Claudia von Selle, Dirk von Selle

Taking Responsibility!

Nazi-confiscated Art between Law and Morality

Resolving the issue of Nazi-confiscated art remains a current concern. The semi-official publication 'Verantwortung wahrnehmen' (Taking Responsibility) makes clear that the German Government recognizes a moral responsibility for the singularity of the Holocaust that can never diminish with the lapse of time. It only follows that calls to consider restitution claims a closed matter are out of place. The search for Nazi-confiscated art must continue and restitution must be offered for such cultural properties. What is surprising is that even today there is still no law providing public institutions a constitutional basis with which to deal with restitution claims that can often run into the millions. Museums and the art market, however, seem to be leading the way.

Jutta Limbach addressed the issue in a speech. Sitting in the audience was Emile Rathenau, a man in his mid-thirties and descendent of a family that was forced to flee Germany in 1936. At first he listened in astonishment and then shook his head in disbelief during the talk given by the President of the Advisory Commission on the return of cultural property seized as a result of Nazi persecution. She explained that the commission statutes obliged that the board meet only under conditions of amicable consensus in order to prevent a flood of claims by concerned parties. "My grandfather would have left the hall," summed up Emile Rathenau understandably. Limbach was, in effect, inverting the meaning of "Taking Responsibility," the motto of the Berlin conference held on 11-12 December 2008 and organized by the *Prussian Cultural Heritage Foundation* together with the *Coordination Office for Lost Cultural Assets*. The consequences of the views expressed in her speech would be that responsibility was not a matter for the legal successors to the Nazi art looters, but rather first and foremost that of the victims and their descendents, in that they are the ones bound to come to mutual agreement.

It is therefore not without an ironical undertone that Hermann Parzinger, the President of the Prussian Cultural Heritage Foundation, thanked Jutta Limbach for her speech with the ambiguous remark that "in it's own very particular way, it brought those in attendance closer to the conference topic." One can refer to the recently published book "**Verantwortung wahrnehmen. Taking Responsibility,"** which documents the conference.1 In any case, after Ms. Limbach's speech, no one needs to wonder about the marginalization that the Advisory Commission has brought upon itself with its compulsory consensus for mediation.2

It only takes a glimpse over the German border to see that things can be done differently. Inge van der Vlies from the Dutch restitution commission and Jean-Pierre Le Ridant from the French Commission for the Compensation of Victims of Spoliations (CIVS) both provide a

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1 Coordination Office for Lost Cultural Assets (ed.): *Verantwortung wahrnehmen. Taking Responsibility. NS-Raubkunst - eine Herausforderung an Museen, Bibliotheken und Archive. Nazi-looted Art - a Challenge for Museums, Libraries and Archives.* Revised by Andrea Baresel-Brand. Magdeburg 2009, 518 p. 27 fig., € 24.90.

2 Gunnar Schnabel, "Den jüdischen Erben bleibt nur das Recht." in *FAZ*, 2.3.2009

detailed overview of their commission work. It must be stressed that contrary to their German counterpart, both commissions can be appealed to by just one party. Despite this, they are in no way swamped with countless requests to undertake investigations. This provides an enormous financial savings for many families of victims, who did not possess highly valued artworks that can be placed on loan. It is often the sole possibility of obtaining their rights. With almost ten years of experience in this area, both van der Vlies and Le Ridant have expressed the need for greater international cooperation. The French commission, which maintains an office in Berlin, has shown that it practices what it preaches.

The conference

The contributions by van der Vlies and Le Ridant provide clear examples of the conference claim to take stock of how to deal with Nazi-looted art. The year 2008 marked the tenth anniversary of the signing of the *Washington Principles*, under which 44 participating states and non-government organizations agreed to ten legally non-binding principles to help resolve issues relating to Nazi-looted art. The Berlin conference was also meant to serve in preparation for the following conference on the *Washington Principles*, which took place from 26-30 June 2009 in Prague with the participation of 49 states and NGOs.

The conference papers documented in Taking Responsibility are, for the most part, printed in a German and English version, and, in a sympathetic touch, are accompanied by summaries in Hebrew. The Magdeburg Coordination Office for Lost Cultural Assets, a German joint federal and state institution, was responsible for the publication. It is supported by the German Federal Commissioner for Culture and Media in accordance with a resolution passed by the German Bundestag, which only tends to strengthen its official appearance.

In light of this background, a remarkable, inspirational paper by Bernd Neumann, Minister of State for Culture, deserves special attention with respect to the practice of restitution. It should be regarded as an authentic representation of the German government's standpoint on the restitution issue. Due to the singularity of the Holocausts, Neumann acknowledges a "moral responsibility that can never diminish with the lapse of time." With encouraging clarity, Neumann opposes any position advocating closure on this issue. This leads to two further conclusions: The search for Nazi-looted art should continue and restitution must be made for such cultural goods. The core concerns of the conference are thereby stated. To the basic question of restitution, one can also add the complex issues of provenance research and investigation as well as just and fair solutions. Let us get straight to the point with the words of *Shlomit Steinberg* of the Israel Museum in Jerusalem: There is a great deal of positive news to report.

Law and Morality – Law through Morality

Nonetheless, this positive news does not absolve those with moral responsibility from poking their finger in the still open wound of the restitution debate. Here, as well, Neumann offers us some starting points. In particular, a tangible aporia seems to lie behind the diffuse comparison of law and morality. What does it mean when Neumann, and analogously Parzinger, pleads for morally grounded decisions far removed from "detailed legal questions" or statutory regulations?

In the best case, such an antiquated understanding of the constitution is based on a separation of law and morality achieved only with Kantian acumen. With respect to the constitutional order in Germany, at any rate, the German constitutional court, in an act of evaluative

recognition not lacking in a certain degree of volition, has repeatedly stated that the imminent system of values, even to the extent that it is lacking or are imperfectly expressed in the texts of written law, can be realized. Legal loopholes should be closed, where applicable, "according to the criteria of practical reason and a grounded, general understanding of justice in society".3 Often, one can fall back on numerous vague legal concepts that are exhibited in plain law.

As Harald König convincingly presents in his paper on the "Legal Foundations of Restitution since 1945," civil courts have always known how to make use of the methodical leeway offered by vague legal concepts, especially in restitution cases, to duly enforce the demands of morality. Already in 1947, the Berlin Court of Appeal judged that the sale of an asset under the threat of persecution can be contested on the basis of "unlawful threat" according to § 123 of the civil code, as "the declarations of intent have already been decisively influenced by the existing collective constraints." Civil law, in particular, remains undiminished in its validity after the expiration of special legal restitution regulations. As such, to plead the statute of limitations as a defense objection is an action of dubious moral quality. According to Neumann's words, the public hand cannot allow such an objection to prevent claims of restitution.

In the worst case, morality functions as a cheap placeholder, behind which those with political responsibility can hide. Even the *Washington Principles* seem to have the air of a compromise formula about them, along the model of "wash me clean, but don't let me get wet," as they are merely intended to be morally binding on the signatories.4 Agnes Peresztegi's paper on the disheartening behavior of Hungarian authorities in dealing with restitution claims unfortunately provides very graphic evidence for this scenario. Peresztegi illustrates with the example of the important Herzog and Hatvany collections how the government's position has been to complicate and obstruct provenance research and investigation, force Holocaust heirs to go through long court cases, and to mobilize public opinion in order to influence the courts. This account makes praise of German restitution practices perhaps understandable, although it is still quite unusual for Germans to hear.

Peresztegi's account is all the more discouraging in that it makes clear that there are no international consequences as to whether a signatory country implements or fully blocks the *Washington Principles*. Consequently, the Hungarian Republic was not represented by an official delegation at the government conference in Prague. Despite all the setbacks, the author deserves great credit for presenting the cases in an objective and factual manner. One could certainly wish for more such well-established investigations into the reality of restitution practices in Eastern Europe. There only remains the hope that the Hungarian practices, as related by Peresztegi, do not represent a model by which Central and Eastern European states understand the notion of "just and fair" solutions in the matter of restitution of cultural assets.

In a democratic state ruled by law, politics must inevitably be held to answer on issues such as the moral demands of the *Washington Principles*, as the writing of laws in itself is insufficient. The formulation of objectives in a representative democracy is articulated in law,

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3 Decision from 14 February 1973 – 1 BvR 112/65

4 Claudia von Selle, Ulrich Zschunke, "Ein Weg, wo kein Wille ist. *Soft-law*-Vereinbarungen als nichtstaatliche Konfliktlösung in Restitutionsfällen." in *Kunst im Konflikt. Kriegsfolgen und Kooperationsfelder in Europa*. Berlin 2006 [= OSTEUROPA 1–2/2006], pp. 383–392.

as expressly elaborated by the Würzburg Professor Georg Crezelius in his treatise on the implementation of the *Washington Principles*. In fact, it almost seems to be a paradox that in a land so obsessed with laws such as Germany, no law exists that offers public institutions a constitutional framework for dealing with restitution of assets often worth millions.

One can only speculate as to the reasons. Perhaps what we see here is the next developmental state of the much-cited flight from responsibility by lawmakers. When legislators make use of traditional, still vague legal concepts in order to hand over the moral value judgment of a difficult matter to the judiciary, it now seems as if they want to totally limit matters to unbinding epithets. One way to overcome this shabby condition with respect to the rule of law in Germany has been shown by Clemens Jabloner and Eva Blimlinger in their presentation of the 1998 Austrian law on the restitution of art objects. The first demand of the conference therefore reads "not morality instead of law, but rather law through morality."

Stones instead of bread?

What might remain without consequences in the theoretical heights of constitutional law can have far-reaching practical consequences for the challenges of every-day law. According to the conformity of budgetary rules for the German federal government and the states, it is forbidden to maintain public assets without statutory or other legal responsibilities. The state, as the German Federal High Court has flexibly formulated in established verdicts, has "nothing to give away." Since moral legitimation in the form of the *Washington Principles* lacks any legal responsibility, decision-makers in public museums and cultural institutions can easily become stuck between morally justified restitution claims and existing budgetary rules. As a result, they could find themselves completely liable. Budget misappropriation is punishable by law with imprisonment of up to five years or a fine (§ 266 Penal Code).

On the other hand, Minister of State for Culture Neumann and the German government seem to represent the position that with the adoption of the so-called "assistance in implementing the declaration of the German government, the federal states, and the communal umbrella organizations on tracing and returning Nazi persecution-related confiscated cultural assets, especially Jewish property," the process of restitution of cultural assets now enjoys a resilient foundation.5 Whether the "assistance" offered by politicians will help to justify a restitution decision seems not totally free of doubt due to the non-legislative status of the declaration, which serves as an administrative measure to implement the *Washington Principles*.6

In addition, the "assistance" comes from executive state authorities, whereas parliamentary budget law is covered by budget legislation.7 This leads one to believe that the "assistance" leaves cultural administrators holding stones instead of bread. In light of the unresolved liability issues, these administrators, at present, can only be recommended to ensure the restitution through a parliamentary decision by local government in possession of the cultural asset to be returned.

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5 By contrast: Matthias Weller, "NS-Raubkunst: Verantwortung wahrnehmen Beobachtungen zur Konferenz der Stiftung Preussischer Kulturbesitz usw." in *Kunstrechtsspiegel* 1/09, p. 37

6 On "assistance": Claudia von Selle, "Rückgabe von Kulturgütern." in *Kultur und Recht*, Stuttgart 2007, L.3, pp. 1-24, 16.

7 Dirk von Selle, "Parlamentarisches Budgetrecht und Haushaltsuntreue in Zeiten 'Neuer Steurungsmodelle'.", in *Juristenzeitung* 2008, pp. 178–186.

Just and fair solutions

Despite the moral primacy claimed by Neumann, among others, there is not a single conference paper devoted to genuine moral criteria for restitution. The large quantity of legal papers, by contrast, is evidence that restitution praxis is seen as a far more fruitful activity in legal faculties, considering that the *Washington Principles* themselves, although legally non-binding, demand *just* and fair solutions. According to our understanding this, of course, includes the methodological duty to let moral considerations be effective in the interpretation of vague legal concepts. It will always be difficult when moralizing takes place in a vacuum. And it has been well known since *Stanisław Jerzy Lec* that "in every moral drivel, there is always something that sticks." What, then, one would like to hear from the American lawyer *David Rowland*, is all the fuss about the "Swedish case," and what has the Swedish museum done that is "immoral," and what are the "alarming trends," the "gruesome facts," the regrettable state of affairs," and so on? The increasingly desperate reader, however, is unlikely to become any the wiser as to what the "Swedish case" is all about by reading the article entitled "Have museums in the USA fulfilled the promise of the Washington Conference?" apart from the fact, of course, that the author of this article acted (unsuccessfully) as a representing lawyer in this case.

Nonetheless, the *Washington Principles* truly offer the potential for a more substantial moral discussion. Its central concepts of justice and fairness are already key elements of probably the most influential theory of justice of the 20th century. John Rawls, the American philosopher of law, interpreted the claim of "Justice as Fairness" (the title of his epochal 1958 essay). As a theory of procedural justice, its quintessence lies in fact that it overcomes the internal perspectives of conflicting interests. Rawls imagines man in an intellectually paradisiacal original state. All individual circumstances that could cloud ethical judgments are intellectually put to one side and are hidden behind the famous veil of ignorance. As applied to the restitution debate, the notion of justice as fairness ennobles the practice of restitution, as the claimant as possessor and the possessor as claimant can agree, because no one can know whether they will once again find themselves in one or the other position. Unfortunately, it is only with a great deal of difficulty that a former owner or subsequent heirs on the one side and a museum director on the other could ever be transported back to a paradisiacal state of infant-like innocence.

Nonetheless, the parallels to an independent and impartial conflict-resolving body are evident. Here, the veil of ignorance is symbolized by the blindfold worn by Justitia. In this sense, one can agree with State Minister for Culture Neumann – justice is difficult to achieve without a court. Those committed to an alternative commission solution need to envision a staffing and procedural mechanism that will guarantee acceptance by all parties and conforms to the rule of law. Georg Heuberger, representative of the Claims Conference Germany, rightfully criticizes that the victim side is not represented in the Advisory Commission ("What are just and fair solutions in dealing with looted art?"). As such, its composition remains below one of the core standards of the German Judicature Act, which requires equal representation of judges sitting on the bench.8

Even Heutberger's additional demands can be classified according to the elementary attributes of procedural justice, namely procedural transparency, openness in provenance research, and dialogue with and between the interested parties. The last point is especially important, as the

8 Cf. § 36 para2 s1 Judicature Act, § 1034 para2 s1 Civil Process Order, § 16 para1 s2) Labor Court Law, § 12 Social Jurisdiction.

matter concerns both sides, even when Heuberger aptly complains that in the reality of restitution practice, it is by no means the case that dialogue is always conducted with all parties being treated as equals. More often than not, victim families are treated as mere "applicants," when not "petitioners".

These experiences contrast with the specific sensitivities found among those on the museum side, as understandably portrayed by Michael Eissenhauer, President of the German Museum Association. One could argue that the public mission to maintain a collection should be given precedence when "no objective clarity" can be established as to whether a museum item is a persecution-related loss, which is rarely possible after the lapse of more than half a century. Yet, the proverbial "painful hole," which the return of a high-caliber artwork would rip out of the fabric of a collection, can hardly be held up as grounds against a justifiable claim for restitution.

Provenance Research and Investigation

The veil of ignorance must be lifted on the basis of the facts. Fortunately, Uwe Hartmann, head of the Post for Provenance Research and Investigation established by the German government, now sees a trend towards museums systematically reviewing their collections for looted artworks without first being contacted by a lawyer about individual cases. Hartmann points to a standard work of art history, which ends in a summary on the history of looting art stretching back to the time of Napoleon, to show that this viewpoint required time to mature in Germany. Shlomit Steinberg from the *Israel Museum* provides a very lively account of the difficulties associated with clarifying cases of looted art. It indicates the difficult situation of second and third generation Holocaust survivors, many of whom have only recently discovered that there exists a chance to recover the artworks of their grandparents. The author of this article also concurs with the seldom expressed desire that one of the goals in the appraisal of looted art cases should be that the public can once again appreciate art without any disturbing worries. This will be a long path, however, writes Michel Kurtz, the Director of the U.S. National Archives and Records Administration (NARA), in his article elaborating on the complexities of serious research. He does not shy away from the demand for better access to private papers in the archives. Extremely useful is the appendix on the state of filming and digitalization of collections. International cooperation in the area of restitution, which NARA supports, must surely include the networking of appropriate European data banks, as Andrea Baresel-Brand of the *Coordination Office for Lost Cultural Assets* reports. Similar to Hartmann, Baresel-Brand also sees "a considerable and positive development … and the tendency is growing!" The author then provides a detailed account of the frequently expressed criticism of the data bank of the *Coordination Office* (www.lostart.de), in which she particularly highlights how the data is subject to limitations of use according to purpose. It is designed as a documentation and not research data bank**.**

The role of the art market

Monica Dugot, the head of the restitution section of *Christie's* auction house has illustrated with the help of many case studies the challenges that looted art pose for the art market. Dugot characterizes the typical restitution cases as the confrontation of wrongful loss with bona fide interim earnings, usually by many parties.9 Contrary to Heuberger, Dugot thinks that such conflicts of interest are beyond the normative framework of Aristotelian balanced

9 On the legal situation in Germany: Claudia von Selle, Dirk von Selle, "Illegaler Kunsthandel 1." in *Kultur und Recht,* Stuttgart 2008, L. 3.7, pp. 1-22, p. 10.

justice (compensation for damages, amends). Restitution decisions serve to settle the consequences of a systematic crime against humanity, such as that posed by the Holocaust. In the process, parties that have in no way taken part in the crime, well-intentioned individuals, perhaps non-Germans and even purchasers who themselves belong to the families of victims must bear responsibility, making it a far more difficult matter to achieve distributive justice. There simply *cannot* be a simple solution here. In light of all this, Dugot, who before taking up her position at Christie's worked for eight years at the *Holocaust Claims Processing Office*, calls for procedural transparency with careful examination in individual cases and differentiated rules for the burden of proof, as well as arbitration and mediation.

Almost as an aside, Dugot heralds nothing less than the turn of an era by calling for an agreement on unified procedures for auction houses with respect to restitution cases. Although this appeal remained unheard in Berlin, *Christie's* already presented the first plan for its own house at the Prague Conference, thereby encountering a fair deal of attention and interest. This signal is of great significance, as the threads of this story intertwine at (large) auction houses more than anywhere else, i.e. auction houses accept paintings that are potentially burdened by ownership questions, auctions can be stopped on short notice by a lawyer's letter with often very little factual evidence, Jewish families search for their paintings there and meet up with freelance art historians offering their services for provenance research, and this is where former claimants sell their restored artwork, occassionally for top prices. Having experienced such a hodge-podge of interests at close hand might explain how Monica Dugot is able to overcome the lager mentality so often encountered in the restitution debate. It remains to be seen if the other auction houses will follow suit with this ambitious goal that *Christie's* has, in all responsibly, set for itself.