Peter Raue, Tagesspiegel, 24 February 2009

Legal Venue where there was no legal venue

The Berlin decision regarding the restitution case Sach could result in a flood of litigation

The Berlin County Court has decided in favor of the restitution of the poster collection of that had been seized by the Nazis from the Jewish owner Hans Sachs. This is a rather spectacular decision with potentially unforeseeable consequences.

Other than with regard to the restitution of the Kirchner painting "Berlin Street Scene, the facts are more or less undisputed in this case: The dentist Hans Sachs (1881 – 1974) had put together a unique collection of around 12.000 posters over a period of forty years; he also edited the magazine "The Poster" and was its most important author. The passionate collector of art managed to emigrate to the United States together with his wife Felicia and their son Peter after the seizure of the collection by the Gestapo. After the war he received a compensation of 225.000 Mark for this reason. At this point Sachs still believed that the collection had disappeared; however, a few years later 4.000 posters from the collection appeared in the Zeughaus unter den Linden in Berlin, today's German Museum for History.

In 1966, a lively correspondence began between Sachs and the registrar of the collection, Mr Rademacher. Already in his first letter, Sachs declared that both of them had the same interest, *i.e.*, to do everything possible "to make the remainder of the collection accessible to the public with an interest in art and culture." He emphasized that he had "no material interest with respect to the collaboration", but only a spiritual interest. After all, he had "received a significant sum of compensation on the basis of a German court order already some time ago which has compensated me for my claims." Sachs confirmed this view in a later letter to a friend of his.

Even though the Sachs parents never made any attempt to request the restitution of the posters, after the death of his mother in 1998, the son insisted on the return of the collection. The museum rejected his request; subsequently, Sachs' lawyers called upon the Limbach Commission. The chair of this commission is the former President of the Federal Constitutional Court; other members are Richard von Weizsäcker, Rita Süssmuth, the art historians Thomas Gaehtgens and Günther Patzig, the philosphers Dietmar von der Pfordten and Ursula Wolf and the historian Rainer Rürup. The commission voices recommendations; it does not have the power to make binding decisions. In the case of the Sachs collection it opined against restitution and referred to the "clearly stated intent of Hans Sachs to leave the collection in the German Museum for History."

In spite of this recommendation, on February 10, the Berlin county court decided that the museum has to return the collection. The county court argued, first of all, that the seizure of the collection by the Nazis did not affect the title to the collection: This is correct and cannot be objected against. But in his further reasoning, the county court did not take account of the following: According to the Federal Suppreme Courts for Civil and Administrative matters, claims regarding unlawful Nazi governmental acts can only be brought on the basis of the Restitution Law, Compensation Law or Property Law. Therefore, claims under civil law, such as had been asserted by Peter Sachs, cannot be brought. The county court chooses to ignore this long-standing jurisprudence of many decades and judges, in clear contradiction to it, that the Civil Code takes priority over the Restitution Laws!

Even the declarations by Hans Sachs not to assert any claims because – as he wrote – he had "received a considerable sum as compensation" is considered as insignificant by the court. According to the court, in order to end his position as owner, a unambiguous (contractual) legal action would have been necessary, and such action was not taken.

It is also surprising how the county court counters the objection of "forfeiture". Forfeiture means: Anyone who asserts a claim after he has reneged it for many years and clearly stated that he did not want to assert his claim can be barred from making the claim. If the Sachs parents, over decades and also after the end of the GDR, did not reclaim their poster collection and declare that they do not want to do this; if the museum relies on these declarations and put work and effort into the collection in reliance on this, a claim raised by the son after the death of the parents ought to be "forfeited." This argument is countered by the county court with the brief remark that "forfeiture would not appear to be relevant solely (!) on the basis of time." No mention of the declarations made by Hans Sachs!

The court even leaves open the issue of whether compensation payments made would have to be repaid in the event of a restitution. It confirms the restitution claim without making restitution contingent on the repayment of the compensation, as is provided, for instance, in the Property Law.

Finally, the court considers it insignificant that restitution claims regarding objects that have reappeared in the former GDR had to be made before June 30, 1993. The county court asserts that the claimant must have actually lost his title at some point in the interim in order for this exclusionary period to be applicable. There is no legal foundation for this assertion which is made for the first time in a court decision.

The decision has another astonishing consequence: 10 years ago, the Washington Conference agreed on principles "with regard to works of art that had been seized by the Nazis" and such principles have been confirmed as binding by the Federal Republic of Germany. They are based on the recognition that restitution claims regarding seized Jewish property can no longer be enforced by legal means and request a "just and fair" solution for each individual

repayment of the compensation once the posters have been returned. This is what the law says and, thus, after reunification compensation payments have been recovered in similar cases with interest and compounded interests, in some cases very harshly.

Will this result in a flood of new liquidation as Raue expects? Probably not at this point, because the owners must expect the current holder of the property would claim statutes of limitation. According to this principle, 30years after the theft, every thief can spite the owner, saying: Everything is barred by statute of limitation; you won't get back your property. In the Sachs case the objection of statutes of limitation was not raised. After all, this would have been an abuse of legal remedies because the federal government, the federal states and the communal authorities have solemnly declared in December of 1999 that they would not raise the statute of limitations defence in cases of Nazi looted art. And the Deutsches Historisches Museum, the defendant in the Sachs case, is a federal institution.

Private owners of looted art can, nevertheless, still assert statutes of limitation. Even before the agreement on the Washington Principles in 1998 and more so in the last few years, looted art has been the subject of litigation in neighbouring countries and in particular in the United States because the signatories do not fully implement the Washington Principles. Current decisions from the United States show that even claims against current possessors of property are possible in that country because German statutes of limitation are considered to be in violation of fundamental principles of justice. Even forced sales in private auctions are considered *de facto* expropriations; a *bona fide* acquisition is not recognized.

On the international level, for some time already Germany cannot hide behind the legal shield of statutes of limitation or forfeiture and refuse the return of Nazi looted art on that basis any more. This is true for the Sachs posters as well as the "Sumpflegende" by Klee in Munich or the "Buchsbaumgarten" in Duisburg.

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