Key Elements of Just and Fair Solutions

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Abstract

Washington Principle No. 8 requires steps to be taken expeditiously "to achieve a just and fair solution, recognizing this may vary according to the facts and circumstances surrounding a specific case". According to Principle No. 10 commissions or bodies established to identify art that was confiscated by the Nazis and to assist in addressing ownership issues should have a balanced membership. There is no more guidance on the question what constitutes a just and fair solution. And there is only little guidance on the procedure that is necessary to achieve just and fair solutions. Any commission or body asked to achieve "a just and fair solution" is therefore confronted with a herculean task.

This paper tries to identify common ground for key elements of material and procedural justice and fairness on an abstract and comparative level. Such key elements may serve as guiding principles for achieving just and fair solutions in a particular case and could help to make better visible the ratio of decisions on just and fair solutions.

This is of particular importance because one of the few general insights on justice and fairness is that decisions should be materially consistent and should be rendered in a procedure that allows the parties and the public to accept the decision. These are formal and procedural elements of justice. Common ground for substantive justice is small. Therefore, procedure is of utmost importance. Some examples will show that even on the level of procedure key elements of justice and fairness have not (yet) been put in place everywhere. However, without implementing at least the procedural key elements for just and fair solutions the herculean task must fail.

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Introduction

We all know Hercules – the amazingly strong hero of ancient Greece. We also know Hercules as the great hero in the book "Law's Empire" by Oxford Professor Ronald Dworkin. "Law's Empire" has become one of the most powerful theories of jurisprudence in modern times. It is a theory about how judges should decide cases. This theory takes law as the expression of what constitutes justice and fairness because this theory supposes that law grounds on certain principles of justice and fairness. And a judge, if she or he wants to achieve a just and fair solution in a particular case, must firstly identify these principles by interpretation of the law and secondly must apply the law in light of these principles to a new case. Thereby the judge produces decisions consistent with underlying principles of justice and fairness and coherent with previous decisions.

Dworkin acknowledges that the judge's task of interpreting and identifying the principles of justice underlying the law and their interacting in cases of conflicts is a Herculean task because the judge needs to take into account a great variety of aspects of a rule of law and previously decided cases in order to have the full picture. But supposed we could convince Hercules to become a judge and he would proceed as Dworkin suggests, Hercules, unfortunately only Hercules, would be able to achieve a truly just and fair solution in each and every case, even in extremely hard cases.

I am not so sure about Dworkin's view on the Washington Principles in that respect: Washington Principle No. 8 requires, as we all know, steps "to achieve a just and fair solution". There is no more guidance on the question what constitutes a just and fair solution. There are no rules of law, there are no principles of substantive justice and fairness agreed upon by the Signatory States of the Washington Principles. How should a judge or a commission or a panel then get to the principles of justice and fairness that enable them to achieve a just and fair solution in a particular case? The only way I see is that these judges, bodies, commissions and panels themselves develop plausible principles of justice and fairness. However, this task is far too big even for Hercules. We would need to supersize Hercules in order to enable him to clean the Augean stables of injustice of Nazi

crimes solely on the basis of the general and totally abstract rule that "just and fair solutions should be achieved".
Therefore, my starting point is that from a theoretical point of view in jurisprudence achieving just and fair solutions is particularly difficult under the Washington Principles.

Elements of Substantive Justice and Fairness

Let me illustrate these difficulties by some examples. Of course I cannot deliver the full picture within a few minutes – obviously and maybe more obviously than other persons, I am not Hercules. I can only focus on very few selected elements or questions of justice that appear to me of particular interest for further discussion at the moment.
Let me start with elements of substantive justice in the first part of my paper. In the second part of my paper I will address elements of procedural justice.

Restitution or Compensation?

A first element of substantive justice and fairness is the question whether restitution or compensation should be granted? Let me illustrate this question by the following hypothetical case:
A persecuted person in Germany, let's say a leading member of the Communist Party, is the heir of an art dealer who had died prior to 1933. Let us further assume that the heir declared to family and friends many times before and after 1933 that she or he wants to sell the artworks in order to finance the political resistance against the Nazi regime. However, due to political persecution by the Nazis the paintings and many other assets were lost. One of these paintings is now in a public museum. Should the painting be restituted or should this loss be compensated by money?
If we look at the German "Handreichung", the "Guidelines" or "Manual" issued by the Commissioner to the German Federal Government for Culture and Media (*Beauftragter der Bundesregierung für Kultur und Medien*) the answer is quite clear. The Manual seeks to build on the old post-war legislation of the Allied Forces on the indemnification of victims of persecution. The painting would have been restituted under Military Law No. 59. Therefore it should be restituted by the Museum today. In addition, it is a principle of justice and fairness under general German law that restitution, if it is technically possible, has always priority over compensation. As a matter of principle, compensation is considered only the second best solution. But this is a principle other legal orders do not follow to the same extent. And if we look at the true interests of the persecuted person in our case, is this interest not about money rather than art? Therefore, would it not be an even better service for justice to grant compensation? If so, what should be the amount of this compensation? Market value at the time of the loss? Including compound interest? Market value today? No guiding principles of justice on all these issues from the Washington Principles. Hercules would now have to assess previous decisions by commissions and bodies on that issue, if there are (already) any, as well as the guiding principles of the leading legal orders as a comparative measure – a truly Herculean task.

Quality of the causal link between persecution and loss?

Another question of justice would be the following: How does the quality of the causal link between persecution and loss affect the solution of a particular case:
Let's assume that a Jewish family suffers from persecution but is able to transfer some assets, including a painting, to third states outside the range of power of the Nazi regime, let' say to Switzerland or England. The Jewish family follows shortly afterwards. The family is now safe but has no income or other assets. Therefore, the painting is put up for auction and receives a market price at London or Luzern. Today, the painting is in a museum. What is a just and fair solution in this case?
This is not a hypothetical case. The Spoliation Advisory Panel's latest recommendation of March 2012 had to deal with such a case. The German Beratende Kommission had to deal with a comparable case in its first recommendation of January 2005. Let's compare the two recommendations:
The Spoliation Advisory Panel held that the sale was a forced sale in the sense that Nazi persecution caused the sale. Nonetheless the Panel considered "that the sale is at the lower end of any

scale of gravity for such sales. It is very different from those cases where valuable paintings were sold, for example, in occupied Belgium to pay for food". Therefore the Panel held that the claim is, despite the impact of the Nazi era on the claimant's circumstances, insufficient to justify restitution or even an ex gratia payment. The Panel only recommended the display alongside the objects of their history and provenance with special reference to the claimant's interest therein.
The German Beratende Kommission had to decide a quite similar case, the case of Julius Freund: Julius Freund had transferred the paintings in question to Switzerland in 1933 and had emigrated to London in 1939. He died there in 1941. In 1942 his family put up for auction the paintings in Luzern in order to make money for their living. The Beratende Kommission recommended the restitution of the paintings to the heirs.
Unlike the Spoliation Advisory Panel, the Beratende Kommission does not give any reason for its recommendation. We can only speculate that the underlying substantive principle of justice could be that ANY causal link between Nazi persecution and a sale suffices to recommend restitution – at least if the conditions for restitution under Military Law No. 59 would have been fulfilled because the "Handreichung", the "Guidelines" how to deal with claims, seeks continuing the principles of the old post-war legislation by the Allied Forces. According to Military Law No. 59 the conditions for restitution were only the following: (1) Persecution, (2) transfer of property in a sale. If these conditions were met, there was a presumption that there was a forced sale. This presumption could be rebutted by showing that (a) the vendor received a fair market price, (b) that he could freely dispose of the proceeds and (c) in case of sales after 15 September 1935 which is the date of entering into force of the Nuremberg laws, that the sale would have taken place without the Nazi regime in power. One may now argue that the death of the family's sole bread winner usually brings any family into difficulties. On the other hand, usually any family emigrating in order to escape from persecution loses its opportunities to make money and loses many of its assets on the way out which might be the principal reason for the difficulties.
The recommendation by the Beratende Kommission does not reveal any facts on that point, nor does it tell us whether these considerations were or were not taken or should or should not be taken into account. Nor does the recommendation explain why the principles of justice laid down in Military Law No. 59 should all of a sudden apply to sales outside Germany in safe states. And this recommendation is inconsistent with the recommendation given by the Spoliation Advisory Panel. The Spoliation Advisory Panel recommended the display of the history, the Beratende Kommission recommended restitution. A greater distance between the two recommendations is hardly imaginable. Inconsistency, however, is injustice.

No double compensation?

Let me finish the first part of my paper with the following example – another real case: the case of the Jewish dentist Hans Sachs. This case resulted in the second recommendation by the Beratende Kommission in January 2007.
Hans Sachs collected theatre posters. His huge collection was taken from him by the Gestapo. Hans Sachs could escape from Germany. He believed that the collection was destroyed. After the war he started proceedings for compensation under the post-war legislation of the Allied Forces. In a settlement of 1961, Hans Sachs received a high amount of compensation – DM 225.000 – for the loss of his collection. In a letter to a friend Hans Sachs declared that the compensation was "utterly respectable" and approved of by several experts. In the 1970ies parts of the collection reappeared in a museum in the former GDR. Today these parts of the collection are in the German Historical Museum in Berlin. Hans Sachs's son Peter raised a claim for recovery. Should the posters be returned to him?
The Beratende Kommission, in its second recommendation of 2007, held that „in light of the express declaration by the collector the Commission recommends that the posters remain at the Museum". The Beratende Kommission thus relies on the rather unique situation that the former owner expressly declared that he is content with the compensation that he received even though restitution is – theoretically – possible. It would have been far more interesting to know the Commission's general view on the effect of post-war settlements about compensation in respect to claims for resti-

tution. Unfortunately, we do not receive any guidance as to what should be the principle of justice on this issue. It is common ground that double compensation would be unjust. But how should we deal with early compensation and today's claim for restitution?
Perhaps you will be puzzled to hear that Peter Sachs, after the Commission had turned down his application, successfully sued in German courts for restitution. The German Federal Court of Justice (*Bundesgerichtshof*) held, by judgment of 3 March 2012, that Peter Sachs has, as heir to Hans Sachs, a claim against the Museum for restitution based on ownership. We should take notice of the surprise that the applicable property law that was meant to be overriden by the Washington Principles for being not sufficiently just, produces the more favorable results to the claimant than the free-floating justice under the Washington Principles.

Conclusion

Let me summarize the first part of my paper: Achieving just and fair solutions freely floating in the universe of abstract justice and fairness is an extremely difficult task, far more difficult than the Herculean task of achieving just and fair decisions within the empire of law. In order to help Hercules in the future to better deal with hard cases we should start working on a restatement of restitution principles and rules.

Elements of Procedural Justice

I am now turning to the second part of my paper – elements of procedural justice. My starting point here is:
The more we are away from Dworkin's ideal the more important becomes procedure.
In his seminal text "Legitimacy by Procedure" (*Legitimation durch Verfahren*) Niklas Luhmann, the leading German legal sociologist, identifies the sociological function of procedure. This function is to achieve legitimacy. Legitimacy means from a purely sociological point of view that a decision is accepted by the majority of the public to an extent that critiques decide to become silent so that there is no longer a dispute. Of course silence will only occur if the content of the decision remains within a certain margin of plausibility. In our context the margin of plausibility is untypically large because, as I showed in the first part of my paper, we do not yet have sufficiently established and settled principles of substantive justice.
How should we deal with this situation in terms of procedure? According to Luhmann, there are three key elements that generally enable a procedure to achieve legitimacy: (1) The decision-making body should consist of persons of the highest possible reputation. (2) The decision should ground on rules that were enacted by someone else than the decision-maker. (3) Society should obtain the possibility to develop a generalized trust in the decision-making system.
If we agree for a moment on these standards, let me measure, by these standards, the procedures we have put in place for achieving just and fair solutions.

Highest possible reputation of decision-making persons

The first element – the decision-making persons should be of the highest possible reputation – is obviously no problem in any of the committees and bodies. It is my impression that the reputation of the decision-making persons is so strong that it is even acceptable not to have additional judges appointed by the parties. However, at least in Germany, this is a controversial issue.

Rules enacted by someone else than the decision-maker

In the first part I have shown that we do not (yet) have sufficient substantive rules for consistent and predictable decision-making. Obviously, if there is no support for the legitimacy of the decision from rules and principles of substantive justice, the other two elements of procedural justice become even more important.

Trust of the public in the decision-making system

What makes the public trust the decision-making system? There are certainly numerous elements that contribute to the growing trust of the public. I select a few of them:

Procedural Rules

First of all, precise rules for the procedure should be put in place. For example, the Dutch Restitution Commission as well as the Spoliation Advisory Panel operate on the basis of a set of procedural rules. The German Beratende Kommission does not have any published rules of procedure. This is a deficiency in the German procedure. There is only a text, a kind of press release, with certain basic information for claimants. *Inter alia*, the claimant is informed that the German Beratende Kommission will only make recommendations if both parties request so. No party is able to submit its case to the Beratende Kommission unilaterally. The consequence is that there is an extremely low number of recommendations – only five until today. The low number of recommendations hinders the development of principles and rules for justice and fairness by a growing body of case law. In my view this should be changed. The German Beratende Kommission should accept unilateral requests for recommendations as, for example, the Restitution Commission and the Spoliation Advisory Panel do.

Reasoning

More importantly, a precise reasoning of the decision is of absolutely crucial importance, in particular because we do not have sufficiently established principles and rules for the decision on the merits. Without thorough reasoning no *ratio decidendi* will become visible, no case law will emerge, and no rendering of justice will be perceived by the public, even though the decision as such might be a perfect service to justice.
Let's compare once more the recommendations of the Spoliation Advisory Panel and the Beratende Kommission on the question I raised in the first part of my paper about the quality of the causal link between persecution and loss. The Spoliation Advisory thoroughly assessed the facts, including uncertainties, revealed its estimation of probability in respect of these uncertainties and then thoroughly reasoned its recommendation. This recommendation comprises 13 pages of reasoning – in my view perfect work. Both Dworkin and Luhmann would be/would have been impressed.
The Beratende Kommission did not publish its recommendation but only a press release about the recommendation, and this press release comprised more or less 1 page – 1 page for facts and reasoning. I think that this is clearly insufficient. Dworkin as well as Luhmann would be/would have been strongly irritated about this incomprehensible aspect of the German practice. There should be thoroughly reasoned recommendations also in Germany.

Conclusions

Let me summarize my paper:
1. From the perspective of legal theory and jurisprudence, achieving a just and fair solution without any rules and principles of justice and fairness is extremely difficult. Given these difficulties, the Commissions and Panels do a great work.
2. However, in order to better deal with hard cases, in particular in order to avoid inconsistencies, we should start working on a restatement of restitution principles and rules.
3. As long as we do not yet have such a restatement of restitution principles, procedure is even more important than it is usually. In terms of procedure the German practice needs to be improved.

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Leitsatz
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