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The Jewish Heirs are left with the Law

A fierce debate was launched by the Berlin decision regarding the restitution of the Sachs collection. What will happen next?

By Gunnar Schnabel

While debate about issues of restitution are fiercely debated, there is a consensus that looted art that was the subject of unlawful seizure, forced sales or expropriation and is now in the possession of state institutions should be returned to the person concerned even today. This is what 44 countries committed to in December 1998 in Washington. Deadlines or exclusion periods in national laws should be disregarded. What does this mean for the Berlin case? Certainly it does not mean that the Washington Agreement was intended to prevent that the person concerned was able to take legal recourse. There is no such indication in the text, nor was it intended by the parties, that existing claims to the restitution of property should be excluded.

There was and always is the possibility to take a two-track approach. There was no restitution of Klimt's "Golden Adele". Instead an agreement was reached under civil law. The Louvre had to return valuable paintings because civil courts had issued respective orders. In the United States, looted art is – and particularly so for the last few years – obtained from private collectors as well as museums on the basis of judgments of civil courts. In Germany there is not exception to this. The Federal Supreme Court has stated correctly since the mid-nineties: Who has not lost his property can claim for such property at any time before the civil courts.

Sachs's son has simply availed himself of his fundamental rights, the guaranty of private property and legal recourse. The Berlin county court that had ordered the return of initially just one of the posters from the Sachs collection on February 10 and that been scolded for its decision could not decide in any other way. Judges are supposed to apply the law; they are no politicians or representatives of special interests. The only baffling thing is that the parties had prior to the litigation appealed to the Advisory Commission – the so-called Limbach Commission – and asked it for a resolution of the conflict. As is well known, this resulted in a decision against the Sachs son which had no binding effect. Apparently the parties did not – as is typical for arbitration agreements – agree to a reciprocal waiver of legal remedies prior to the procedure before the Commission – but this is only one of the many *ab initio* defects of the Advisory Commission which has mostly been condemned to inaction since its creation.

In six years out of thousands of disputed cases there was only a handful of recommendations – why that? The reason is as simple as annoying. The museums in question, such as the Duisburg museum in the case of Nolde's "Buchsbaumgarten", the cities and communities in question, such as Munich with respect to the negotiations about Klee's "Sumpflegende" refuse to appeal to the Commission. Since there is no right to unilaterally appeal to the

Commission, this is sufficient to disable the Commission. It is condemned to do nothing and becomes more and more of a joke. In other countries such as the Netherlands, Austria or England restitution commissions can act *ex officio* and have decided hundreds of cases since their establishment in the late nineties. Their resolutions which are based on careful legal reasoning are published and can be accessed through the internet. This creates transparency – and acceptance. The Limbach Commission in contrast only issues a brief press release. The reasons for the recommendation remain mainly in the dark for outsiders.

Furthermore, many museums, cities and communities have been thwarting the implementation of the Washington Principles for 10 years – impressive examples have recently been described in the volume edited by Melissa Müller and Monika Tatzkow “Lost Paintings – Lost Lives” (see FAZ of January 27). This is another reason why the persons concerned now have to file suit. Still, there will be no flood of litigation as feared by some critics. After all Germany has, almost uniquely in the world, rules under civil law that protect even the thief and *male fide* acquirer: At the latest 30 years after loss of possession, the owner can no longer claim the return of his property. In the Sachs case the Deutsches Historisches Museum did not claim statute of limitations. Other countries ignore the German rules on statute of limitations on the basis that it violates fundamental principles of law; opponents to restitution call this legal peace. But there has been no legal peace with regard to looted art for a long time already. Someone who had no success before the courts here due to presumably *bona fide* acquisition or statute of limitation can often successfully assert his claim abroad because German legal subtleties are not relevant there. Many concerned persons who are very old by now cannot and do not want to wait any longer. They will file suit in order to assert their property right to lost paintings when this is necessary. Therefore, there is need for political action. This subject can no longer be swept under the carpet any more, nor can it be disposed of by referring to a commission which has less and less relevance for the reality of restitution cases.

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Sachs and the Consequences

The dispute concerning the restitution of Jewish property does not settle down: In Berlin the county court ruled that the Deutsches Historisches Museum has to return a work from the Sachs poster collection to the heir of the previous owner (see FAZ of February 25). Among other critics, Peter Raue, a lawyer dealing with restitution cases, has sharply criticized the decision: While it were correct that the seizure by the Nazis would not affect title, the county court ignored in its reasoning that the Federal Administrative Court and the Federal Supreme Court had ruled that claims regarding unlawful Nazi government acts could only be asserted

under the restitution laws, compensation laws or property laws and that, therefore, claims under civil law could not be brought. Furthermore, the decision would render the Limbach Commission unnecessary because action by the Commission, according to Raue, "would only be called for if no legal claims could be asserted any ore before the courts." In Raue's view "all the efforts to account for the complicated issues of property and restitution through international declarations and national commissions of experts are rendered absurd" if recourse to the court remains possible. The attorney Gunnar Schnabel draws different conclusions.