their heirs, respectively, who in turn are not entitled to any restitution or who have missed the deadline set in response to demands by the JCC pursuant to § 30a para 1 of the Property Act.

The JCC is therefore not only a trustee for the Jewish people who were persecuted or murdered and are without natural heirs, but also a trustee for entitled survivors who failed to comply with the deadlines specified in the Property Act. The JCC sees this differently and, as shown, has the support of the German Government and the German Parliament.

However, according to the Property Act, *people who are ‘genuinely entitled’ are disqualified and unable to assert claims against the JCC.*

At the same time, it must be possible to file a lawsuit against the JCC in a civil court. Because, as a trustee, the JCC is obligated to return the assets it has received.

By using a fictitious legal succession, the legislature only intended to create temporary authorization for the JCC to prevent the German state from becoming the legal heir.

In the past, an indirect inheritance by the German state is not prevented when the JCC can freely dispose of the assets and use the money that actually belongs to the heirs to finance assistance programs that should actually be funded by the German government. The less the JCC pays out to the entitled heirs, the more the state saves. If, as recently, the German Federal Ministry of Finance increases relief funds,²⁹ the JCC can no longer argue that its assistance programs were threatened by the continuation of the Goodwill Fund.

*The legal status of the entitled heirs is therefore not affected by § 2 para 1 sentence 3 of the Property Act. These individuals remain the legal successors. Accordingly, **in several decisions**, the Federal Administrative Court assumed that this is **merely a fiction** of a legal succession in favor of the JCC.*

This is true. But so far, no practical conclusions have been drawn from these decisions. The civil courts still see this in a completely different light.

A lawsuit based on the decision by the Federal Administrative Court was dismissed in the first hearing before the Regional Court in Frankfurt am Main on January 24, 2014 (2-10 O 332/13). A ruling by the Frankfurt Higher Regional Court is still pending.

According to a decision by the Regional Court in Frankfurt am Main from March 12, 2014 and announced on April 4, 2014 (2-04 O 457/13): "The purpose of § 2 para 1 sentence 3 of the Property Act is to assert Jewish claims for the purpose of collective restitution in favor of the Jewish people. The fiction of legal succession for the defendant was only necessary to prevent inheritance by the German state, i.e. the successors of the Nazi regime. The purpose, however, was not to keep the formerly entitled parties from exercising their right to claim compensation. This would have made the legal structure of succession obsolete. **Moreover, the proceeds should be used to benefit only the Jewish people as such, but not to benefit formerly entitled individuals.**" (highlighting added by F.E.)

The Frankfurt Regional Court thus asserts that, from the very beginning, German lawmakers sought to bring about an expropriation of the entitled claimants in favor of the Jewish Claims Conference. This makes a mockery of all assertions in favor of restitution for individual claimants.

An appeal of this court decision is currently pending.

Notes

- 1) Expropriation pursuant to § 30a of the Property Act, ZOV 5/2009, p. 219
- 2) Heirless and unclaimed. Unclaimed? Review of § 2 para 1 sentence 3 of the Property Act, ZOV 6/2012, p. 324
- 3) Speech by Dr. Schäuble on 15 November 2012, www.bundesfinanzministerium.de/Content/DE/Reden/2012/2012-11-15-60-Jahre-Lux.html
- 4) www.sueddeutsche.de/politik/opfer-des-nationalsozialismus-deutschland-stockt-entschaedigung-an-holocaust-ueberlebende-auf-1.1683735
- 5) § 2, para 1, sentence 3 of the Property Act: Is it unconstitutional? Thoughts on the Goodwill Fund of the Jewish Claims Conference. ZOV 6/2008, p. 277. Is the Federal Republic of Germany responsible for the JCC's use of compensation funds it receives? Berliner Anwaltsblatt 10/2009, p. 354
- 6) Bundestag publication, 11/7831
- 7) Does Germany deal in stolen property? ZOV 6/2010, p. 301
- 8) Missed application deadlines – Correspondence with MP Siegfried Kauder, ZOV 4/2010, p. 174
- 9) RzW (a legal journal focusing restitution) 1954, no. 5, p. 5
- 10) Unpublished, quoted from Ernest H. Weismann, Die Nachfolge-Organisationen, in: Wiedergutmachung II, Munich 1981 p. 754
- 11) What the guidelines and deadlines of the JCC Goodwill Program are all about, Jüdische Zeitung August 2008, p. 2
- 12) <http://www.claimscon.org/about/successor/goodwill-fund/amendment/>
- 13) <http://www.claimscon.org/about/successor/goodwill-fund/goodwill-fund-announcement/>
- 14) Only 25% for Late Applicants? Jüdische Zeitung May 2013, p. 2
- 15) The Federal Constitutional Court and § 30a of the Property Act, ZOV 5/2010, p. 212
- 16) Ruling from January 10, 2000 – 1 BvR 1398/99
- 17) loc. cit.
- 18) www.claimscon.org/about/successor/asset/
- 19) loc. cit.
- 20) Restitution bypasses victims: Why the German government needs to take immediate action!" ZOV 4/2010 s. 170
- 21) Government misconduct, Jüdische Zeitung September 2012
- 22) Bundestag publication, 17/12076
- 23) Stegemann: "The Conference on Jewish Material Claims Against Germany as legal trustee of the heirs of property owners expropriated by the Nazis" ZOV 6/2012, p. 313
- 24) Aufarbeitung der unter NS-Herrschaft verübten Entziehung von Kunstwerken (Reappraisal of the works of art confiscated under Nazi rule), NJW 11/2014, p. 752
- 25) BVerwG 8 B 81.12, ZOV 2/2013 p. 75

- 26) ZOV 2/2013 p. 53
- 27) The Claims Conference and German inheritance law, Jüdische Zeitung September 2011, p. 20
- 28) The JCC bylaws specifically state that the organization is required to support individual victims of Nazi persecution. These bylaws are extensively quoted in ZOV 2012/6, 324 pp.
- 29) See footnote 4

*This article was first published in:
Zeitschrift für offene Vermögensfragen, 2/2014, page 84*

Open Letter

**to the Representative of the Conference on Jewish
Material Claims Against Germany, Mr. Rüdiger Mahlo,
Sophienstraße 26, 60487 Frankfurt a.M.**

2 April 2014

Dear Mr. Mahlo,

I have followed with great interest the debate about the Gurlitt paintings as well as your comments in the press and on television. You have called for the unconditional return of any paintings from Jewish estates to the original owners or their heirs, with no questions asked and irrespective of any statutes of limitation or other deadlines. I assume that you express this view not as a private citizen, but as a representative of the Jewish Claims Conference.

What I can't understand is that the JCC obviously applies a double standard when it comes to returning assets confiscated by the Nazis to the former owners or their heirs.

Although you have only worked for the JCC for a short time, it must have come to your attention that your organization maintains the position that Nazi victims who missed the deadlines specified by the German Property Act have thereby forfeited any legitimate claims. And because these people failed to meet the deadlines, the JCC has become the rightful holder of the claimed assets and has no obligation to those Nazi victims.

The JCC has shared proceeds or restitution with late applicants from time to time, but this was ostensibly an act of "goodwill." In this respect, the JCC fails to recognize that lawmakers merely intended to create a fiction of legal succession granting temporary rights to the JCC – as was stated last year in a Federal Administrative Court – without affecting the status of the actual heirs.

I have written several articles showing that the lawmakers had no intention of forfeiting the rights of Nazi victims, because this would completely counteract the idea restitution.

Mr. Mahlo, it would make me very happy if you could take a closer look at this problem. Perhaps some of my articles would be helpful in this respect:

§ 2, para 1, sentence 3 Property Act: Is it unconstitutional? Thoughts on the Goodwill Fund of the Jewish Claims Conference. ZOV 6/2008, p. 277

Is the Federal Republic of Germany responsible for how compensation funds paid to the JCC are used? Berliner Anwaltsblatt 10/2009, p. 354

Restitution bypasses victims: Why the German government needs to take immediate action! ZOV 4/2010, p. 170

Missed application deadlines – correspondence with MP Siegfried Kauder (Member of the German Bundestag). ZOV 4/2010, p. 174

Heirless and unclaimed. Unclaimed? A review of § 2 para 1 sentence 3 of the Property Act. ZOV 6/2012, p. 324

Still Waiting for Restitution. A court ruling provides an opportunity to once again take a close look at the content and interpretation of the Property Act., Jüdische Zeitung, October 2012, p. 12

Only 25% for late applicants? Jüdische Zeitung, May 2013, p. 2

When it comes to making sure those who have suffered are granted unconditional rights to share in the proceeds and compensation as specified in the Property Act, the Nazi victims and their heirs expect you to argue their case with the same vehemence you have shown in your struggle for the return of the stolen paintings.

Yours faithfully,
Prof. Fritz Enderlein
Attorney-at-Law

*This article was first published in:
Zeitschrift für offene Vermögensfragen, 2/2014, page 2*

Meeting of the Jewish Claims Conference Board of Directors in New York

In July, the Board of Directors of the Jewish Claims Conference will hold its annual meeting in New York to discuss the ongoing work of the organization. This board, which can be compared to the supervisory board of a corporation, includes representatives from 10 international and 16 national organizations (one of them is the Central Council of Jews in Germany), along with 12 private individuals.

Responding to pressure from the Claimants Representative Committee, the Board of Directors created the Late Applicants Fund two years ago. However, according to the Committee, the EUR 50 million allocated to this fund is not enough.

I expressed criticism of this situation in my article „Only 25% for late applicants?“ (Jüdische Zeitung, May 2013.) In reality, the amount actually paid may be much less, because there is a limit of EUR 50,000 per property asset – even if multiple heirs are involved. This can result in a situation in which, instead of the 80% as previously required, less than 2% is actually paid out.

The Claimants Representative Committee presented this situation to the German Chancellor in 2013 and asked for assistance (see open letter in the Jüdische Zeitung, March 2014).

The Committee also filed a complaint last year with the New York Attorney General's office (published on www.claimantsrepresentativecommittee.com). This complaint is currently being investigated.

In preparation for this year's JCC Board of Directors' meeting, the Committee has again addressed the Executive Vice President of the JCC and each individual member of the Board as follows:

„Unfortunately ... this issue was not taken up by your board [in 2013].

„In our view, [the LAF program] is insufficiently funded and does not guarantee the claimant the right to adequately and fairly obtain the return of his/her family property. In addition, many of our clients believe that it borders on being fraudulent, since it requires the release of claims before the amount of the award is determined.

„As you know, the Gurlitt affair has re-ignited public interest in the matter of returning Nazi stolen property to the families who lost it. In the Gurlitt matter the Claims Conference has quite correctly taken the position that stolen artworks need to be returned to the victims who lost it and to their heirs.

„Yet when the same families request the return of their Nazi stolen property from the Claims Conference they are met by a different response. They are ‘late’, the Claims Conference has better plans for their property, the rights of Nazi victims and their heirs are somehow less when such property has been obtained by the Claims Conference, even though there is absolutely no difference between the Nazi victim whose property ended up with Gurlitt or with the Claims Conference. The cold truth is that their property was stolen from them by the Nazis and by all of the laws of man and by all morality needs to be returned to them. It is that simple.

„During our previous discussions, you always brought up the fact that these funds would be used for your home care project for Holocaust survivors. The CRC applauds this program and supports it. But, the CRC does not believe that it is the duty of Nazi victims to pay for this program. And, when we found out last year in April 2013 that the German government would fund this program in the amount of approximately one billion USD, we thought that the Claims Conference would finally do the right thing and return to our clients the property which was stolen from them.

„You can of course imagine our surprise when not only did this not happen, but that you did not even address this issue at your annual board meeting [that is why we went public with the matter in fall 2013].

„Now the Claims Conference has an historic opportunity to do the right thing. To agree to fairly and adequately fund the LAF program and to restore to our clients the property which was illegally stolen from them by the Nazis. Here we ask that the Claims Conference treat all LAF claimants just like Goodwill Fund claimants were treated in the past [80% of revenue paid out].

„We think that if you look into your hearts, you will find there the humanity and the courage to do this, which is no less than what we would expect from a Jewish organization which has been tasked with a great historical responsibility.

„Finally, we would be remiss if we did not point out that many of our clients continue to weigh their options, they seek justice and they hope that the Claims Conference will be wise enough to give it to them. However, if this chance is missed, and the Claims Conference turns away from them,

they will pursue their rights in the other forums which are available to them. Should you wish to meet and discuss this further we are available.“

This is the content of the letter sent to the JCC executives. We expect the JCC to finally follow their own noble objectives and do whatever is necessary to bring justice to the Holocaust victims and their heirs. Above all, we expect the JCC to stop applying double standards (see my open letter to Mr. Mahlo, the JCC representative in Germany, in the *Jüdische Zeitung*, May 2014).

The lawyers from the U.S., Israel and Germany who have joined the Claimants Representative Committee unanimously agree that the JCC, which was not itself a victim of persecution, is only a trustee for the actual Holocaust victims. This was also established for the first time with absolute clarity by the German Federal Administrative Court in March 2013. I reported on this in August 2013 in the *Jüdische Zeitung*.

The JCC director in Frankfurt responded with a furious attack against me which, for lack of substantive arguments, included a number of offensive and defamatory remarks.

The letter from our Committee was not only sent to the JCC board members. It was brought to the attention of the New York Attorney General and the German Chancellor. Dr. Merkel was made aware of the fact that the provisions of the Property Act have resulted in an expropriation of property in favor of the JCC.

For many years, I have been trying to make the German government and parliament (Bundestag) aware of their responsibilities. („Is the Federal Republic of Germany responsible for how compensation funds paid to the JCC are used? *Berliner Anwaltsblatt* 10/2009, p. 354; „Restitution bypasses victims. Why the German government needs to take immediate action! *Zeitschrift für offene Vermögensfragen* 4/2010, p. 170, etc.)

The upcoming meeting of the JCC Board of Directors would be a good opportunity for the German government to recommend to the JCC governing body that the Goodwill Fund should continue in its previous form.

The Central Council of Jews in Germany, which has always strongly supported the rights and claims of the survivors and their descendants vis-à-vis the German government and the Claims Conference, can also exert its influence on the JCC Board of Directors.

We will see whether the Board of Directors will draw the right conclusions from the ruling by Germany's highest administrative court.

This article was first published in: Jüdische Zeitung, Juli 2014, page 4

The Jewish Claims Conference – Legal Successor and Trustee?

Two recent appellate court verdicts handed down by the Higher Regional Court (OLG) in Frankfurt/Main and concerning the role of the JCC as a legal successor and trustee are worthy of comment. Both of these verdicts are reprinted in this publication.

The first lawsuit, the case of **Ruth W.** (11 U 16/14, verdict from February 3, 2015), focused on the role of the JCC as a trustee for entitled parties who had failed to register a claim before the deadline specified by the second Property Rights Amendment (December 31, 1992). It also dealt with JCC guidelines that deviate from German inheritance law.

The second lawsuit, the case of **Bernhard K.** (19 U 84/14, verdict from February 11, 2015), focused on claims from those entitled to a compulsory share of an inheritance. It also dealt with the role of the JCC as a trustee, although in my opinion, this has nothing to do with a claim for a compulsory share. Since both of the courts present the same arguments to reject the role of the JCC as a trustee, I will address this issue only in the first part of my article. All quotes from court verdicts appear in *italics*.

The case of Ruth W.

1. The Jewish Claims Conference granted the plaintiff Ruth W. restitution from the Goodwill Fund, but limited the amount to one-third.

Goodwill Fund guidelines originally specified that if the person persecuted by Nazis was deceased, the parties who would have otherwise been entitled under German inheritance law would have a right to the inheritance, providing they had filed an application before the specified deadline. In other words, anyone who presented proof of inheritance would be entitled. Although this position was defined in the Goodwill Fund guidelines in 2010,¹ it was unfortunately limited in its practical application.² More specifically, the great-nephews and great-nieces were excluded as heirs – although, as in this case, they are the only living descendants of the former property owner.

Hermann H. owned real estate in Berlin. His only living heir is his great-granddaughter Ruth W. However, as a result of the JCC guidelines, she only received one-third of the proceeds from the property (which was assigned to the JCC and subsequently sold). This was based on the following: Hermann H. had three sons, Julius, Alfred and Willy. Alfred and Willy, who had no children, were both murdered in concentration camps. After Julius and his wife Rosalie died, their inheritance went to their daughter Margot, who also inherited the shares of her two uncles. This placed the entire estate in the hands of one person, namely the granddaughter of Hermann H.

Margot immigrated to Shanghai, where her daughter Ruth was born in 1946. She later moved to Palestine, but the hardships she suffered led to her early death at the age of 46 in Jerusalem.

Ruth, who grew up in an orphanage after her father died, knew nothing about the property owned by her great-grandfather. It wasn't until after the filing deadline that she found out about the property. She then decided to approach the Claims Conference and request restitution from the Goodwill Fund. She was informed that she would be entitled to the share of inheritance from her grandfather Julius, but not to the share from her great-uncles Alfred and Willy, who were both murdered by the fascists.

Had the loss of property not taken place in 1938, but after the death of brothers Alfred and Willy, when Margot was assigned sole ownership, Ruth would have – according to the Claims Conference guidelines – been eligible for the entire sum of proceeds received from the sale of the property.

2. Unwilling to accept the JCC's refusal to recognize her as the heir to her two great-uncles, Ruth W. initiated a lawsuit against the JCC in the Frankfurt Regional Court on July 25, 2013. She based her claim on the premise that the JCC only serves as a trustee for entitled parties who failed to file a claim prior to the application deadline. Therefore, the JCC would be obligated to surrender the assets.

The Frankfurt Regional Court rejected the lawsuit in a decision handed down on January 24, 2014 (2-10 O 332/13). According to the court, the JCC is not legally required to surrender the assets. Furthermore, the organization is not regarded as a trustee for entitled persons who failed to file a claim on time, but as a trustee for the Jewish people.

“According to the clear and unambiguous wording of § 2 para. 1 sentence 2 of the Property Act, the defendant shall be deemed the legal successor (and not a trustee or

agent) for any claims that were not filed on time by entitled Jewish applicants.”

“Consequently, the entitled parties, or their heirs, irrevocably lose their rights to reassignment (of property).” The court asserted that “this legal succession was not accidentally, but deliberately” determined by lawmakers.

Therefore, the Frankfurt Regional Court assumed that, from the very beginning, German lawmakers sought to achieve an expropriation of the entitled parties to the benefit of the Jewish Claims Conference.

3. An appeal against this decision submitted by the plaintiff to the Frankfurt Higher Regional Court (OLG) was rejected on February 3, 2015.

The OLG essentially followed the reasoning of the Regional Court (LG) and asserted that the role of the defendant (JCC) was defined in the Property Act. Furthermore, the court claimed that the Property Act does not contain any provisions pertaining to rights and obligations between the defendant and the originally entitled parties, for example, in the context of a trustee relationship. The court maintained that there is “no indication that lawmakers simply ‘forgot’ to include a corresponding provision governing the relationship between a successor organization and the originally entitled parties.”

A verdict by the Federal Constitutional Court from October 20, 1998 (1 BvR 1730/98) was also cited as follows: “The ... loss of rights suffered by the originally entitled party is a permissible limitation of the content and scope of the legal position in line with Article 14, para. 1, sentence 2 of Basic Constitutional Law.”

In a verdict reached more than 16 years ago by the Federal Constitutional Court, The focus was not on the issue of whether the JCC is a trustee and, if so, for whom, it was on the justification of the deadline.

In a verdict from April 24, 2013 (ZOV 2/2013, p.75), the Federal Administrative Court also referred to the verdict handed down by the Federal Constitutional Court: “This [limitation of content and scope] is admissible because the deadline for property claims is justified by particularly important **reasons of public interest** and is also in line with the constitutional principle of proportionality.”

The “... omission of the right to return of property or entitlement to compensation is still reasonably commensurate with the ... more important normative purposes of **legal certainty and clarity or eliminating investment barriers.**”

It states further that there is nothing preventing the lawmakers from “introducing deadlines, even though this **results in certain unavoidable hardships.**”

“The hardships associated with the introduction of a cut-off date are, in any case, objectively and sufficiently justified by the legislative intent of § 30a para. 1 sentence 1 of the Property Act.”

It is obvious in all of these arguments that the focus was on the deadline for further claim applications, and not on the question of a trustee relationship.

Important reasons of public interest were undoubtedly a factor in the introduction of a deadline. But there is no public interest in the repeated or continuing expropriation of Jewish heirs. This would clearly contradict Germany’s obligation to provide restitution.

Claims filed in accordance with the Property Act are restitution claims. If the relevant laws passed by the Nazis are voided by the Allied Control Council Law No. 1 and subsequent German legislation, the original owners have not lost their legal position, which is passed on to their heirs. These property claims are also protected by of Article 14 of Germany’s Basic Constitutional Law.

Even if expropriation would have been necessary, appropriate compensation would be required in accordance with Article 14 of Basic Constitutional Law. Expropriation was not necessary to ensure legal certainty and clarity.

4. According to the opinion of the Higher Regional Court (OLG), the role of the defendants is defined in the Property Act. Regarding the trustee position of the JCC, it was assumed that *“this could only be defined through an interpretation of the provisions of this Act”*. At the same time, the OLG determined that *“in terms of a trustee relationship, the Property Act contains no provisions pertaining to the rights and obligations between the defendants and the originally entitled party; such provisions are also not included in other laws.”*

Let us therefore focus on the interpretation of the law.

According to the opinion of the OLG, the literature cited by the plaintiffs, which in no way objects to the introduction of a deadline or questions its necessity, *“predominantly assumes that such a trustee position does not exist de lege lata and would first have to be created by the lawmakers (see Wasmuth, ZOV 2003, 224, 229 ...).”*

This is clearly not the case. In fact, according to Wasmuth, the trustee position of the JCC results from “the system of the Property Act.” In other

words, **it already exists**. The Property Act has, thus far, “**not clearly established** the position of the JCC. The lawmakers apparently presume that the observance of this function by the JCC is self-evident.”³

Wasmuth regards the JCC as a “trustee for victims who came too late.” “The fact that the lawmakers have not legally clarified the obligations to these victims arising from the JCC’s position as trustee is, given their involvement in the implementation of deadlines, an oversight that needs to be rectified.”⁴

Stegemann also assumes that a **statutory trustee relationship exists** and he clearly substantiates this point (Stegemann, ZOV 6/2012, p. 313). The Higher Regional Court (OLG) is not convinced by this reasoning. At the same time, the court does not address the arguments presented by Stegemann.

Interpreting the Property Act in such a way that ultimately includes an expropriation of those affected insinuates that this expropriation is intentional or at least condoned by the German state.

A legal consequence that obliterates the legal position of the entitled parties cannot be intentional. “The actual heirs would, without their knowledge, be suddenly deprived of all rights. This interpretation would overturn the meaning and purpose of the law.”⁵

Stegemann does not think that the supplement to § 2 para. 1 sentence 3 of the Property Act suggested by me in previous articles⁶ is necessary, because the consistent application of the existing rules would lead to the same conclusion. He maintains that § 2 para. 1 sentence 3 of the Property Act clearly specifies who is actually entitled. It could be deduced from the wording of the provisions that the lawmakers assume an order of preference among the entitled parties. The regulations show that the JCC could only be regarded as an entitled party if those persecuted, or their heirs (those primarily entitled) had not filed a claim.⁷

The application of § 2 para. 1 sentence 3 of the Property Act must not result in a reversal in the order of those entitled. The Federal Republic of Germany is primarily obligated to provide restitution and compensation to those who have lost their property as a result of Nazi persecution. The JCC was never persecuted: The real victims are those individuals who suffered and their descendants who are still suffering the consequences.⁸

The wording of § 2 para. 1 sentence 3 of the Property Act assumes “only a fiction of legal succession in favor of the JCC. The JCC is regarded

as a legal successor ‘only in view of the rights defined in the Property Act,’ i.e., only in conjunction with the provisions of the Property Act. Conversely, this means that the legal fiction is actually limited to the proceedings in accordance with § 2 para. 1 sentence 3 of the Property Act. Outside of these proceedings, the JCC neither becomes a bona fide legal successor, nor is it to be regarded as such.” “Thus, the legal status of the actual heirs is not affected by § 2 para. 1 sentence 3 of the Property Act. From a legal standpoint, they remain the rightful successors of the expropriated victims.”⁹

Also, “in applying the provisions of § 2 para. 1 sentence 3 of the Property Act, it (must) be ensured that the heirs become the general legal successors within the meaning of § 1922 of the German Civil Code. With the assets or compensation payments, the JCC has received something that would not realistically be permitted due to nonexistent inheritance rights (which is only a legal fiction).” Therefore, pursuant to § 2018 of the German Civil Code, the heir, as the inheritance holder, would be entitled to reclaim what has been acquired by the JCC.¹⁰

If there were no fiction of legal succession, the unclaimed assets would (initially) go to the German national treasury. As soon as the heir finds out about this, he would have a right to recover the property.

5. The assertion of the OLG that most of the literature cited by the plaintiff indicates a **trustee position does not exist *de lege lata***, also does not apply to me. The court decision cites earlier articles written by me and fails to mention that, in subsequent published statements, I fully supported the opinions of Wasmuth and Stegemann, which clearly indicate that a trustee relationship already exists and only needs to be more precisely elaborated.

Rodenbach also assumes that the JCC is required to hand over the assets of persecuted Jews “in accordance with the special provisions of § 2a of the Property Act aimed at collective restitution, or to forward these assets to those entitled applicants who failed to file a claim within the short application period.”¹¹

Originally, there was no intention to redistribute Jewish property. Instead, the successor organizations should have only received **uninherited** Jewish property.¹²

This is also how Spannuth regards the objective of the Property Act. For him, the “task assigned to the Claims Conference by the Property Act” is ... “to ensure the return of all heirless assets.”¹³

After the War, those involved (other than the successor organizations) unanimously shared the opinion that the successor organizations should only be assigned the position of a trustee for property for which entitled parties still exist.¹⁴

A trustee position is also assumed in a commentary on the restitution laws of the American military government.¹⁵

This idea is also included in the Federal Restitution Act of 1957. In § 29 et seq., the focus is on reopening the application deadlines. According to § 29 paragraph 3: “If the entitled party files a claim based on paragraph 1 or 2, a transfer of this claim to a successor organization is regarded as not have taken place.”

6. The Higher Regional Court (OLG) interprets the decision by the Federal Administrative Court from April 24, 2013¹⁶ differently than the plaintiff.

“To the extent the Federal Administrative Court referred to the defendant as a ‘trustee,’ it is merely meant that the defendant is not entitled to use the assigned property as it sees fit, but is required by statute to hand it over to the survivors of the Holocaust.”

Apparently, the Higher Regional Court ignored the JCC bylaws, which I have repeatedly cited. Accordingly, JCC activities should primarily support the individuals who were persecuted. The Court also ignores the oft-cited criticism of the JCC’s distribution practices that not only provide social assistance, but also support other projects that have nothing to do with restitution to the persecuted German Jews.¹⁷

There has been ongoing criticism for many years from leading Jewish groups – especially from Israel – about the way the JCC distributes these funds.¹⁸

7. The OLG attempts to use legislation history to support its rejection of the JCC trustee status. The idea behind establishing the JCC as a legal successor was purportedly to ensure that heirless or unclaimed assets would not revert to the national treasury of a state, “in whose recent history the injustice that needs to be rectified took place,” which is what it says in the justification of the Property Act (BT publication 11/7831, p. 4).

However, the exclusion of the national treasury does not necessarily give the JCC unrestricted rights of disposition. The treasury is also excluded as an heir when the role of the JCC is that of a trustee.

Unfortunately, the Property Act does not completely prevent the use of Jewish property to benefit the German state (or Aryanizers). This is because the JCC is not generally designated as the legal successor to heirless assets. Instead, the organization is required to file a claim within the time limits specified by § 30 of the Property Act.¹⁹ The global applications filed by the JCC were, for the most part, not recognized.²⁰

In another section, it says that the appointment of the JCC “enables proceeds to be distributed, if not to the heirs, then to other needy Jewish citizens through support provided by the defendant’s organization. This provides partial financing for the defendant’s various social programs.”

The JCC’s social programs, which are clearly in line with the organization’s founding principles, are thus financed with money that has been withheld from those who are actually entitled. The advantage for Germany lies in the fact that the more money received by the JCC – at the expense of the defrauded heirs of the murdered Jews – the less is required for JCC relief funding as specified, for example, in the agreement between the GDR and the FRG governing the implementation and interpretation of Article 2 of the Unification Treaty.²¹

8. The OLG very briefly addressed an earlier decision by the Federal Court of Justice, which was cited by the plaintiff. In 1955, this court clearly stated that “*in the interests of those persecuted and the protective intention of the restitution law, the successor organization (i.e. the predecessor to the JCC), should assume (a trustee) role.*”

“*The displacement of the actual heirs by the JRSO would, in the first place, basically mean that the Nazi injustice would be fully borne by those persecuted ... The concept of justice, which serves as a basis for the compensation and restitution laws, would only be fundamentally satisfied if the compensation goes to those who actually suffered the damage.*”²²

According to the OLG, this was merely a case of “*obiter dictum*” and it was allegedly “*moreover not further substantiated from a legal standpoint.*”

This is not correct in this form. The Federal Court of Justice deals in detail with a legal opinion of the CORA and cites the negative criticism of Rosenthal, Börner, Weißenstein, Engler and Moser. This also gives the decision special meaning, because it is a decision by all civil divisions of the Federal Court of Justice. With its current decision-making approach, the OLG circumvents case law established by German courts back in the sixties.

9. The OLG refused to consider an appeal, *“because the case has no fundamental significance, nor does it serve the development of legal rights or ensure a uniform administration of justice requiring a decision by a court of appeals.”*

The plaintiff does not see it this way and plans to file an appeal against the denial of leave to appeal with the Federal Court of Justice.

The case of Bernhard K.

1. The grandchildren in the United States knew that their grandfather, Bernhard K., was the majority shareholder of a large company and owner of a plot of land in East Berlin. As a Jew, their grandfather lost his entire fortune to the Nazis in 1938.

Prior to the deadline in 1992, they filed a claim with the authorized property office in Berlin. They were greatly disappointed to receive notice that their claim was rejected. The reason given was that they were not regarded as heirs and would only be entitled to a compulsory share of the proceeds.

Their grandfather had written a joint testament with their grandmother in 1922, in which the couple appointed each other as primary heirs and their children as secondary heirs. The testament also contained a clause stating that the surviving spouse was entitled to specify new provisions. The applicants' grandmother died in 1925.

When the Nazis came to power, the four children left Germany as a precautionary measure. Werner and Helene moved to Switzerland in 1933, Hanna went to Great Britain in 1933, and Ilse emigrated to the U.S. in 1936.

Bernhard K. later remarried. Shortly before his death in 1941, he wrote a new testament that named his second wife, M.K. as the beneficiary. His four children were not mentioned in the will – for good reason.

The 11th decree of the Reich Citizenship Laws stipulated that Jewish persons who establish residency outside of Germany would automatically lose their German citizenship. At the same time, the loss of citizenship meant that any property owned by this person would be forfeited to the German Reich.

Appointing the children as heirs would have led to their disinheritance. In other words, the testament was clearly written under duress.

Shortly before Bernhard K.'s widow was sent to a concentration camp, where she was murdered in 1942, she was awarded a certificate of inheritance

as the sole heir to Bernhard K. She left a testament that specified M.M., her only daughter from a previous marriage, as the sole heiress.

After the war, M.M. filed a claim for return of the assets once held by Bernhard K., who had also owned several properties in West Berlin. His four children submitted a claim for the same property, but this claim was rejected due to the certificate of inheritance held by M.M.

The four children tried to challenge this certificate of inheritance, but failed. They discontinued their efforts to be named as heirs after reaching an agreement with M.M. to divide the estate of Bernhard K. into five equal parts. Following the advice of her lawyers, M.M. later retracted this agreement.

M.M. died in 1982 in Great Britain, leaving no descendants.

After the claim filed by Bernhard K.'s grandchildren was rejected by the BADV (Federal Office for Central Services and Unresolved Property Issues), they initiated another attempt to be recognized as heirs and filed a petition to nullify the certificate of inheritance in which the grandfather's widow M.K. was named as the sole beneficiary. This was based on the premise that, after her death, there were no remaining descendants, which meant that the estate would therefore be considered as heirless – although there were direct descendants who were only excluded from the inheritance because of the Nazi persecution of Jews. Their application was rejected by the Charlottenburg District Court (AG) and the Berlin Court of Appeals (KG).

2. The Jewish Claims Conference filed a global application for Bernhard K.'s assets in December 1992. This application was later supplemented with further details. The JCC was recognized as an entitled party and received a larger compensation sum for a majority share of the company owned by Bernhard K. as well as for his property.

The grandchildren then approached the JCC, the legal successor to their grandfather, and demanded their compulsory share of the inheritance. The JCC, claiming that it is not the legal heir, rejected the request.

After this, one of the grandchildren, P.L., took the case to the Frankfurt Regional Court and demanded his compulsory share of the inheritance from the JCC. This case was rejected by the court on April 4, 2014.

This decision is absolutely unacceptable. Statements that refer to the actual reason for the claim can only be found at the beginning and end of the court ruling. At the beginning it says: "*Under § 2303, para. 1 of the*

German Civil Code, the defendant is not required to honor the payment claim. The defendant is not an 'heir' within the meaning of the legal provision, but has gained ownership rights through an act of law ... "

At the end it says: *"Because, if the entitled parties (who were expropriated in favor of the JCC) remain, from a legal standpoint, the legal successors, any claim to a compulsory share of the inheritance under § 2303 para. 1 BGB could only be directed against them."*

Between these two statements, the Regional Court focused its reasoning on the question of whether the JCC, based on the fiction of legal succession, becomes a trustee for the entitled party. But this had nothing to do with the reason for the lawsuit.

The plaintiff did not base his claim to a compulsory share of the inheritance from the JCC because he regards the organization as a trustee, but because, as a legal successor, the JCC has not only fictionally, but factually gained possession of the estate. Therefore, the JCC is required to assume not only the rights of the entitled heirs, but also the obligations.

3. Generally speaking, the JCC must accept the burdens associated with the property assets. This applies to the repayment of any amounts received in previous equalization proceedings as well as to the repayment of mortgages or the payment of compensation for the purchase price to the previous buyers. The plaintiff commented on this in detail in a letter dated March 3, 2014, but these statements were completely ignored by the Regional Court (LG). Consequently, this case is a refusal of the right to a fair hearing.

In a decision from November 26, 2013 (8 BVerwG B 20/13), the Federal Administrative Court dealt *inter alia* with the question of when the right to a fair hearing is violated. This right requires the court to hear the arguments from all parties and to take these into consideration insofar as they are relevant to the decision (with reference to a verdict by the Federal Constitutional Court from November 17, 1992, 1 BvR 168/89).

A violation of the right to a fair hearing occurs when it is clear in an individual case that the court has not complied with this obligation. And this is precisely the situation in this case.

The court deals with the loss of rights when an entitled party fails to meet the deadline: *"When the actual heir is no longer permitted to file a claim against the JCC after the application deadline has expired, this must also apply to the plaintiff who is merely (!) entitled to a compulsory share of the inheritance,*

because placing the person entitled to a compulsory share in a better position than the actual heir would be unreasonable.”

The court completely ignores the fact that the plaintiff already filed a claim before the deadline with the property office. But this isn't the point. Entitlement to a compulsory share of the inheritance has nothing to do with the deadlines specified in the Property Act.

The Regional Court (LG) expects the person entitled to a compulsory share to approach the heir or heirs – who have no money because their assets have been assigned to the JCC. The situation in this case, however, is different – which is something that is overlooked by the court. Namely, there are no heirs. The JCC gained its legal position not because the heirs missed the deadline, but because there are no heirs. In other words, this case is about truly heirless assets.

4. An appeal filed by the plaintiff against the Regional Court (LG) decision was rejected by the Higher Regional Court (OLG) in Frankfurt on February 11, 2015.

The OLG largely agreed with the reasoning of the LG. A demand for a compulsory share is directed against the heirs. But the JCC cannot be regarded as an heir because it has gained its legal status not from an inheritance, but from a legislative order. How the JCC gains its legal status is undisputed.

The OLG reiterated the objectives of § 2 para. 1 sentence 3 of the Property Act by maintaining that the JCC prevents use of the property by the German state, or Aryanizers. At the same time, it enables funds to be distributed, if not to the heirs, then to other needy Jewish citizens. The OLG fails to answer the question: And why not to the heirs? How would that conflict with the stated objectives?

The JCC is tasked with handling restitution claims for the purpose of collective restitution. But where does the law exclude individual restitution? According to its own statutes, the JCC is also directly responsible for individual restitution.

The exclusion of the 'entitled' party is regarded as a conscious decision on the part of the lawmakers. Thus, the OLG repeated the assertion of deliberate expropriation. The lawmakers purportedly made no provisions for cases in which the heirs file a claim after the deadline has expired. This is obviously true, but at the same time, it pinpoints the oversight that needs to be criticized.

Following the opinion of the Federal Constitutional Court, the OLG argues that the exclusion of proprietary claims for cases in which the claimant failed to meet the deadline is not the same as expropriation, because this should have been asserted anyway and its termination could have been easily prevented within a reasonable time and in a simple form. All this is nothing more than theory. In practice, the situation was very different. I have already provided the necessary comments on this in other articles.²³

The OLG also repeated the premise that there is no inadvertent loophole. But this is precisely the case. The JCC should have been named as a trustee for the entitled party.

The other repetitions in the reasons for the judgment – limitation of the content and scope of ownership based on the important needs of public interest (which could all be satisfied without expropriation of the entitled parties), eliminating barriers to investment (which would have been eliminated even if the JCC was named as a trustee for the entitled parties), deadlines created in the general interest of economic development – are all noble objectives that have nothing to do with the trustee position of the JCC.

The legislative intent purportedly justifies the specification of an appropriate and necessary deadline aimed at achieving the desired goal.

In my opinion, all of this misses the point. Nothing speaks against the idea of a deadline, but this doesn't have to result in an expropriation of the entitled parties. Expropriation does not contribute to the suitability of a limitation period, nor was it necessary.

Incidentally, the deadline has not been consistently applied to the JCC. The organization was granted a new time limit for filing claims as a result of § 1 para. 1a of the Compensation Act for Victims of Nazi Persecution (NS-VEntschG) included in the 2nd Compensation Act Supplement (EntschRÄndG) from September 1, 2005.²⁴ This clearly infringes the principle of equality defined in Article 3 of Basic Constitutional Law.

5. In its 12-page decision, the Higher Regional Court (OLG) comprehensively addresses the trustee position on behalf of the entitled parties, which in the court's opinion, is non-existent. But the court hardly looks at the issue of why the JCC is not required to satisfy claims for a compulsory share of the inheritance. Is this simply because the JCC is not regarded as an "heir" but as a fictitious legal successor?

There is obviously no doubt about the plaintiff's entitlement to a compulsory share of the inheritance. Consequently, the arguments regarding the absence of a trustee position for the JCC do not hold water. Whether or not the JCC is a trustee does not play a role in terms of its obligation to satisfy any claim for a compulsory share.

Why can't the basic principle, stating that the party who receives a property asset be required to assume the associated burdens, be applied? What does 'legal successor' actually mean? The legal successor assumes all rights, along with all responsibilities. Examples of this were cited in the notice of appeal and can be further supplemented. For example, the purchaser assumes responsibility for a contaminated plot of land, or a building owner is liable to tenants for hidden defects, etc. This principle permeates civil law and was probably included in Roman law.

The following is stated in the justification of the Property Act: "In the appropriate application of the law in accordance with § 1 paragraph 6, the term 'legal successor' is to be broadly interpreted."²⁵ It is precisely this broad interpretation that the OLG has failed to implement.

The OLG approved the appeal because the matter is of fundamental importance. Clarification from the highest court is apparently required to determine whether the JCC should be regarded as an heir, against whom relevant inheritance claims can be asserted.

Excursus

In their decisions, both divisions (11 and 19) of the Higher Regional Court of Appeal address the trustee status of the JCC in detail. The Federal Administrative Court also dealt with this issue in 2013 and, in my opinion, came to some very different conclusions. In its decision, the court arrived *inter alia* at the following conclusions:

The JCC is "*solely entitled to serve as a trustee on behalf of Jews persecuted by the Nazi regime or their heirs.*"

I have commented in detail on the Federal Administrative Court decision.²⁶

It is obvious that the Property Act was "hastily thrown together."²⁷

Although the standard rules in § 2 paragraph 1 of the Property Act are absolutely correct and necessary, the fact that the Property Act does not differentiate between a) heirless assets, and b) assets for which there are

heirs who did not file a claim before the deadline, was a mistake. In the first case, a) the JCC serves as a trustee for all Jewish people. In the second case, b) the JCC serves as a trustee for individuals.

Due to a lack of clarification of the JCC's role, § 2 para. 1 sentence 3 Property Act results in a redistribution of Jewish assets and an expropriation of Jewish heirs. This constitutes a violation of Article 14 of Basic Constitutional Law and is contrary to Article 1, Protocol No. 1 of the European Convention on Human Rights.

The goal of not letting the German state or the Aryanizers benefit from stolen Jewish property was not fully achieved. If the JCC also failed to file a claim, the situation remains unchanged. It also remains unchanged for cases in which the initially generous handling of the global applications submitted by the JCC were later revised.

There are various reasons why entitled parties failed to file their claims within the time limits specified in § 30a of the Property Act.

In many cases, claims were not resubmitted at the time because proceedings had already been initiated in the 1950s and 1960s. To the extent that these old claims were rejected because the property assets were outside the scope of restitution laws, the process should have been resumed through official channels without requiring the submission of a new claim.

Some claims were not submitted because the (Jewish) owner was still listed in the land register. In these cases, the failure to submit a claim led to the absurd result that the heirs were expropriated and the property was assigned to the JCC.

Claims were often rejected because the heirs – who were scattered all over the world – had no knowledge of the assets of their ancestors, and no effort was made to locate or notify them, although verification of their existence and their addresses were available in official documents.

Hopefully, regarding the two verdicts of the OLG discussed here, the cases pending in the Federal Court of Justice will reaffirm the line of thinking it followed in 1955.

Notes

- 1) Goodwill Fund Guidelines as approved by the Board of Directors on July 19, 2000 and incorporating decisions of the Executive Committee from November 2000, the Board of Directors of the Claims Conference on July 19-20, 2005, the Executive Committee on November 2-3, 2005, the Executive Committee on March 7, 2006, Board of Directors on April 27, 2006 as circulated to the Board of Directors on October 9, 2006 and incorporating the decisions of the Executive Committee on March 31, 2009 and Successor Organization Committee of January 5, 2010. Updated guidelines as of June 2010
- 2) Fritz Enderlein, "What the guidelines and deadlines of the JCC Goodwill Program are all about," *Ju"dische Zeitung*, August 2008, p. 2; *idem* "The Claims Conference and German inheritance law," *Ju"dische Zeitung*, September 2011, p. 20
- 3) Johannes Wasmuth, ZOV 4/2003 p. 229, text highlighted by F.E.
- 4) *idem* "Aufarbeitung der unter NS-Herrschaft veru"bten Entziehung von Kunstwerken" (Reappraisal of the works of art confiscated under Nazi rule), NJW 11/2014, p. 752
- 5) Jan Stegemann, "Die Conference on Jewish Material Claims Against Germany als gesetzliche Treuh"nderin der Erben der durch die Nationalsozialisten enteigneten Eigent"mer" (The Conference on Jewish Material Claims Against Germany as a legal trustee on behalf of the heirs of property owners who were expropriated by the Nazis), ZOV 6/2012, p. 313 ff
- 6) Fritz Enderlein, "Is the Federal Republic of Germany responsible for how compensation funds paid to the JCC are used?" *Berliner Anwaltsblatt* 10/2009, p. 354
- 7) Stegemann, loc. cit.
- 8) See "Missed application deadlines – Correspondence with MP Siegfried Kauder," ZOV 4/2010, p. 174, letter from July, 2010; also Wasmuth loc. cit. p. 229, "Die JCC war zu keinem Zeitpunkt Verfolgungen ausgesetzt" (The JCC was never subject to persecution)
- 9) Stegemann, loc. cit. p. 314
- 10) loc. cit. p. 315
- 11) Hermann-Josef Rodenbach, "Das deutsche Recht der offenen Verm"gensfragen. Sterbendes Rechtsgebiet oder Vorbild f"r andere L"nder?" (German law related to unresolved property issues. A dying branch of law, or a model for other countries?), ZOV 6/2012, p. 316, text highlighted by F.E.
- 12) Fritz Enderlein, "Heirless and unclaimed. Unclaimed?" ZOV 6/2012, p. 324
- 13) Jan Philipp Spannuth, "Der Umgang der DDR mit dem „arisierten“ Eigentum der Juden und die R"ckerstattung im wiedervereinigten Deutschland (How the GDR deals with "aryanized" Jewish property and restitution in reunified Germany), Klartext Verlag 2007, p. 7

- 14) Evidence provided in Enderlein, "Heirless..."
- 15) Kohlhammer Kommentare, Die Rückerstattung in Westdeutschland und Berlin, 1950, (Kohlhammer Commentary on restitution in West Germany and Berlin), remarks on article 10
- 16) ZOV 2/2013 p. 75
- 17) In preparation for the annual meeting of the Board of Directors in July 2014, a working group discussed the idea of using the remaining funds for educational purposes in commemoration of the Holocaust, or for the construction of synagogues in Central Asia.
- 18) Reports appear regularly, particularly in the Jerusalem Post. Articles have also been cited by Spannuth, loc. cit. p. 200
- 19) This issue was critically addressed in detail in my article "§ 2, para. 1, sentence 3 of the Property Act: Is it unconstitutional? Thoughts on the Goodwill Fund administered by the Jewish Claims Conference," ZOV 6/2008
- 20) See also Johannes Wasmuth, "Global applications by the Jewish Claims Conference and deadlines in accordance with the Property Act," ZOV 4/2003, p. 225 ff. However, special rights were subsequently granted to the JCC, see below
- 21) Agreement between the German Democratic Republic and the Federal Republic of Germany for the implementation and interpretation of the Agreement signed in Berlin on 31 August 1990 agreement between the German Democratic Republic and the Federal Republic of Germany on the establishment of German unity – Unification Treaty – Journal of Laws of the DDR, Part I No. 64 p. 1979
- 22) Verdict of the Federal Court of Justice from February 28, 1955, GSZ 4/54
- 23) Enderlein, "The Supreme Constitutional Court and § 30a of the Property Act," ZOV 5/2010, p. 212; *idem* "Expropriation pursuant to § 30a of the Property Act," ZOV 5/2009, p. 219
- 24) Hermann-Josef Rodenbach, "Das 2. Entschädigungsrechtsergänzungsgesetz" (2nd Compensation Act Supplement), ZOV 5/2005, p. 271
- 25) BT publication, as previously mentioned
- 26) Fritz Enderlein, "Justice at last for the heirs of Holocaust victims?" ZOV 2/2013, p. 53
- 27) See the interesting comments from Spannuth regarding the legislative history, *ibid* p. 183

*This article was first published in:
Zeitschrift für offene Vermögensfragen, 2/2015, page 119*

The Mosaic-Talmudic Right of Succession

In his book, *The Mosaic-Talmudic Right of inheritance*, Rabbi Moses Bloch, 125 years ago, wrote the following: “For Judaism, ‘the law, the truth and the peace’ represent the pillars of moral world creation. Therefore, Judaism recognizes – as the law in general – also the law of inheritance as divine and recommends that its confessors keep these religious rules holy.”¹

This divine right of inheritance was revealed to Moses.² It corresponds to the intestate succession specified in the German Civil Code (apart from the fact that daughters are entitled to inherit only if there are no surviving sons). When there are no surviving children of the first or second order, the heirs of the third order take their place. These are the grandparents of the deceased and their descendants (§ 1926 German Civil Code/BGB), in other words, the grandnephews and nieces.

The Jewish Claims Conference (JCC) is a secular, not a religious organization. Nevertheless, one would expect that, as representatives of Jewish victims of Nazi persecution, the JCC should adhere to the principles of the Mosaic Right of inheritance. Unfortunately, this is not the case.

I have focused on these issues in two previous articles: “What the guidelines and deadlines of the JCC Goodwill Program are all about” (*Jüdische Zeitung*, August 2008) and “The Claims Conference and German inheritance law” (*Jüdische Zeitung*, September 2011). Both of these articles deal with the JCC Goodwill Program that ended in 2004.

In the meantime, the JCC has established new rules for its two-year “Late Applicants Fund” program.³ Unfortunately, these rules do not change the situation for grandnephews and nieces.⁴ Because, in addition to the immediate testamentary heirs, only the direct descendants of the testator, up to the great-grandchildren and their spouses and siblings of the testator and their children (including spouses), but not their grandchildren (grandnephews and nieces) are entitled to an inheritance.

It is important to point out that the JCC had originally promised to let all heirs participate in the Goodwill Fund who were entitled to file a claim under the Property Act (and under German inheritance law). This group would also include the successors of the testamentary heirs. Excluding these

people leads to results that are incomprehensible to those concerned. The following is one example:

Mr. L. designated his wife R. as a testamentary heir. She was later murdered in a concentration camp. R. brought her daughter M. into the marriage. The girl was raised by L. like his own child. But as an heiress, M. does not qualify because she is not an immediate testamentary heir. There is little hope that the JCC will change its position and adhere to the divine Jewish Right of Inheritance. But there is a chance that it will be forced to do so. The exclusion of heirs of the third order plays a role in proceedings before the Federal Court of Justice (BGH, III ZR 99/15).

Notes

1) The book was published in Budapest in 1890 and is available (in German) on Google <https://archive.org/stream/dasmosaischtalmOOhungoog>

2) See Moses 4/27

3) Only 25% for late applicants? Jüdische Zeitung, May 2013.

4) <http://www.claimscon.org/?url=LAF>

Appendix

Claimants Representative Committee

c/o David Rowland , Esq.
Rowland & Petroff
2 Park Avenue, 19th Floor
New York, NY 10016
United States
Tel. +1 (212) 685-5509

c/o RA Dr. Westphal
Knauthe Rechtsanwälte Partnerschaft
Leipziger Platz 10
10117 Berlin
Germany
Tel. +49 (0)30 206 70-0

December 9, 2013

Chancellor Dr. Angela Merkel
Bundeskanzleramt
Willy-Brandt-Strasse 1
10557 Berlin
Germany

Re: Nazi Victim Restitution, Eastern Germany

Dear Chancellor Merkel:

We are a group of lawyers and other business professionals who represent the majority of the heirs of Nazi victims who lost property in eastern Germany due to Nazi persecution and have not yet received it back.

We noted your prompt reaction to the Gurlitt affair and the efforts you and Germany are making to insure that Nazi victims and their heirs obtain their art back. This is laudable and fulfills Germany's historic responsibility.

However, we are not sure if you are aware that currently Germany has disinherited most of the heirs of Nazi victims from their eastern German property.

The problem has to do with Germany's naming the Claims Conference as the "legal representative" of Jewish Nazi victims and their heirs who did not file timely claims under the 1990 Property Law (Vermögensgesetz). The deadlines for filing property claims were quite short, especially given the fact that Jewish victims and their heirs had been scattered across the

globe and many had no idea what to claim, or that there was any possibility to claim back their property after 40 years of communism.

As a result, the Claims Conference has obtained approximately 2.3 billion Euro of property which belonged to individual Nazi victims and their heirs, of which they have returned only approximately 700 million Euro to the actual victims or their heirs who lost this property.

This means that the Claims Conference is keeping approximately 1.6 billion Euro of Nazi victim's property which it refuses to return to the heirs of Nazi victims who lost this property.

In the past when Nazi victims or their heirs asked for their property back from the Claims Conference, it opened a "Goodwill Fund" which paid out 80% of the property it had obtained to the victim or their heirs who lost it. However this program closed on March 31, 2004. Since then a new Late Applicant Fund (LAF) was opened this year which pays out only 25% of the property which the Nazi victim lost to the heirs, but only up to 50,000 Euro, and for this the Claims Conference demands a full release of claims.

For this new LAF fund, the Claims Conference has set aside 50 million Euro, although this is only about 3% of the 1.6 billion Euro of Nazi victim property which it is keeping.

The Claims Conference says that it needs these funds to provide home care for holocaust victims and therefore cannot fairly and adequately return this property to the heirs of the Nazi victims who lost it. However, we recently learned that the German government has agreed to fund the Claims Conference's home care program with 1 billion US Dollars until the year 2017.

Therefore, we cannot and do not understand why the Claims Conference continues to refuse to fairly and adequately return Nazi victim property to the heirs of the Nazi victims who lost it. This is especially so where the heirs have contacted the Claims Conference and asked them for the return of their property.

Of course we agree that where there are truly no heirs, the Claims Conference should keep these funds and use them for charitable purposes to improve the lives of Holocaust survivors. However, this should not be at the expense of the victims and their heirs who survived and want to have their property back. Our estimates are that the Claims Conference, or Germany, if the Claims Conference will not act, should set aside at least 200 million Euro to make sure that the heirs of Nazi victims can obtain the return of their property.

The refusal of the Claims Conference to fairly and adequately return this property to the heirs of the victims who lost it is a scandal of the highest level and needs to be remedied immediately. In this regard Germany has a sacred duty and responsibility to Nazi victims and their heirs to insure that their stolen property be fairly and adequately returned to them.

Please keep in mind that when Nazi victims lost their property, the entire family was affected and to a great extent the tremendous problems Nazi persecution caused these families continues to affect them today. Restitution of their property can help to heal this wound.

Please also keep in mind that this property was lost due to Nazi persecution and that it is Germany's responsibility to return it to the victims who lost it, and to their heirs. That Germany gave this property to the Claims Conference is no solace to the heirs of Nazi victims when the Claims Conference refuses to return it to them.

We therefore appeal to you to take all necessary steps to insure that the Claims Conference returns Nazi victim property to its rightful owners, the heirs of the Nazi victims who lost it, or if the Claims Conference continues to refuse to do this, that Germany fulfills its responsibility to do so.

For further information see www.claimantsrepresentativecommittee.com.

We look forward to hearing from you.

Respectfully

David J. Rowland

Member, Claimants Representative Committee

Cc:

President Barack Obama

Julius Berman, Chairman Claims Conference

Greg Schneider, Executive Director Claims Conference

Douglas Davidson, US Ambassador for Holocaust Issues

CRC Members

Members:

Law Offices Rowland & Petroff New York, Law Offices Lissner & Lissner LLP New York, Knauth Rechtsanwälte Partnerschaft Berlin, Rechtsanwalt Prof. Dr. Fritz Enderlein Potsdam, von Trott zu Solz Lammek Berlin, Andrea Enderlein Potsdam, Muggenthaler Research München, Rechtsanwältin Barbara Erdmann Berlin, Rechtsanwälte Rosbach & Frey Berlin, Rechtsanwalt Ralph Konnertz Neuss, Attorney Yuval Hen Israel u.a.

About the Author

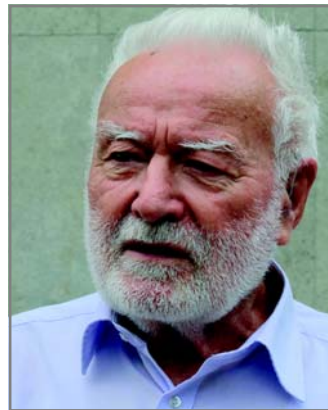
Born in 1929, Fritz Enderlein witnessed the horrors of war first hand. In 1945, at the age of 16, he was drafted into the army. Afterwards he adopted a lifetime pledge: “Fascism and war. Never again!” He did everything he could to support international understanding. His work focused on global cooperation, international law, international business law, comparative law and legal unification. He worked as a member of United Nations committees and working groups for many years. From 1979 to 1982 he was a member of the UN Secretariat in New York and Vienna. During this period, he served as a board member and vice president of the International Institute for the Unification of Private Law (UNIDROIT) in Rome.

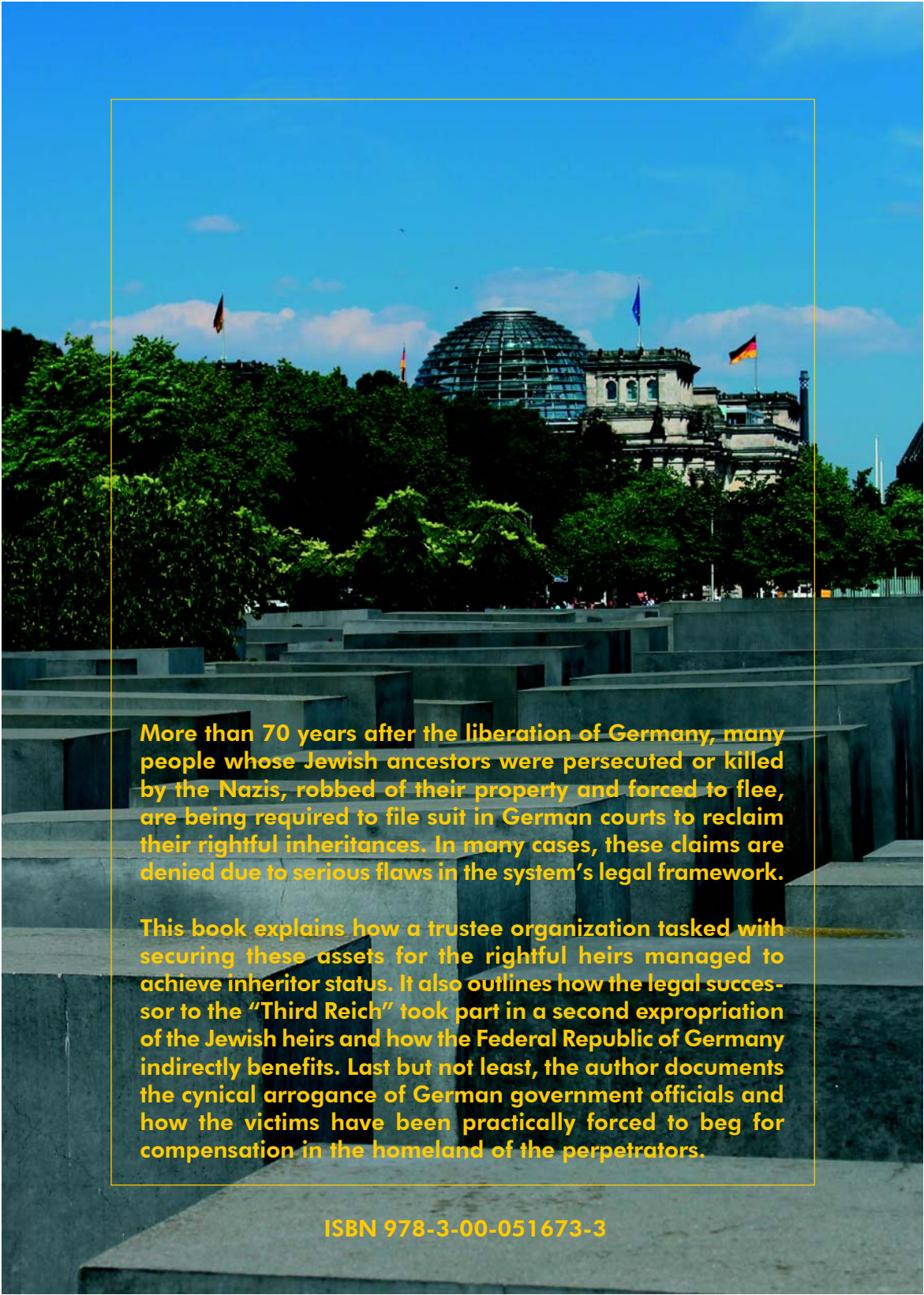
Beginning in 1948, Enderlein studied law at the Universities of Leipzig and Berlin. He later completed his business training at the University of Economics in Berlin. Prior to German reunification, he served as director of the Institute for Foreign and Comparative Law at the Academy of Law and Political Science in Potsdam.

Since 1990, Enderlein has worked as a lawyer specializing in restitution cases. Over the years, he has attempted to at least obtain some form of material compensation for the irreversible damage caused by Nazi injustice. Through his efforts, he has helped hundreds of victims of Nazi terror and developed close friendships with a number of them.

Professor Enderlein is a member of several international organizations, including the German-Israeli Society and the German-Israeli Lawyers’ Association.

He is married and has four children. His two daughters work with him in his law office in Potsdam.





More than 70 years after the liberation of Germany, many people whose Jewish ancestors were persecuted or killed by the Nazis, robbed of their property and forced to flee, are being required to file suit in German courts to reclaim their rightful inheritances. In many cases, these claims are denied due to serious flaws in the system's legal framework.

This book explains how a trustee organization tasked with securing these assets for the rightful heirs managed to achieve inheritor status. It also outlines how the legal successor to the "Third Reich" took part in a second expropriation of the Jewish heirs and how the Federal Republic of Germany indirectly benefits. Last but not least, the author documents the cynical arrogance of German government officials and how the victims have been practically forced to beg for compensation in the homeland of the perpetrators.

ISBN 978-3-00-051673-3