Articles

Ghetto Pensions

By Dr. Sven Simon[*] & Avraham Weber[**]

A. Introduction

Under the Nazi regime, tens of thousands of Jews lived in ghettos, working more or less normal jobs. Some of these ghettos had their own employment centers, and some employers even paid into retirements funds. Legislation known as "German Pensions for Work in Ghettos," or by its German acronym, ZRBG (*Gesetz zur Zahlbarmachung von Renten aus Beschäftigungen in einem Ghetto*)[1] was passed in 2002 to grant pensions to some of these former laborers. But more than ten years after its passage, its implementation is still subject to considerable conflict. For many years, former laborers in Nazi ghettos have been fighting to get the pension that this law ostensibly guarantees them, but the vast majority of their applications have been rejected. Since 2002, around 70,000 survivors have invoked the ZRBG. However, over ninety percent of these applications were initially rejected by German authorities for various legal and practical reasons.[2] This essay is an attempt to summarize the major steps in the implementation of the law. It begins with an overview of the historical background, and then will shift focus to the judicial, diplomatic, political, and practical problems with the implementation of the ZRBG.

B. Historical Background

The movement to compensate victims of the Holocaust dates back more than sixty years. The Federal Republic of Germany, the legal successor to Nazi Germany, found itself responsible for the Nazi regime's breach of basic human rights and the violations of

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[1] Gesetz zur Zahlbarmachung von Renten aus Beschäftigungen in einem Ghetto [ZRBG] [German Pensions for Work in Ghettos], June 20, 2002, BGBl. I at 2074, *available at* http://www.gesetze-im-internet.de/bundesrecht/zrbg/gesamt.pdf.

[2] Mainly by the Deutsche Rentenversicherung (German statutory pension insurance scheme).

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international law that resulted from the genocide and persecution.[3] One week after the establishment of the new government, Chancellor Konrad Adenauer made the first attempt to contact Jewish organizations in the US and Israel to discuss potential compensatory arrangements.[4] The first sum suggested was 10 million deutschemark, but this was rejected by the representatives of Israel and by the representatives of the World Zionist Organization. Ongoing negotiations during the 1950s led to the construction of legal structures that would allow survivors to claim reparations from the federal government and receive payments directly from the Federal Ministry of Finance.[5] Not long after the rejection of the initially proposed reparation amount, the German federal government tried to promote agreements with broader scopes, eventually leading the federal state to reach a global compensation agreement with the State of Israel.[6]

I. Bundesentschädigungsgesetz

The *Bundesentschädigungsgesetz* (Federal Compensation Law – BEG)[7] was passed in 1956. The BEG, however, did not solve all relevant issues and became the grounds for many legal disputes between the survivors and the German authorities. The courts took an important role in defining the law and facilitating its implementation. More importantly, the BEG set a new precedent by placing the issue of personal reparation of survivors firmly within the public law of the German legal system. Unfortunately, during the first twenty years of administration of BEG claims, the complexity of these claims negatively impacted the

[3] Ernst Féaux De la Croix, *Vom Unrecht zur Entschädigung: Der Weg des Entschädigungsrechts*, *in* DIE WIEDERGUTMACHUNG NATIONALSOZIALISTISCHEN UNRECHTS DURCH DIE BUNDESREPUBLIK DEUTSCHLAND 1, 4 (Ernst Féaux La Croix & Helmut Rumpf eds., 1985).

[4] Yeshayahu A. Jelinek, *Israel und die Anfänge der Shilumim*, *in* WIEDERGUTMACHUNG IN DER BUNDESREPUBLIK 119, 128 (Ludolf Herbst & Constantin Goschler eds., 1989).

[5] José Brunner, Norbert Frei & Constantin Goschler, *Komplizierte Lernprozesse—Zur Geschichte und Aktualität der Wiedergutmachung*, *in* DIE PRAXIS DER WIEDERGUTMACHUNG: GESCHICHTE, ERFAHRUNG UND WIRKUNG IN DEUTSCHLAND UND ISRAEL 9, 16 (Norbert Frei, José Brunner & Constantin Goschler eds., 2009).

[6] Helmut Buschbom, *Die völkerrechtlichen und staatsrechtlichen Maßnahmen zur Beseitigung des im Namen des Deutschen Reiches verübten nationalsozialistischen Unrechts*, *in* DAS BUNDESRÜCKERSTATTUNGSGESETZ 1, 52 (Friedrich Biella et al eds., 1981); ISRAELI FOREIGN OFFICE, ISRAEL'S CLAIMS AGAINST GERMANY: THE GERMAN ECONOMIC BACKGROUND (1951); Letter to Felix Eliezer Shinnar, (Fall 1951) (on file with Israeli State Archives, Foreign Office, 2417/3) (presenting the position of the Israeli government).

[7] The BUNDESENTSCHÄDIGUNGSGESETZ were a series of laws passed in the 1950s in West Germany regulating the restitution of lost property and the payment of damages to victims of the Nazi persecutions. BUNDESENTSCHÄDIGUNGSGESETZ [BEG] [FEDERAL COMPENSATION LAW], Sept. 18, 1953 (providing for retroactive affect). The BEG was intended to provide a "claim to compensation" to a defined group of "victim[s] of National Socialist persecution"—"persecutees"—who, "because of political opposition to National Socialism, or because of race, religion or ideology, [were] persecuted by National Socialist oppressive measures and, in consequence thereof," thus "suffered loss of life, damage to limb or health, liberty, property, possessions, or vocational or economic pursuits." *Id*. 1, § 1(1). INSTITUTE OF JEWISH AFFAIRS, THE (WEST GERMAN) FEDERAL COMPENSATION LAW (BEG) AND ITS IMPLEMENTARY REGULATIONS 8 (1957).

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claimants themselves—who were extremely unsatisfied with both the need to appeal to the courts and to deal with expensive and complicated legal proceedings[8]—as well as the authorities—who became increasingly interested in bringing the entire issue of reparations under the BEG to a close.

This was not a small problem. Some 300,000 personal restitution claims were filed under the BEG and in accordance with the relevant legislation for German nationals deported from their previous homes.[9] The complexity plaguing the administration of the BEG led to more attempts to reach additional agreements regarding what reparation payments were applicable under the law.

II. Bundesentschädigungsschlussgesetz

The *Bundesentschädigungsschlussgesetz* (Final Federal Compensation Law or Second Revised BEG) was written as an attempt to get a clearer view of the numbers of Holocaust survivors to be compensated by the above arrangements and to allow the Federal Ministry of Finance to have a better picture of the financial cost to be allocated for the benefit of the survivors every fiscal year. The legislation came into force in 1966, allowing survivors to submit their claims no later than 31 December 1969.[10] The goal of the German federal administration was to attempt to limit the scope of claims that would still be presented to the authorities, attempting to introduce a cap to the reparations budget allocated under the federal budget. An additional reason for this so-called "final law" was of course to attempt to reduce the pressure on the authorities processing all these claims, and at the same time to reduce the pressure on local courts hearing claims regarding the legal definition of potential claimants.[11]

C. Compensation via the German Social Security System

Parallel to the development of the BEG and the German compensation administrative law, the federal government decided to explore additional methods of creating a more coherent system to compensate Jews persecuted under the Nazi laws.[12] Attempts to place

[8] Daniel Cohen, *Unfaire Prozeßführung*, 1965 ZEITSCHRIFT FÜR RECHT UND RECHNUNGSWESEN [RWZ] 530.

[9] Kristina Meyer & Boris Spernol, *Wiedergutmachung in Düsseldorf, eine statistische Bilanz*, *in* DIE PRAXIS DER WIEDERGUTMACHUNG 690 (2009).

[10] Richard Hebenstiert, *Sonderfonds nach Art. V BEG Schlussgestz, Das Bundesentschädigungsgesetz, in* DAS BUNDESENTSCHÄDIGUNGSGESETZ 690 (Hans Giessler, Otto Gnirs & Richard Hebenstreit eds., 1983).

[11] During the deliberations in regard to the *BEG-Schlussgesetz*, the parliamentarians held a long discussion regarding the scope of the financial costs due to this legislation process. *See* ERICH BLESSIN & HANS GIESSLER, BUNDESENTSCHÄDIGUNGSSCHLUSSGESETZ: KOMMENTAR ZU DER NEUFASSUNG DES BUNDESENTSCHÄDIGUNGSGESETZES 216 (1967).

[12] Jan Robert von Renesse, *(Zu) Späte Gerechtigkeit für Ghettoarbeiter?,* 2008 ZEITSCHRIFT FÜR RECHTSPOLITIK [ZRP] 18.

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some of the compensation programs under the social security law were not without reservations, since the government had to ensure that this would not levy unbearable costs on the system.[13]

The idea of placing compensation of formerly persecuted Jews under the umbrella of German social law came as the result of many years of historical studies.[14] These studies enabled scholars and legislators to construct potential frameworks for how reparations might successfully be implemented under social security law.

I. The Situation Prior to the ZRBG

Historical sources assisted scholars in developing a clearer picture of what life in the ghetto was like, and of the trilateral relations between the German occupiers, the Judenrat, and the ghetto's inhabitants.[15] The occupying German military's civil commands would supervise the factories that operated in the ghettos, not directly employing the labor force, but creating a new labor infrastructure via the Judenrat to assist German industry.[16] Several legal arrangements were made, allowing the Social Security Agencies to examine and process claims of survivors under the prism of the social security system.[17] To make this possible, two classic hurdles needed to be overcome: First, how to identify which survivors would be allowed to claim compensation, and second, how to deal with exporting social security payments outside the borders of the Federal Republic of Germany.

In the case of deported German Jews, due to the annulment of their civil rights following their deportation from Germany, there was a question as to whether they retained any rights to social benefits. In accordance with the Wannsee conference's[18] decisions and after the deportation of Jews to concentration and labor camps, the Labor Ministry decided to expropriate their social benefit rights and to cease transferring monthly

[13] C.H. Beck, Book Review, 1999 NEUE ZEITSCHRIFT FÜR SOZIALRECHT [NZS] 25, 26 (reviewing VERFASSUNG, THEORIE UND PRAXIS DES SOZIALSTAATS (Franz Ruland et al. eds., 1998)).

[14] MICHAL UNGER, THE LAST GHETTO: LIFE IN THE LODZ GHETTO, 1940–1944 115 (1995).

[15] 3 DOKUMENTY I MATERIAŁY DO DZIEJÓW OKUPACJI NIEMIECKIEJ W POLSCE, [3 GETTO ŁÓDZKIE] 316 (A. Eisenbach ed., 1946).

[16] ISAIAH TRUNK, GHETTO LODZ: A HISTORICAL AND SOCIOLOGICAL STUDY, INCLUDING DOCUMENTS, MAPS AND TABLES 514 (1962).

[17] Manfred Glombik, *Das Ghettorentengesetz,* DIE RENTENVERSICHERUNG: ORGAN FÜR DEN BUNDESVERBAND DER RENTENBERATER E.V. 204, July 7, 2011, http://www.rentenberater.de/docs/dierv/RV_Heft_07_2011.pdf.

[18] The Wannsee Conference was a meeting of senior officials of Nazi Germany, held in the Berlin suburb of Wannsee on 20 January 1942. The purpose of the conference was to ensure the cooperation of administrative leaders of various government departments in the implementation of the final solution to the Jewish question, whereby most of the Jews of German-occupied Europe would be deported to Poland and exterminated.

benefits to German Jews.[19] Thus, a direct connection between social security institutions, Aryanization laws, and the expropriation of German Jews' rights was established.[20]

It was even more complex to establish the legal liability of the German social security institutions where the claimants lived in other countries, such as in Poland and Hungary. In areas outside the German Reich, like the Generalgouvernement in Poland, the German Nazi administration took over the local national social security institutions and applied the Nazi regime's regulations regarding local Jews. This created a special legal situation for the local Jews and deprived them from their social security rights.[21]

1. Fremdrentengesetz

The *Fremdrentengesetz* (FRG), another German law, was an important step in facilitating the exportation of social security benefits.[22] This was the first important legal arrangement that made reparation payments possible under the social security system. Later arrangements were made that would allow the export of social benefits abroad, and the German legislature introduced supporting legislation to incorporate special amendments to the general social law for those survivors that were to present their social claims.

2. WGSVG

The *Gesetz zur Regelung der Wiedergutmachung nationalsozialistischen Unrechts in der Sozialversicherung* (WGSVG), drafted in 1970,[23] uses the legal definitions established by the BEG and aided both the applicants and the social security authorities in the processing of the claims under the social security system. This was an attempt to create some legal coherence with the existing legal compensation order.

Art. 1 of the WGSVG sets out the basic legal process for applying for social benefits. In doing so, it attempts to avoid creating new legal definitions under German law, relying instead on the BEG. Once Holocaust survivors are legally recognized as such and therefore

[19] Petra Kirchberger, *Die Stellung der Juden in der deutschen Rentenversicherung*, *in* SOZIALPOLITIK UND JUDENVERNICHTUNG: GIBT ES EINE ÖKONOMIE DER ENDLÖSUNG? 111, 121 (Aly Götz ed., 1987).

[20] For a collective and detailed survey of the infringements of the civil rights of the Jews, see DAS SONDERRECHT FÜR DIE JUDEN IM NS-STAAT 408 (Joseph Walk ed., 1996).

[21] *Id*.; *see also* JOCHEN AUGUST, HERRENMENSCH UND ARBEITSVÖLKER: AUSLÄNDISCHE ARBEITER UND DEUTSCHE 1939–1945 (1986).

[22] Fremdrentengesetz [FRG] [Foreign Pensions Law], Feb. 25, 1960, BGBl. I at 3024.

[23] Gesetz zur Regelung der Wiedergutmachung nationalsozialistischen Unrechts in der Sozialversicherung [WGSVG] [Law Regulating the Restitution of National Socialist Injustice in the Social Security], Dec. 22, 1970, BGBl. I at 1846.

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eligible to apply for a pension, the applicants—who mostly did not live in Germany and had never had any legally binding contact with German social security institutions—have to prove a relation to the system in order to successfully receive their social benefits. This requirement was based on an amendment to the FRG law, Art. 17 lit. b, which equated non-Germans' claims to those of Germans who had contributed directly either to a German social security institution or to an institution nationalized by the Nazis.[24] Via this legislation, the German social security institution indirectly created a legal assumption that the Reichsversicherungsgesetz (Reich Insurance Act for White-Collar Workers) would be applied to all social claims, opening the way for non-German Holocaust survivors to claim a pension.[25]

From a historical point of view, it is important to note that the German legislature sought to solve a rather complicated legal issue concerning the payment of social benefits to those who had paid installments to social institutions and who were now to lawfully receive a regular social benefit whether inside or outside Germany.[26] For these purposes, Holocaust survivors and German nationals who were deported from Central and Eastern Europe during the forced displacement (*Vertriebene*) would be treated the same by one legal structure according to German law.[27]

The influx of claims under this new legal order allowing Holocaust survivors to apply for social benefits from Germany according to the social security system led the Federal Ministries of Finance, Labor, and Social Security to contemplate alternatives that would reduce foreign nationals' eligibility for benefits. The legislation was changed, denying those who did not request to purchase rights according to Article 21 WGSVG and Article 17b FRG prior to 1990 the possibility to substantiate legally binding rights vis-à-vis the German authorities.

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[24] FRG, *supra* note 22, BGBl. I at 3024, art. 17b. ("*an einen nichtdeutschen Träger der gesetzlichen Rentenversicherung und einen deutschen Träger der gesetzlichen Rentenversicherung, die bei Eintritt des Versicherungsfalles wie nach den Vorschriften des Reichversicherungsgesetzes entrichtete Beiträge zu behandeln hatte.*").

[25] For the German Jewish Holocaust survivors, other social security arrangements were made, similar to the arrangements made with the *Volksdeutsche* and other special legal groups who had legally binding relationships with a social security institution.

[26] For a comprehensive review of the issue of German social security in respect to the export of German social benefits under the Reichversicherungsgesetz, see Felipe Temming, *Unbegrenzter Rentenexport und die Berücksichtigung von Reichsgebietsbeitragszeiten zugunsten von Unionsbürgern*, 2011 ZEITSCHRIFT FÜR EUROPÄISCHES SOZIAL- UND ARBEITSRECHT [ZESAR] 117.

[27] WGSVG, *supra* note 23, BGBl. I at 1846, art. 20.

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II. The Case of Sophie Bild *Before the Federal Social Court*

Finally, the Federal Social Court (*Bundessozialgericht*—BSG) itself engaged in a long legal analysis of the issues involved in compensating formerly persecuted Jewish ghetto workers. The case of *Sophie Bild*,[28] a survivor of the Lodz ghetto, brought the complexity of the matter of reparations through the existing social security system to light for the first time. For the first time, the BSG was confronted with a survivor's request not to enforce the deadline for the retroactive purchase of social rights, allowing her to reach the required time period that would enable her to receive a monthly benefit.[29]

The claim was unsuccessful, but the Federal Social Court referred the matter back to the German legislature, arguing that from a legal point of view, the court was not able to change the legislation. Nevertheless, the court did analyze the complexity of obtaining reparations and came to the conclusion that new legislation directly targeting the issue of social security rights for ghetto laborers was needed.[30] In later cases reviewed by the BSG, the court maintained that, despite the fact that it acknowledged that ghetto work contained the needed relationship between the Holocaust survivor as the insured and the social security institution as the insurer, no binding relationship as required according to SGB VI existed, and therefore a claim could not be approved.[31]

III. The Creation of a New Legal Order in Respect to Ghetto Workers

Only seven years later, an appeal to the court led to a legislative process attempting to create coherent legislation.[32] The new order was to be presented to the German parliament and was described as the creation of a new legal sphere, supposedly introduced in order to support the survivors and assist them in reaching their long-awaited recognition by the federal government and the social security institutions. The legislation was to contain a new budget within the social security system allowing ghetto workers to apply for a social pension without regard to their statehood or the institution they contributed social installments to. The first draft presented to and deliberated by the

[28] Bundessozialgericht [BSG - Federal Social Court], Case No. 5 RJ 66/95, June 18, 1997, 80 BSGE 250.

[29] Jan Robert von Renesse, *Wiedergutmachung fünf vor zwölf—Die Sozialgerichtsbarkeit und die Rentenansprüche jüdischer Ghettoübelebender*, 42 NJW 3037 (2008).

[30] Jürgen Zarusky, *Hindernislauf für Holocaustüberlebende, Das "Ghettogesetz" und seine Anwendung,* 47 DIE TRIBÜNE 155 (2008).

[31] Bundessozialgericht [BSG - Federal Social Court], Case No. B 13 RJ 83/98 R, Mar. 10, 1999, 1999 NZS 405.

[32] Ulrike Pletscher, "*Ghetto-Rente*"*—Markstein in der Geschichte der Entschädigung nationalsozialistischen Unrechts,* 2011 DIE SOZIALGERICHTSBARKEIT [SGB] 429.

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German Bundestag was a joint inter-fractional initiative calling for the creation of new legislation based on the decisions of the BSG.[33]

The legislation authorizing payment of pensions for employment in a ghetto (ZRBG) was a cornerstone of federal German social security law. The model under which the claimants would be able to establish a legal right for social benefits differed from most existing compensation programs known to survivors. Some thirty years after the first legislation that made it possible to use the German social security system for reparation, the ZRBG was the first real attempt to create new coherent rights for the ghetto workers.[34]

D. Legal Framework of the ZRBG

In order to assure that Jewish ghetto workers would be able to submit claims for social security pensions, the German legislature enacted a special referral law (*Ergänzungsgesetz*) that was to set forth the requirements.[35] Article 1 ZRBG laid out the grounds for substantiating a claim to a ghetto pension: (1) persecuted persons must have been employed in ghettos; (2) their employment was not coerced but instead freely chosen; (3) the work was done in return for a payment or reward (*Entgelt*); and (4) the respective ghettos were found in German occupied or integrated territories.

The ZRBG is therefore targeted legislation, set forth to deal with a concrete, specific situation that occurred during a particular period of time. When one compares this legislation with other forms of arrangements, it is clear that this legislation was limited to those Holocaust survivors who were taken to ghettos either in the German Reich itself or in areas under its sovereignty and who worked in areas belonging legally or *de facto* to the German Reich.

A further important issue that was to be discussed was the exportation of social benefits abroad. Whereas, as a general rule, legal persons who are not Germans and did not contribute any deductions in Germany do not hold any legal claim *vis-à-vis* the social security institutions.[36] This core German legal principle was brought before the Federal

[33] *Gesetzentwurf eines Gesetzes zur Zahlbarmachung von Renten aus Beschäftigung in einem Ghetto und zur Änderung des Sechsten Buches Sozialgesetzbuch* [Draft Legislation regarding the conditions for making pensions payable on the basis of employment in a ghetto and the amendment of the German Code of Social Law], DEUTZCHER BUNDESTAG: DRUCKSACHEN [BT DRS] 14/8583; *see also* DEUTZCHER BUNDESTAG: PLENARPROTOKOLL 14/233, at 23279. Already during deliberations, the members of parliament were fully aware of the complexity of the matter and of the future implications of the legislation concerning the export of social benefits to non- Germans under the existing social security law. *See id.* at 23281.

[34] *See* BT DRS, *supra* note 33, at 14/8583, 14/8823.

[35] ZRGB, BGBl. I at 2074.

[36] ULRICH SARTORIUS & THOMAS BUBECK, SOZIALRECHT IN DER ARBEITSRECHTLICHEN UND FAMILIENRECHTLICHEN PRAXIS 74 (2004).

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Constitutional Court, which upheld the legality of the regulatory limitations on claims processed by social security authorities in Germany.[37]

The possibility of exporting social benefits was included in the social law in order to make it possible to transfer benefits to foreigners not holding a direct legal right.[38] By doing so, the German legislature enabled amendments to the social security structure to allow payments not only to returning nationals, but also to those whose rights were revoked under the Nazi regime and who did not take up residence in Germany after 1945.[39] Thus, the problem of exporting social benefits was resolved through Art. 1 para. 2 ZRBG in combination with Art. 18 para. 1 WGSVG, making it possible to export social benefits abroad despite the general territorial prohibition on such activity.

The last legal obstacle seemed to be the necessity of fictively purchasing the social security contributions, as required by social law to substantiate a pension. The first step in this respect was made with the FRG,[40] which created a solution for deported German nationals and Holocaust survivors. However, in the early 1990s, Article 17b FRG, which allowed the recognition of contributions paid by survivors to foreign social security institutions, was cancelled. This negatively impacted the legal situation of Holocaust survivors applying under the social security system. The ZRBG helped remedy this situation, allowing those survivors who worked in ghettos to repurchase their social contribution, thus establishing their legal right to a pension (Art. 2 ZRBG).

To complete the creation of a new legal structure enabling Holocaust survivors to apply for social benefits, the legislature had to make a clear decision concerning the payment date. The German parliament decided that the relevant date for the payment of the pension would be 18 July 1997 (the same date the BSG acknowledged that social security relations might be constructed in ghettos). Having decided this, the legislature then limited this retroactive payment to claims made up until 30 June 2003 (Art. 3 para. 1 ZRBG).

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[37] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvR 809/95, Dec. 30, 1999, 2000 NEUE ZEITSCHRIFT FÜR ARBEITSRECHT [NZA] 391.

[38] HANS DIETER BRAUN, SOZIALVERSICHERUNGSRECHT UND SONSTIGE BEREICHE DES SOZIALRECHTS 348 (2005).

[39] *See* Gesetz zur Regelung der Wiedergutmachung nationalsozialistischen Unrechts in der Sozialversicherung [WGSVG], BGBl. I at 1846, art. 19 (recognizing the legal rights of those deported under *Bundesvertriebenengesetz* [BVFG] Article 1(2)(1), and the equalization of the rights of persecuted persons under the BEG and deportees under WGSVG Article 20).

[40] FRG, *supra* note 22, BGBl. at 93, 94.

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E. Legislation and Intentions Meet the Social Security Insurance Authorities

Although specific legislation was created to adapt the general social security law to apply to claims made by former ghetto workers, the claims themselves were to be processed and administered by the German social security authorities.

I. The Dispute Regarding the Implementation of the ZRBG

Even though the legislature intentionally created a special structure for Holocaust survivors, it decided that these claims should be processed under the existing German social security system.[41] Not long after the law was enacted, technical problems and juridical obstacles began to emerge. The poor manner with which the new legislation was implemented resulted in direct calls for parliament to investigate the issue.[42]

The parliamentarian inquiry lead to the following figures: Over 60,000 applications were submitted, and during the first year, almost 1,900 applications were approved, with some 5,500 being denied. Less than a year after the legislation was passed, some 1,400 appeals were reviewed by the internal appeal panels of the social security institutions or in the social courts.[43] This clearly meant that less than 2.3 percent of the claims made by survivors were positively approved in a year's time.

Similar to the debates held in Germany, the Israeli Knesset held debates as well. At the meetings, the representatives discussed possible diplomatic or political steps to be taken by the Israeli parliament and government regarding the implementation of the ZRBG.[44] Similarly, the US Congress appealed to the German government to undertake steps to improve the practice of processing of applications made in accordance with the ZRBG.[45]

II. The Circles of Claimants According to the ZRBG

One of the basic issues addressed in these discussions was the need to create a binding legal definition of who would be eligible to present a claim under the legal framework discussed above.

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[41] BT DRS, *supra* note 33, at 14/8823.

[42] *Id.* at 15/1290.

[43] *Id.* at 15/1475.

[44] COMMITTEE OF LABOR, WELFARE AND HEALTH, ISRAELI KNESSET, Mtg. Mins. No. 512, at 8 (Nov. 15, 2005).

[45] Letter From Ulla Schmidt, Member of the German Parliament, to the United States Congress (Sep. 27, 2004), *available at* http://waxman.house.gov/sites/waxman.house.gov/files/Response_from_German_Minister.pdf.

1. Persecuted Persons

The first basic requirement that any potential claimant needs to meet is to prove that he or she is a persecuted person under this legislation. The ZRBG, as mentioned before, refers to the old legal definition of persecuted persons as defined under the BEG. Article 1 para. 2 ZRBG refers to the general legal definitions of the WGSVG, which in Article 1 para. 2 WGSVG refers to the legal definition in Art. 1 BEG, stating:

> A victim of the national-socialist persecution is a person who was persecuted with national-socialist violence because of his political opposition to national-socialism or due to his race, beliefs, or world view and thereby sustained damage to life, body, health, freedom, property, or assets, or was hindered in his professional or economic advancement . . . .[46]

This relatively broad legal definition of a persecuted person was grounds for many legal decisions by the courts.[47] However, the incorporation of the BEG into the ZRBG via the WGSVG enabled most claimants to cross the first hurdle on their way to receiving a monthly pension in accordance with the law.

2. A Ghetto

In contrast, the task of determining whether an individual was in a ghetto was not easy for the federal government and the German parliament. This was in fact extremely complex, as specific laws were created in order to allow social benefits to be granted to former Germans or people who used to reside out of the territories of the German Reich.[48] In order to create a just, fair, and balanced arrangement, the legislature had to define the legal elements and the criteria enabling survivors to claim benefits under the newly constructed legal order.

The meaning of the term *ghetto*, a factual precondition in Art. 1 para. 1 ZRBG, was the subject of many legal debates. Hundreds of hearings and deliberations were held in order to establish which type of ghetto qualified under the ZRBG for a monthly payment to be

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[46] WALTER BRUNN & RICHARD HEBENSTREIT, BUNDESENTSCHÄDIGUNGSGESETZ (BEG-SCHLUSSGESETZ) UND RECHTSVERORDNUNGEN KOMMENTAR 4 (1965).

[47] Bundesgerichtshof [BGH - Federal High Court of Justice], Case No. IV ZR 140/56, Sep. 26, 1956, 1956 NJW 1755; Oberlandesgericht Frankfurt [OLG Frankfurt - Frankfurt Court of Appeal], 1960 RzW 495.

[48] *See* Bundessozialgericht [BSG - Federal Social Court], Case No. 13 RJ 67/91, May 23, 1995, 1996 MONATSSCHRIFT FÜR DETSCHES RECHT [MDR] 618, 618–19 (debating the legal scope of the FRG regarding workers not of German nationality).

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granted to survivors.[49] The process of determining who qualified for payments was further complicated by the fact that the legal definition of a ghetto in respect to compensation law is based upon the definitions as appearing in the original BEG legislation, and its incorporation into the ZRBG and the general social security law under the WGSVG. Art. 1 BEG refers to a person who was subjected to such wrongdoings. Thus, the legal term ghetto did not have a clear definition as it was unnecessary for the purpose of processing such claims under the original restitution law.

The BSG found itself confronted with the lack of an administrative or binding legal definition of ghettos, and it demanded that the respective Social Security authorities conduct detailed historical research on the relevant ghettos that would be regulated under the ZRBG.[50] The results of this research would aid the authorities and the court to determine which ghettos should be relevant or eligible under the ZRBG.[51] In practice, this levied enormous administrative costs on all parties. Contrary to other modern compensation law under the ZRBG, parties would need to conduct thorough historical research to determine whether a particular place qualified as a ghetto.[52] This is why many complicated legal debates took place since no clear list existed, and because the relevant definition of ghetto under the ZRBG incorporates the need to establish first that it was not a concentration or labor camp, situated in a territory of German occupation, or integrated into the *de facto* control of the German Reich.[53]

3. Working Relationship in the Ghetto

The most difficult element to prove under this respected legislation was the existence of a so called "social relationship" between the persecuted person in a ghetto and his or her employer. As clearly stated in Article 1 ZRBG, these relationships distinguish the claimant from the normal scope of a compensation claimed based on wrong doing conducted by the

[49] Ulrich Freudenberg, §87, *in* 5 JURIS PRAXISKOMMENTAR: GESETZLICHE KRANKENVERSICHERUNG (Rainer Schlegel & Thomas Voelzke eds., 2011); Bundessozialgericht [BSG - Federal Social Court] Case No B 5 R 26/08 R, June 3, 2009, 103 BSGE 220.

[50] For a detailed legal discussion of the need to conduct historical studies in order to receive a clearer picture of the historical-legal situation, see Bundesgerichtshof [BGH - Federal High Court of Justice], Case No. B 4 R 29/06 R, Dec. 14, 2006, 98 BSGE 48.

[51] Stephan Lehnstaedt, *Ghetto—"Bilder": Historische Aussagen in Urteilen der Sozialgerichtsbarkeit*, *in* GHETTORENTEN, ENTSCHÄDIGUNGSPOLITIK, RECHTSPRECHUNG UND HISTORISCHE FORSCHUNG 89, 90 (Jürgen Zarusky ed., 2010).

[52] BT DRS, *supra* note 33, at 16/5720.

[53] Sonja Kallmayer, *Sozialrecht im Blickpunkt—Essener Sozialgerichtsforum: Ghettoarbeit und Rentenanspruch, Tagungsbericht*, 2012 NZS 618, 619.

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Nationalist-Socialist regime, and those who can submit a claim for benefits regulated under the guise of social security law.[54]

The German legislature made it clear that this new legislation would divide survivors into two groups: (1) individuals who freely and actively applied for work in the historical social framework of the ghetto, and (2) individuals that are considered Holocaust survivors who were taken to the camps as prisoners or slave laborers. The existence of two separate groups, over time, sparked a debate in respect to the legal framework that was to be established in order to regulate the compensation framework. In the case of a framework under the Social law, such as in the case of ZRBG, the general law was to be modified with relaxed standards of proof to substantiate a legal claim, whereas the second group—slave laborers—did not meet the minimum criteria of the General framework of the Social Security law. Thus, slave laborers were to be compensated under special compensation law to be paid by the Federal Ministry of Finance.[55]

Interestingly, the BSG did not accept, at first, the assumption that Social Security working relationships could be established in a ghetto. On this matter, the Federal Social Court decided not to recognize the period of persecution and deportation to Germany, or of work conducted under the German Reich, as a time period appropriate for the creation of a retroactively defined Social Security benefit—essentially, a legal fiction (*Ersatzzeiten*).[56] This decision, however, was to be changed under the leading BSG decision in respect to compensation of Jewish ghetto workers under the General social law. The BSG[57] ultimately left for the legislature the task of creating a legal framework that would allow such relation to be covered under the general social security legal order.

4. Personal Dependency (Persönliche Abhängigkeit)

Under Social Security law, one of the most important tests for the establishment of a working relationship that is eligible for the payment of benefits, and therefore constitutes a recognized relationship under the social law, is the test that establishes the nature of the relationship between the two parties. In accordance with the Federal Social Court's decision, to pass this test and receive benefits, one has to prove *personal dependency*.

[54] BT DRS, *supra* note 33, at 14/8823.

[55] ARNOLD LEHMANN-RICHTER, AUF DER SUCHE NACH DEN GRENZEN DER WIEDERGUTMACHUNG: DIE RECHTSPRECHUNG ZUR ENTSCHÄDIGUNG FÜR OPFER DER NATIONALSOZIALISTISCHEN VERFOLGUNG 286 (2007).

[56] Bundessozialgericht [BSG - Federal Social Court], Case No. 13 RJ 67/91, May 23, 1995, 1996 MONATSSCHRIFT FÜR DETSCHES RECHT [MDR] 618, 618–19.

[57] Bundessozialgericht [BSG - Federal Social Court], Case No. 5 RJ 66/95, June 18, 1997, 80 BSGE 250.

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In order to legally establish personal dependency, the courts created requisite criteria to establish such a relationship: the employer's ability to decide on the location, time, length, and content of the work combine to determine and define the relationship between the sides.[58] Essentially, the courts established that the most important element that needs to be established legally is the ability of a third party to give instructions or orders to the employee. In cases where such a relationship cannot be established, the legal consequence is most probably that no relationship can be established according to social law.[59]

III. Special Assumption of a Working Relationship for Holocaust Survivors

The existence of a relationship between parties under the social law is therefore based both on the economic relationship between both sides, and the ability to prove a legal relationship that enabled the employer to decide and determine the scope and content of work performed. Therefore, orientating a compensation arrangement for Holocaust survivors under the social order required certain amendments to the existing legal structure and to the economic analysis of the relationships between the parties involved. The legislature had to create the relevant legal fictions and assumptions in order to allow the claims to be regulated and processed under Social Security law.[60]

Acknowledging this complicated legal structure and reaffirming the difference between the various legal orders that regulate compensation for Holocaust survivors, the Federal Social Court was charged with interpreting and resolving the legal questions, and with clearly defining the criteria for applications for compensation under the social law.[61] In response, the courts decided to examine the entire scope of the economic relationships between the survivors, the Jewish administration, and the German industrial company or the German civil administration.

Through the Federal Social Court decisions, the courts developed a legal analysis that attempted to simplify the criteria for establishing working relations between holocaust survivors and an employer who was retroactively recognized by the post-war Social Security order. This created the legal grounds for social pensions to be paid by the Social Security authorities.[62]

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[58] *See* Bundessozialgericht [BSG - Federal Social Court], Case No. 3 RK 86/59, Aug. 29, 1963, 20 BSGE 6; Bundessozialgericht [BSG - Federal Social Court], Case No. 12 RK 26/72, July 31, 1974, 38 BSGE 53; Bundessozialgericht [BSG - Federal Social Court], Case No. 12 RK 63/79, May 27, 1981, 1981 MDR 1052.

[59] *See* Bundessozialgericht [BSG - Federal Social Court], Case No. 3 RK 2/56, Dec. 13, 1960, 13 BSGE 196.

[60] *See* Bundessozialgericht [BSG - Federal Social Court], Case No. 1 RA 83/78, Oct. 4, 1979, 49 BSGE 63, *available at* https://www.jurion.de/de/document/show/0:85482,0/.

[61] Bundessozialgericht [BSG - Federal Social Court], Case No. B 5 RJ 48/98 R, April 21, 1999, 1999 NJW 3143.

[62] Bundessozialgericht [BSG - Federal Social Court], Case No. B 13 RJ 75/98 R, July 14, 1999, 1999 SOZIALGESETZBUCH (SGb) 557, ¶ 6 (1999).

The court's position was that two distinct tests should be conducted in order to prove that legal economic relationships were established between a survivor and his employers. The first test was the need to prove that the work was performed freely, without any intervention by the authorities. This was called "the freedom test" (*Freiwilligkeit*). The logic behind this criterion was the ability to differentiate between compensation claims based on incarceration, deprivation of human rights, and compulsory work. The clear separation between the two legal situations in which Holocaust survivors found themselves during the war led to the creation of two parallel, and independent, compensation agreements.[63]

Once it was established that the claimant was able to engage in activities freely and was able to decide, without pressure, whether he wanted to work or not, it was assumed that the survivor might be entitled to payments under the social security order. After passing this first test, the next step was to prove the relationship. The main way to prove that such a relationship was created is determined by "the salary test" (*Entgeltlichkeit*) as defined, over time, by the decisions of the Federal Court.

In light of the above mentioned court decisions and the complexity of the orientation of the legal solution under the social security order, the decision to situate this type of restitution under the social law finally came in the form of a new legislation, known as the ZRBG. This law, the outlines and content of which we have presented above, was created mainly to bring order to this complicated legal structure.[64]

The ZRBG was legislated in order to create a new legal structure that enabled the survivors to substantiate a claim directly due to work conducted in a ghetto. Under Article 1 ZRBG, a claim could be filed based on work conducted in a ghetto located in an occupied or annexed territory. In this way, the legislature solved the issue of claims based on the RVO and FRG,[65] and avoided the legal consequences of recurrent amendments to the law which restricted the ability to apply for benefits or to purchase the necessary social contribution periods.

Furthermore, the new legislation aimed to incorporate the Federal Social Court's numerous decisions on compensation of ghetto workers under the Social Security order, attempting to tackle issues relating to international public law discussed previously in this article. These were of great importance in establishing the path to benefits claims under

[63] BT-DRS, *supra* note 33, at 16/10334, 4 (providing a decision and recommendation report by the Committee on Employment and Social Affairs).

[64] Friedrich Joswig, *Die Gewährung von Altersrenten aus der gesetzlichen Rentenversicherung an ehemalige Ghettoarbeiter*, 61 NJW 3040, 3041 (2008).

[65] Ulrich Freudenberg, *Beschäftigung gegen Entgelt im Rahmen von Ghettorenten*, *in* AKTUELLE FRAGEN DES SOZIALRECHTS 131, 133 (Ralf Thomas Bausch, Günter Krings & Rainer Schlegel eds., 2010).

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the complicated social law structure.[66] Specifically, it was decided that the burden of proof would fall on the claimants. An analysis of the psychological aspect of the survivor's decision to engage in work on a voluntary basis (*Freiwilligkeit*) was required. The burden of proving that the worker received a reward for his or her work (*Entgelt*) was also referred to the claimant.[67]

This matter was the background for two conflicting decisions of the fourth senate and the thirteenth senate of the BSG. The fourth senate was of the opinion that the ZRBG is an entirely new legal order; as a specific law, it was based on the notions of Social Security, however, the ZRBG was not oriented under the legal scope of the SGB. The thirteenth senate did not share this position and believed that the ZRBG was created to solve technical complexities in the field of compensation under the Social Security order—but it was not of the opinion that the new legal arrangement could be discussed detached from the Social Security law.[68]

The dispute about the interpretation of the ZRBG and the clear difference in legal opinions between the senates led the fourth senate to use a right granted by Article 41 *Sozialgerichtsgesetz*, and called on the Large Senate (*Großen Senat*) to clarify the questions of interpretation at hand.[69] The Large Senate decided not to deliberate on this matter in this form, as it declared the matter to be an issue of pension rights that needed to be discussed by the senate responsible for the interpretation of legal questions in the field of social law. Furthermore, the Large Senate of the BSG was clear in its position that it would not provide any legal opinions.[70]

Therefore, the Large Senate decided to refer the task of interpreting the law in accordance with the Social Security legislation back to the relevant senate, declaring that it was not its task to interpret legal questions, nor was it the highest legal institution to issue legal opinions. Nonetheless, in June 2009, the fifth and thirteenth senates of the Federal Social Court published verdicts about the jurisprudence that would regulate and solve most legal questions that still remained unclear. Concerning the legal interpretation of remuneration,

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[66] *See* Bundessozialgericht [BSG - Federal Social Court], Case No. B 13 RJ 34/04 R, May 3, 2005, 94 BSGE 294.

[67] Eva Dwertmann, *Zeitspiele. Zur späten Entschädigung ehemaliger Ghettoarbeiter*, *in* DIE PRAXIS DER WIEDERGUTMACHUNG, *supra* note 5, at 635.

[68] *Compare* Bundessozialgericht [BSG - Federal Social Court], Case No. B 13 R 28/06 R, July 26, 2007, 99 BSGE 35, *with* Bundessozialgericht [BSG - Federal Social Court], Case No. B 4 R 29/06 R, Dec. 14, 2006, 98 BSGE 48.

[69] For the intermediate decision of the Bundessozialgericht [BSG - Federal Social Court], see Case No. B 4 R 85/06 R, Dec. 20, 2007, *available at* https://www.jurion.de/de/document/show/0:3346513/?q=b+4+r+85%2F06+r&sort=1.

[70] For the decision of the Large Senate, see Bundessozialgericht [BSG - Federal Social Court], Case No. GS 1/08, Dec. 12, 2008, 102 BSGE 166.

the BSG established that remuneration would not only be recognized in cases where monetary payments were made, but also in cases where remuneration took other forms, like food or coupons.[71] The court adopted the jurisprudence already passed down by the fourth senate in 2006, clearly interpreting the element of the remuneration under the special circumstances of the ZRBG and the conditions in which the ghetto workers lived during their incarceration in ghettos.

The following day, the fifth senate delivered its decision on the interpretation of the term *remuneration*. As opposed to the internal dispute between the fourth and thirteenth senate, in 2007, the fifth senate decided to join the thirteenth senate's decision.[72] The swift decision, which was actually an exact repetition of the legal opinion presented by the thirteenth senate a day before, clearly voiced the Federal Social Court's position on the interpretation of this law. By undertaking this important step, the Social courts were able to signal that a clearer understanding of the special circumstances that the ghetto workers found themselves must be achieved.

IV. Practical Issues in Relating the Personal Claims

As mentioned in the previous analysis of the elements of free will and remuneration, the Social Security authorities denied most claims based on the assumption that the original declarations given in the context of earlier claims made under the general compensation arrangements, for example, claims under the BEG, had to be considered truthful declarations. These declarations were considered to be legally established facts that could determine a person's right for benefits.

Claimants under the ZRBG had to prove the existence of three main elements under this law: (1) His incarceration in a ghetto, (2) a working relationship entered into under a free will, and (3) remuneration.[73] It was apparent to all who were dealing with survivors' claims, however, that most of them were unable to produce a copy of a working contract or any other documents proving that work for pay was performed.

This problem arose from the original claims submitted in the 1950s in which Holocaust survivors aimed to establish a claim for compensation for the deprivation of their human rights and for their incarceration in ghettos and concentration camps under the Nazi regime or other entities under its influence. These claims were not concerned, however, with proving anything other than incarceration. Therefore, most affidavits were focused on the elements needed to establish the claim, and did not contain a fully detailed picture of

[71] Bundessozialgericht [BSG - Federal Social Court], Case No. B 13 R 81/08 R, June 2, 2009, 103 BSGE 190, 27–28.

[72] Bundessozialgericht [BSG - Federal Social Court], Case No. B 5 R 26/08 R, June 3, 2009, 103 BSGE 220, 24–25.

[73] *Id.* 24, 35, and 70.

the living conditions at the time, or a complete description of survivors' day to day activities during the persecution.[74]

As a result, the original affidavits collected in the 1950s were rather limited and did not contained sufficient information on the work conducted in ghettos. The application criteria at the time were rather simple, and claimants were instructed to describe the nature of persecution and the places he was incarcerated in. When it came time to prove a working relationship though, most of the applicants were unable to produce a full-scale affidavit relating to their detailed experiences during the persecution.[75]

Thus, the decision to regard the original affidavits as established legal facts for the administrative processing of claims by the Social Security authorities was highly questionable. Everyone involved in the field of compensation understood that these declarations were of limited scope, and only given in order to establish a single legal fact: the incarceration in a camp under the Nazi regime in order to establish the necessary elements under Article 43(1) BEG.

The German Social Security institutions' internal decision to rely on the affidavits created a wave of denials based on claimants' inability to establish the legal facts required by Social Security law. This attracted international criticism of the entire legal structure, including at international conventions in which Germany participated, for example the Prague Holocaust Era Assets Conference in June 2009, at which most unsolved international restitution questions were discussed.[76] The expert committee that prepared the conference claimed that these practices, and the authorities' inability to provide relevant solutions to the question of establishing the required legal facts, needed to be addressed by the German government or the Social Security courts.[77]

It is important to note that in the case of Social Security claims made by Holocaust survivors, the existing legal order in the form of WGSVG allowed for a lower burden of proof to establish legal facts: mere possibility.[78] The Federal Social Court addressed this matter, and decided that the element of *substantiation* is given in cases where a fact is "most likely" true, and therefore a legal fact. In other words, facts that are not fully

[74] Constantin Goschler, *Ghettorenten und Zwangsarbeiterentschädigung*, *in* GHETTORENTEN, *supra* note 51, at 101.

[75] *See* Meyer & Spernol, *supra* note 9, at 695.

[76] *See* Prague Holocaust Era Assets Conference Proceedings, June 26–30, 2009, http://www.holocausteraassets.eu/en/conference-proceedings/.

[77] *See* Declaration, Holocaust Era Assets Conference, Special Session on Caring for Victims of Nazism and Their Legacy 15, 16, June 19, 2009, http://www.holocausteraassets.eu/program/conference-proceedings/declarations/ (click on Expert Conclusions).

[78] *See* Bundessozialgericht [BSG - Federal Social Court], Case No. B 4 R 29/06 R, Dec. 14, 2006, 98 BSGE 48.

proven, or facts that are not conclusive enough to establish a legal fact without doubt, can still be considered sufficient to fulfill this element, allowing authorities to treat the assertions as legally established fact.[79]

Regardless, in most cases, the Social Security authorities still denied ghetto workers' claims mainly because they maintained that the affidavits did not reach the level of substantiation required by the WGSVG, and incorporated into the ZRBG. As opposed to the historical questions about the legal interpretation of various aspects of the law, for example, the territorial element required under Article 1(1) ZRBG, when it came to evaluating the *substantiation* of the claims with claimants' personal affidavits, the courts were confronted with a complicated situation. The authorities stubbornly believed that the claimants were unable to fulfill the required burden of proof, yet, at the same time, they claimed that due to the claimants' old age and the fact that they were living outside Germany, the courts were unable to conduct a fair trial because the claimants were unable to fly to Germany and appear before the courts. Therefore, they seemed to be admitting that their legal conclusions were based on inconclusive facts, but decided the issue conclusively nonetheless.

Acknowledging this fact, the social court system searched for possible ways to enable survivors to prove that their affidavits were truthful, thereby enabling the court to approve their social claim on the basis of a fully developed factual record. To actually do so, the courts made use of existing treaties between the Federal Republic of Germany and foreign countries, attempting to determine the mechanism of legal aid between the countries already in place.

1. Bypassing the Territorial Limit—Courts Go Abroad

For the judges presiding over the appeals at the social courts and actually evaluating the claims by Holocaust survivors, the problem of repeated denials because of the claimants' inability to prove that their affidavits and history of persecution were true was a difficult one to accept. The judges often inquired whether historical opinions were examined and whether other sources of information were crosschecked with the affidavits; in response, they were surprised to learn that most of the denials issued were based on "non credible information," with no actual steps taken by the authorities to investigate further.[80] They were largely dissatisfied with this result and sought to rectify the situation through various means.

[79] *Id.* 116.

[80] von Renesse, *supra* note 29, at 3038.

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2. The Legal Framework of Transposing Sovereign Legal Borders

To circumvent this problem, the judges tried to set up a technical mechanism that would enable them to travel outside of Germany and to hold legal hearings in a country outside Germany's borders. The legal right to do so was found in the Hague Convention of 18 March 1970 on Gathering of Evidence Abroad in Civil and Commercial Matters (the Hague Convention or the Convention).

The scope of the Convention was discussed in the context of a United States Supreme Court decision analyzing its goal:

> The Convention's purpose was to establish a system for obtaining evidence located abroad that would be "tolerable" to the state executing the request and would produce evidence "utilizable" in the requesting state. Amram, Explanatory Report on the Convention on the Taking of Evidence [482 U.S. 522, 531] Abroad in Civil or Commercial Matters, in S. Exec. Doc. A, p. 11.[81]

The international convention highlighted the need for a mechanism that would respect states' sovereignty, while still supporting one another in the pursuit of justice by gathering relevant evidence across borders. The Convention allows courts to submit a request to the relevant authority of the State in which the evidence is located. In order to ensure international comity, the submitted request should be approved by the fellow State in accordance with the Convention.[82]

Germany ultimately relied on the Convention to create its own legal mechanism for a *consular hearing* in a foreign country that would be admissible according to the German legal structure; a way to import this legal order into the procedural law of the ZRBG was established. These procedures require the presence of a diplomat in the fellow country, allowing the court to collect evidence in the form of hearings and affidavits in the third country.[83] The concept of consular hearings, in turn, was part of the North German

[81] Société Nationale Industrielle Aérospatiale v. District Court, 482 U.S. 522, 530 (1987).

[82] *See* Colin A. Underwood & Adam Katz, *The Hague Convention on the Taking of Evidence Abroad in Civil Commercial Matters*, PROSKAUER ON INTERNATINOAL LITIGATION AND ARBITRATION: MANAGING, RESOLVING, AND AVOIDING CROSS-BORDER BUSINESS OR REGULATORY DISPUTES, http://www.proskauerguide.com/litigation/13/II (last visited Aug. 25, 2013).

[83] Gesetz über die Konsularbeamten, ihre Aufgaben und Befugnisse [Act on the Powers and Performance of Duties of Consular Officers], Sept. 11, 1974, BGBl. I at 2317.

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Confederation's[84] understandings on international private law agreed upon on 8 November 1867. Ever since that date, those hearings became an integral part of the German international private law system: assigning consuls this special role in order to enable the North German legal system to collect legal affidavits outside the boundaries of the legal territory of the North German Confederation.[85] Taking the framework of the Hague convention into consideration, and in accordance with Article 17 of the Hague convention, the judges were declared to be commissioners who would collect affidavits from the claimants abroad. The appointment of the judges to this consular mission is in accordance with Article 19 of the *Konsulargesetz*,[86] allowing judges to execute the tasks needed to collect legal affidavits in civil matters outside the sovereign borders of Germany.

The so-called solution, however, was not without its difficulties. One problematic aspect of the consular hearings in the case of the ghetto workers' affidavits is the fact that the Hague convention regulates civil matters and commerce, but does not relate to legal disputes on social law. For example, under Article 1 IIc EUGVVO, the European Union, under the relevant legal platforms, distinguishes between civil and social law, precluding the former from inclusion in the latter.[87]

Fortunately, a workaround was found. Given that the legal process of holding consular hearings is based on Article 118 SGG, which follows the general orders of the civil law in Article 363 ZPO, the German side was able to present the request to hold such hearings in Israel under the auspices of the Hague convention, claiming that the proceedings follow instructions on matters of a civil nature.

Whereas over 50% of the Holocaust survivors claiming under the ZRBG appealed before the different instances, the Israeli government recognized the importance of enabling the survivors to appear in front of the social courts to enable them a free and fair trial on the appeal they submitted against the German Social Security authorities. In the diplomatic letters, the Israeli government therefore granted the German judges free reign to execute their legal duties under the Social Security law; the Israeli side agreed to hold these hearings in Israel following an exchange of diplomatic notes of consent in the form of *note*

[84] The North German Confederation (Norddeutscher Bund) was a federation of 22 independent states of northern Germany, with nearly 30 million inhabitants. It was the first modern German nation state and the basis for the later German Empire (1870/1871), when several south German states, such as Bavaria, joined.

[85] Rudolf Möhlenbruch, *"Gerichtstage" in Israel—Zur Hoheits- Gerichtsgewalt deutscher Sozialgerichte im Ausland*, 2011 NZS 417, 419.

[86] *See* Act on the Powers and Performance of Duties of Consular Officers, *supra* note 83, at 2317.

[87] *See* Commission Regulation 44/2001, Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2000 O.J. (L 12) 1.

verbale.[88] This allowed the judges to evaluate the situation in accordance with the lenient approach accepted by the Federal Social Court,[89] and by the Constitutional Court,[90] in cases of traumatized claimants.

Following this, many hearings were held in Israel. These enabled many cases to be solved individually in the form of a legal compromise between the German Social Security authorities and the survivors. In cases where the judges travelled to Israel and held such deliberations, many claims were resolved thanks to being able to clear the facts relating to the work that the survivors performed in the ghettos.

On 8 February 2010, the Israeli Knesset's Committee on Labor, Social Welfare, and Health held a special hearing about holding consular hearings in Israel. The Knesset commended the German judges for their creative idea intended to promote justice for the survivors. In the context of this meeting, parliamentarians as well as survivors and survivors' umbrella organizations expressed their gratitude to the court and to the German and Israeli foreign ministries, which allowed the hearings to take place.[91]

The hearings cleared the path for processing the applications under the ZRBG with consideration for the special circumstances under which work in the ghetto was preformed. Even though much progress was made with the evaluation of claimants' affidavits and the establishment of the legal facts required for substantiating a claim under this legal order.

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[88] The first dated 5 December 2006, the second 13 February 2007. *See* Landessozialgericht Nordrhein-Westfalen [LSG Nordrhein-Westfalen - Social Court of North Rhine-Westphalia], Case No. L 8 R 239/07, December 3, 2008, 2012 PRAXIS DES INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHTS (IPRax) 243–49, ¶¶ 15, 26.

[89] *See* Bundessozialgericht [BSG - Federal Social Court], Case No. B 9a VG 7/07 B, June 4, 2007, https://sozialgerichtsbarkeit.de/sgb/esgb/show.php?modul=esgb&id=63731.

[90] *See* Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 1613/07, Sept. 27, 2007, 2008 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT [NVwZ] 418.

[91] Protocol No. 213, Labor, Social Affairs and Health Committee, Feb. 8, 2010, *available at* http://www.knesset.gov.il/protocols/heb/protocol_search.aspx (Isr.).

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V. Retroactive Payments

Following the Federal social courts' formulation of the new legal definitions in the important decisions dated 2 and 3 June 2009,[92] an additional question arose: The extent of survivors' rights to receive retroactive payments in accordance with the ZRBG and the general arrangements under the social security law needed clarification.

1. The Question of Applicability of Article 3(2) ZRBG

The question of the applicability of Article 3(2) ZRBG first became relevant in cases where retroactive payments were awarded to survivors who had already received a preliminary decision and appealed to the appeal panel of the Social Security authorities or to the social courts. In accordance with Article 3(1) ZRBG, the legislature included this principle into the legislation's text, allowing claimants who submitted their claims prior to 30 June 2003 to receive their rights retroactively from 18 July 1997, the date the Federal Social Court delivered its verdict in the matter of *Sophie Bild*, and recognized the existence of social working relations in ghettos.[93]

The legislation itself did not provide any additional tools for determining the extent of retroactive payments for claimants who submitted their claims after 30 June 2003. Moreover, it did not present a separate mechanism to define the extent of retroactive payments for claims not filed in fulfillment of the conditions stipulated under Article 3(1) ZRBG.

The Federal Social Court decisions dated 2 and 3 June 2009,[94] which provided legal definitions that enabled Social Security authorities to process ghetto workers' applications, raised the important question of retroactive payments. Since most applicants were refused because of the lack of clear legal decisions on the elements ghetto worker were required to prove, the question of the extent of the payments became an important issue. This was enhanced by the fact that Article 3(1) ZRBG outlines a specific arrangement for applications filed before a specific date, which were processed by the authorities in the first round of applications.

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[92] By judgments given on 2 and 3 June 2009 the Federal Social Court considerably abated the characteristic requirements for *employment at one's own will* and *remuneration*. *See* Bundessozialgericht [BSG - Federal Social Court], Case No. B 5 R 26/08 R, June 3, 2009, 103 BSGE 220; Bundessozialgericht [BSG - Federal Social Court], Case No. B 13 R 81/08 R, June 2, 2009, 103 BSGE 190.

[93] *See* Bundessozialgericht [BSG - Federal Social Court], Case No. 5 RJ 66/95, June 18, 1997, 80 BSGE 250.

[94] *See* Bundessozialgericht [BSG - Federal Social Court], Case No. B 5 R 26/08 R, June 3, 2009, 103 BSGE 220; Bundessozialgericht [BSG - Federal Social Court], Case No. B 13 R 81/08 R, June 2, 2009, 103 BSGE 190.

Because Social Security law did not contain a specific structure to solve the question of retroactive payments paid under the ZRBG, claimants had to refer to the regulations of the general Social Security law. This sparked an interesting debate between the Social Security institutions and the Federal Ministry of Finance and labor and social law about the article of the general social law that would be applied following the above-mentioned decisions of the BSG.[95]

The issue of retroactive payments was first to be determined under the general regulation existing under the current Social Security law in Germany. In such cases where the social security authorities might automatically reconsider their previous decisions if they were based on wrong assumptions, or on a mistake in the interpretation of the law (*Überprüfungsanträge*), Article 44 SGB X[96] may be considered, creating a different balance between the social security authorities and the claimants.

In applying Article 44 SGB X, however, the authorities found a legal way to retroactively correct decisions issued prior to June 2009 Federal Social Court decisions, which were based on wrong legal assumptions about the interpretation of the legislation, and the legal definition of social relations formed in the ghettos.

The possibility to implement the retroactive aspect granted by this Article allowed the authorities to embark on one of the largest administrative proceedings in the history of the Social Security institutions. The amount of cases reopened and re-evaluated by the Social Security institutions amounted to over 56,000.[97] This created a huge overload of work for the authorities. The authorities decided to consider June 2009 as the date when all these claims were reprocessed, enabling authorities to allocate payments starting from 1 January 2005.

Through this solution, Article 3(1) ZRBG became irrelevant for the retroactive aspect of the claims that had previously been rejected. The authorities decided to apply Article 44 SGB X instead, limiting the extent of retroactive payments to 1 January 2005, as opposed to 1 July 1997 in accordance with Article 3(1) ZRBG. The legal reasoning behind this limitation was that Article 3(1) ZRBG required all applications to be submitted prior to 30 June 2003.

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[95] Wolfgang Binne & Christoph Schnell, *Die Rechtsprechung zum Gesetz zur Zahlbarmachung von Renten aus Beschäftigungen in einem Ghetto (ZRBG) und die Umsetzung durch die Rentenversicherung*, 2011 DEUTSCHE RENTENVERSICHERUNG 12, 21.

[96] SOZIALGESETZBUCH [SGB – SOCIAL CODE], Jul. 23, 2004, BGBl. at 1842, § 44 (revoking the rejection by the pension insurer with respect to the recognition of contribution periods pursuant to ZRBG, the Law regarding the conditions for making pensions payable on the basis of employment in a ghetto or an application leads to a pension entitlement).

[97] *Payments from Germany; German Social Security*, CLAIMS CONFERENCE: THE CONFERENCE ON JEWISH MATERIAL CLAIMS AGAINST GERMANY, http://www.claims-conference.de/index.php?id=28 (last visited August 30, 2013).

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The fact that Article 44 SGB X was applied and that the claims were reopened, implying that legally, the original decisions were void, did not automatically mean the authorities calculated retroactive payments from the original date of application, forcing them to pay starting from 1 July 1997. Instead, the Federal Social Court analyzed the groups of claimants described above and decided that claims resolved under Article 44 SGB X could not receive retroactive payments for more than four years from the time authorities began reopening the cases.[98]

Since the ZRBG is not a separate legal arrangement, but an arrangement orientated under the general rules for compensation for wrongful Nazi acts under the WGSVG and the general rules of the social law order regulated under the SGB, the court did not follow this argument. The court was of the legal position that, while keeping in mind the special nature of the ZRBG, the court could not follow such a broad interpretation of Article 3(1) ZRBG,[99] especially in light of the arrangement under Article 44 SGB X. The court considered itself limited in its ability to interpret the law, and ruled against the possibility to bypass Article 44 SGB X.[100]

Furthermore, the claimants in front of the BSG claimed that the legal situation, with the division of ghetto workers into several groups entitled to different retroactive rights, could be considered unconstitutional because of the infringement of Article 3 GG, an article that requires equal applicants to receive equal rights. In three hearings about the retroactive aspects of the ZRBG at the BSG, the court stated that under the existing constitutional jurisprudence, such a claim is not founded; the claimants appealed the case in which there were three different groups of claimants, but were unable to prove that discrimination forbidden by Article 3 GG existed within a specific group.[101]

The court maintained that the rights of those who were never rejected by a final judicial or administrative decision should be subject to the general regulations of the social order. The court was in no position to limit the extent of retroactive payments for claims submitted prior to June 2003. These claims, when approved, were paid in accordance with Article 3(1) ZRBG, thus with retroactive payments starting from July 1997.

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[98] *See* Bundessozialgericht [BSG - Federal Social Court], Case No. B 5 R 38/11 R, February 8, 2012, 2012 NJW 2139, 16–17.

[99] *Id*.

[100] Helmut Dankelmann, *BSG: Keine über die Frist des Art. 44(4) SGB X hinausgehenden Zahlungen für Empfänger von Ghettorenten zulässig*, 2012 FACHDIENST SOZIALVERSICHERUNGSRECHT.

[101] *See* Bundessozialgericht [BSG - Federal Social Court], Case No. B 13 R 40/11 R, Feb. 7, 2012, 2012 NJW 2908, 27–28.

Having stated so, for Israeli Holocaust survivors that submitted their claims for a Social Security benefit in Israel, the DISVA[102] allows them to export their rights with respect to the German social security system and also with respect to the ZRBG issue.

Thus, the Federal Social Court accepted these claims made by survivors, and allowed them to use their initial Social Security request in Israel as the original date of submitting the claim for ZRBG in Germany.[103]

In other words, survivors who submitted applications for old age benefits under the Israeli Social Security law can be considered as having concurrently applied for social benefits according to the German Social Security order. Since the ZRBG provides a framework for retroactive payments when applications were submitted prior to 30 June 2003, the outcome of an Israeli application submitted prior to 30 June 2003 would be the retroactive payment of benefits starting from July 1997.

2. Parliamentarian Debate on the Question of Retroactive Payments

While Article 3(1) ZRBG (the primary legal regulation on retroactive payments) requires that claims must have been submitted prior to 30 June 2003, the general administrative clause limited the backdating of payments to four years, thus precluding Holocaust survivors from receiving payments starting from July 1997.

In light of the complicated situation created by the important BSG decision on claimants who submitted their applications from Israel and were awarded retroactive payments in accordance with DISVA, parliament addressed the matter of retroactive payments, and attempted to find a coherent solution for the entire issue.

The *Die Linke* faction at German Bundestag was the first opposition party who addressed the government on the ZRBG and its implementation in light of the new Federal Social Court decision. In a parliamentary inquiry, the faction questioned the administrative aspects of reprocessing applications in light of the new jurisprudence, and further focused on the aspect of retroactive payments for the claimants.[104]

On 28 June 2012, the two leading opposition parties at the German Bundestag submitted a motion to the house in an effort to solve the issue of retroactive payments.[105] The

[102] *See* AUGUST, *supra* note 21.

[103] *See* Bundessozialgericht [BSG - Federal Social Court], Case No. B 13 R 20/10 R, April 19, 2011, 26, *available at* https://www.jurion.de/de/document/show/0:4429092/?q=B+13+R+20%2F10+R&sort=1.

[104] BT-DRS, *supra* note 33, 17/6648 at 2.

[105] BT-DRS, *supra* note 33, at 17/10094.

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initiators mentioned that the Bundestag originally attempted to incorporate the BSG's 1997 *Sophie Bild* ruling into the law, and created a new legal order allowing survivors to receive pensions under the general Social Security order.[106]

Article II(B) of the motion presented to the German Bundestag suggests a new model to be implemented by the Federal Ministry of Finance.[107] It calls for a model that would incorporate the Social Security legal order, including the payment of monthly pensions calculated individually for each survivor. The motion suggests that individual pensions should be paid for the period from 1 July 1997 to 1 January 2005, either by the Social Security authorities directly, after an amendment to the ZRBG, or alternatively by the Federal Ministry of Finance, which would grant individual payments based on the original individual monthly ZRBG pensions.

However, on 10 December 2012, experts discussed the question of "retroactive payments" in a hearing of the Committee on Employment and Social Affairs.[108] However, on 21 March, 2013, Parliament rejected legislation that would have retroactively granted social pensions, beginning from 1 July 1997, to Holocaust survivors who were former ghetto workers.[109] A constitutional complaint was brought to the German Constitutional Court[110] but was unsuccessful. Finally, on 5 July 2013 the states of North Rhine-Westphalia, Baden-Württemberg and Bremen proposed an initiative in the German Federal Council (Bundesrat) urging the Federal Government, in the context of the federal elections taking place in September 2013, to ensure that former ghetto workers receive their pension retroactively from the year 1997.[111] It remains to be seen who is faster in solving one of the final matters where people try get back a piece of justice—the legislature or the judiciary.

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[106] *See* Bundessozialgericht [BSG - Federal Social Court], Case No. 5 RJ 66/95, June 18, 1997, 80 BSGE 250.

[107] *See* BT-DRS, *supra* note 33, 17/10094 at 2.

[108] *Compare* BT PLENARPROTOKOLL, *supra* note 33, 17/118, *with* BT-DRS, *supra* note 33, 17/10094, 17/7985.

[109] *See* BT-DRS, *supra* note 33, 17/12870; BT-DRS, *supra* note 33, 17/10094; BT-DRS, *supra* note 33, 17/7985.

[110] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvR 1008/12 (pending); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvR 1444/12 (pending).

[111] BUNDESRAT DRUCKSACHEN [BR] 549/13.

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F. Closing Remarks

Following the signing of the Reparations Agreement[112] between Israel and West Germany on 10 September 1952 Germany began to create the legal framework for compensation of those who suffered under the Nazi regime and its racial persecution. The acknowledgment of a moral debt towards the victims of Nazi terror was one of the foundations for Germany's rehabilitation into the community of democratic and free states.

Implementing the frameworks for compensating Holocaust survivors in general, and the ghetto workers in particular, was a slow process, however. The administration's and the government's unwillingness to acknowledge the problematic aspects of the implementation of a legal framework for survivors' compensation under the general Social Security System slowed the process down even more.

Approximately five years after the ZRBG legislation was presented, the rate of denied claims submitted under this law stood at over 97%. At this stage, the federal government finally decided to look into the matter, and attempted to create a substitute solution for the one presented under the ghetto workers' law. After long deliberations, the government decided that the reason for the high number of denials was the survivors' inability to grasp the complicated legal elements that needed to be proven under the Social Security law.

The attempt to resolve the legal dispute outside the Social Security law, and the creation of a substitute solution enabling the survivors to receive accelerated, reduced compensation, proved to be very costly. Since this solution could not infringe on social rights recognized by the federal legislature under the ZRBG, the legal matter was referred to the Federal Social Court, which conducted a thorough legal analysis of the jurisprudence needed to process ZRBG claims.

The BSG reached three monumental decisions about the interpretation of the ZRBG and its orientation under the Social Security System. These decisions, taken approximately seven years after the ZRBG was enacted, gave the authorities the much needed tools to successfully process the respective claims.

The last, but by far the most complicated issue to be resolved was proving legal relations between ghetto workers and their employers in a way that could be recognized by social law. Since the ZRBG required proving two elements—free will and remuneration—the court was faced with a complicated task.

[112] According to the Agreement (Luxemburg Accord), West Germany was to pay Israel for the slave labor and persecution of Jews during the Holocaust, and to compensate for Jewish property that was stolen by the Nazis. *See* Frederick Honig, *The Reparations Agreement between Israel and the Federal Republic of Germany*, 48 AM. J. INT'L L. 564 (1954).

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It took a while, but, with the sequence of decisions, the Federal Social Court installed a clear and coherent interpretation of the law, allowing most claimants who were in ghettos under Nazi occupation to succeed with their claims for compensation.

Nonetheless, the courts decided to leave one important legal question to be addressed by the legislature. Since most claims by ghetto workers were now being approved, the remaining legal question is the extent of retroactive payments. The debate focused on Article 3(1) ZRBG, and on the question whether retroactive payments should be backdated to 1 July 1997, or whether the general clause for retroactive payments, regulated under Article 44 SGB X should be applied, in which case formerly denied claims, now approved in light of the new jurisprudence by the Supreme Social Court, should be backdated to 1 January 2005. The Federal Court made it clear that this decision should be made by the legislature. At the same time, it was evident that the court was of the opinion that the decision to implement Article 44 SGB X was viewed as unjust by the survivors.

Legally seen, the orientation of this compensation framework under the social security law was correct, although not always easy to follow. The social law compensates those who proved social relations in a ghetto, allowing the federal government to allocate pensions to these workers now living outside the territory of the federal government. This is a logical arrangement, especially in light of the federal government's decision about the BEG-Schlussgesetz, and the decision not to burden the Federal Ministry of Finance any more.

Yet, because complications arose due to lack of proper administrative and legal planning, one can doubt whether a different solution would have been preferable. As seen above, the complicated route survivors had to take to obtain a pension usually took over ten years. Thus, it bears remembering that while the saga behind compensation for ghetto workers is of legal importance, it also created just another complicated burden at the end of the survivors' lives.

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