25 Years of the Washington Principles on Nazi-Confiscated Art

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A Refugee's Freedom of Choice

Those who assert justified claims surrounding the return of art works are nevertheless often confronted with significant and challenging hurdles during court proceedings. These hurdles are introduced by decontextualising the circumstances of a single story, so that isolated personal decisions are presented as if they were examples of normal everyday actions, and one consecutive course of action.

Hans Erich Emden, a German Jew, was forced to flee to Chile to escape Nazi persecution. His new life as a refugee in South America was his only course of action, after being stripped of his German citizenship and being refused a residence and a work permit in Switzerland where his father held a Swiss passport. To obtain capital for his new life in South America, he was forced to sell his artwork, as explained by an experienced provenance researcher in a court proceeding to reclaim the art.[1] A question that arises from cases like this is whether the sale of art under duress should be considered a forced sale, almost equivalent to expropriation and therefore reversible, or a sale freely made that cannot be reversed.

1998: Evaluating the Restitution Claims Following an Extended Period of Silence

In 1998, representatives of 44 governments, twelve NGOs and the Vatican met in Washington to discuss what should happen regarding works of art stolen from Jews by Nazis. The original idea of developing binding norms had failed. To achieve a declaration, non-binding principles were passed – prompted by the Swiss – that recognized the different legal systems of the signatory states. In the declaration, the states are charged with integrating these principles into their own national legal systems.[2]

Since then, the non-binding nature of these principles has been seen as an advantage for handling this complicated topic. The practice of restitution and material compensation for cultural assets confiscated and looted through Nazi persecution since the end of the war should, however, be sufficient reason for introducing binding norms that deviate expressly from the applicable principles of civil law.

As this has not happened to date, the number of "just and fair solutions" since the Washington Principles of 1998 is marginal relative to the number of cultural assets for which searches have been initiated.

The Original Idea of the Allies Concerning Restitution During and After WWII

Many studies that focus on restitution begin with the Washington Declaration of 1998, and in doing so they fail to recognize that it is based on considerations, requirements and definitions that go back to the years 1943-1947. The Inter-Allied Declaration Against Acts of Dispossession Committed in Territories Under Enemy Occupation or Control, also known as the London Declaration of 1943, states that the Allied powers reserve the right to declare the trading in and acquisition of cultural assets to be illegal. It can be asked whether this relates to the sale of everything or just to stolen goods.

When WWII ended, attempts were made to counteract the redistribution of private assets by devaluing this type of "expropriation." However, issues arose in trying to define what type of assets were covered by this policy and what expropriation of this kind means. Numerous problems emerged in the practical implementation of this policy, as the court findings required that this type of claim could only be asserted if the principles and prescriptions of general civil law were suspended.

According to a report by the U.S. Department of State, there were no historical models outlining legal interventions addressing the ownership of private property

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1. "In fact, these sales by Hans Erich allowed him to get a hold of capital for his new life in South America." Expert Report of Laurie A. Stein, Sept. 20, 2021, U.S. District Court Southern District of New York, Civil Action No. 19-10155-RA-KHP.
2. U.S. Department of State, "Washington Conference Principles on Nazi-Confiscated Art" (December 3, 1998), available *at* https://www.state.gov/washington-conference-principles-on-nazi-confiscated-art/

that once belonged to persecuted and suppressed minorities. The report also determined that regulations within civil law fail to provide satisfactory outcomes, because basic contracting principles such as freedom of contract, contract compliance and legal stability stand in the way of this path. These contracting principles are still regularly brought as a defense in cases dealing with ownership disputes.

Upholding Contract Formation Principles Amidst Asymmetrical Power Dynamics

How can one defend the freedom to contract and ensure contract compliance when the legal position of the parties upon signing the contract is totally asymmetrical? We are familiar with such considerations from consumer protection law. In cases like this, a consumer does not have any negotiating freedom vis-à-vis a company that dominates the market. As a result consumers are seen as members of an "at risk" group.

The Exclusion of Principles of Civil Law and Definitions Used in the Restitution Laws

The Allied regulations pertaining to the return of ascertainable assets between 1947 and 1949 can only be explained in the context of asymmetrical power dynamics between the parties. The notable regulations include:

A. Law No. 59 of November 10, 1947 (Restitution of Identifiable Property) of the Military Government of Germany - American Control Area - (Official Gazette of the Military Government of Germany - American Control Area - Issue G of November 10, 1947 p. 1).
B. Ordinance No. 120 of November 10, 1947 (Restitution of Looted Property) of the Military Government of Germany - French Control Area - (Official Gazette of the French High Command in Germany No. 119 of November 14, 1947 p. 1219).
C. Law No. 59 of May 12, 1949 (Restitution of Identifiable Property to Victims of Nazi Oppression) of the Military Government of Germany - British Control Area - (Official Gazette of the Military Government of Germany - British Control Area - No. 28, p. 1169).
D. Ordinance BK/O (49) 180 of July 26, 1949 (Restitution of Ascertainable Property to Victims of National Socialist Repressive Measures) of the Allied Kommandantura Berlin (Ordinance Gazette for Greater Berlin Part I 1949, p. 221).[3]

All regulations followed a general assumption: Transactions of the persecuted that took place between January 30, 1933, and May 6, 1945 were the result of persecution.[4] It is from this basic assumption that the necessity of a reversal of the burden of proof and of proof of individual persecution for members of a persecuted group, such as the "Jewish race" as defined by the Nazis, arises.

The term "act of seizure" in the meaning of these laws is also relevant for our discussion today, as – in addition to state measures in the narrowest sense – it also includes:

(a) any transfer or relinquishment of property made during a period of persecution by any person who was directly exposed to persecutory measures on any of the grounds set forth in Article 1;
(b) any transfer or relinquishment of property made by a person who belonged to a class of persons which the German government or the NSDAP intended on any of the grounds referred to in Article 1 to eliminate in its entirety from the cultural and economic life of Germany by measures taken by the State or the NSDAP.[5]

Preventing the Enforcement of the "Special Right" by Prejudiced Parties in Civil Cases

One might assume that such clear rules would have led to numerous proceedings in which assets, including many works of art and culture, would be returned. This has not been the case. Legal experts from public offices responsible for resolving questions of compensation and the courts responsible for awarding and enforcing reparations attempted to introduce principles of civil law through the back door. This would allow them to reject claims of "violation of the obligation of good faith," or "objection to the abusive exercise of rights." In fact, the Higher Regional Courts, and the superior court responsible for reparations (ORG), regularly rejected such arguments for several years. They posited that the arguments were not convincing enough for many applicants, especially in view of the precarious situation in which many of the

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3. Law No. 59 - American Control Area - of 11/10/1947 ABI. Edition G, p. 1 (USREG); Ordinance No. 120 of 10.11.1947, OJ of the French High Command in Germany No. 119 of 14.11.1947; Law No. 59 of the Military Government - British Control Area - OJ No. 28, p. 1169 (BrREG); BK/O (49) 180 of the Allied Command of 6/26/1949, VOBl. f. Gross-Berlin, I, p. 221 (REAO).
4. Art. 3 of the order BK/O (49) 180 of the allied command dated July 26, 1949, REAO.
5. Art. 3, Sec. 1, (a) and (b) of the order BK/O (49) 180 of the allied command dated July 26, 1949, REAO.

applicants found themselves following years of persecution and flight.

Moreover, there were additional requisites that were required to allow for the return of art works. First, the applicant needed to locate the work of art, as the jurisdiction of the courts, and the applicable law which were assigned to one of the Allied forces, depended on this. If the supposed owner denied that the asset in question was at the alleged location, then the claim was null and void. The claimant's ability to obtain information was very limited. Art dealers lacked any willingness to cooperate, and the public administrations and museums often denied possession of said artworks or maintained that they had been lost or destroyed.

An End to the Post-war Efforts and the Enforceability of Claims

Although a considerable number or works of art were returned to their original owners or their countries of origin thanks to the "Monuments Fine Art and Archives (MFAA) Program" of the "Central Collecting Points," only a small percentage of looted artwork was returned. Today, we refer to these two initial phases as the "primary phase" (Allied law) and the "secondary phase" (from the provisional law of 1952 to the end of the 1960s, including BEG and BRueG).

Following these initial phases, attempts were made to curtail these corrective measures. Many European countries rejected most lawsuits and applications from the end of the 1960s onwards because statutes of limitations had passed. This heralded the end of the special law pertaining to restitution, and subsequent claims under civil law were rejected due to the statute of limitations or other obstacles.

However, various factors in the 1990s would bring these issues to the forefront. First, provenance-related issues arose in the art trade and at exhibitions in the late 1990s in the United States, resulting in applications for artworks to be returned. Some of these applications led to pieces being confiscated for the purposes of a judicial review of the claims. Additionally, the opening of archives after the fall of the Iron Curtain highlighted the extent of the expropriation of cultural assets from their Jewish owners. These factors led the subject to be placed again on the international agenda and ultimately led to the Washington Conference of 1998.

Accusations that Current Claims to Looted Art Were Motivated by the Increased Value of the Artworks

In view of the limited nature of the post-war art restitution procedures, accusing the legal heirs of the original Jewish owners of not doing enough or waiting too long to assert their claims, is an unjustified argument. It was determined that, apart from the short period immediately following the war, very little time remained for submitting applications to recover property. That is why, when assessing the efforts by former owners, both the time constraints and a claimant's personal living circumstances must be considered. Factors include their economic situation, their ability to prove the circumstances in which the purchase and the loss took place, as well as tracking down where the artwork is currently located. If it is difficult for the actors in the art market to provide such information, then more weight must be given to Jewish vendors who were in the process of fleeing and did everything possible to obtain financial resources to save the lives of their families. Furthermore, the art dealers who were involved in the market at the time failed to provide Jewish victims with any support whatsoever. They feared that they would be held liable by the buyers themselves. This indeed was the case in a few successful civil cases in the post-war period. An example of this was the case of *Emil G. Bührle v. Theodor Fischer, Galerie Fischer and the Swiss Confederation*, July 5, 1951.[6]

The German Interpretation of the Washington Principles and the Deviation from Principles and Terms Used in the Allied Laws

In Germany, museums and collections, both at the national and municipal level, jointly committed themselves to the Washington Principles and issued a "handout" and "guidelines."[7] Like the previous legal regulations in Germany, the handout refers to Allied laws and decisions associated with the terms "persecution-related loss of assets" and "confiscation," and their subsequent interpretations.

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6. Judgment of the Federal Court of July 5, 1951 (Emil G. Bührle against Theodor Fischer, Galerie Fischer and the Swiss Confederation), unpublished decision. Commentary: Emile Thilo, "La restitution des rapines de guerres," JOURNAL DES TRIBUNAUX 386 ff. (1952).
7. German Minister of State for Culture and the Media, "Guidelines for implementing the Statement by the Federal Government, the Länder and the national associations of local authorities on the tracing and return of Nazi-confiscated art, especially Jewish property of December 1999" (2019), available *at* https://www.kulturgutverluste.de/Content/08_Downloads/EN/BasicPrinciples/Guidelines/Guidelines.pdf?__blob=publicationFile&v=8

An editorial in the newsletter published by the Advisory Commission on September 14, 2022, said:

> The Guidelines for verifying whether a work of art was Nazi-confiscated and for preparing decisions on restitution claims [p. 29] offered here are essentially based on the US Military Government Law No. 59 of 10 November 1947. While the Washington Principles are limited to works of art "confiscated by the National Socialists," the Guidelines – in accordance with US Military Government Law No. 59 – expand the definition of Nazi-confiscated art to include property lost as a result of forced sale or for other reasons. US Military Government Law No. 59 was not intended to apply to the appraisal of a sale of cultural property outside the borders of the Nazi sphere of power: the Act was exclusively focused on business transactions that took place within territory under Nazi control. The criteria enumerated in the Guidelines are therefore not readily applicable to the appraisal of a legal transaction which took place outside this domain.[8]

Meanwhile, the current version of the 2019 Guidelines states: "However, even if an item changed hands outside of those territories [German Reich and occupied territories], it still cannot be ruled out that the item changed hands as a result of Nazi persecution" (p. 21).

This passage is a mistaken account of the historical events. The planners of the 1998 Washington Conference and the authors of the Principles used the restitution and compensation regulations, laws and practices created by the Allies from 1947 onwards as a basis for the final Principles. In the 2009 Terezin Declaration, the terms "looted and confiscated" explicitly refer to the same concepts that are used in the Allied laws of the post-war era and all subsequent legal regulations that draw reference to these, including the 1990 law regulating unresolved matters relating to assets for the former territory of the GDR.[9] Opponents see in this an "expansion" of the original area of application of the Washington Principles, although it is in fact a clarification.

The Swiss Interpretation of the Washington Declaration

In Switzerland, the terms "looted and confiscated" were initially interpreted literally. How can such a dissenting point of view and interpretation come about? The Swiss delegation representatives discussed their literal interpretation of the terms "looted and confiscated" in the context of Swiss political neutrality, just as they had already done in the period immediately after the war. Switzerland was neither an occupier nor was it occupied, and therefore cannot be held responsible for the acts committed by those who participated in the war.

The "Glossary of Nazi-looted art" of the Federal Office of Culture (BAK) reflects this position by defining three relevant terms as follows:

> Nazi-looted art
> The Washington Guidelines of 1998 define Nazi-looted art in the title and under numbers I, III-V, VII-X as "works of art confiscated by the National Socialists."
> In the exercise of its ethical and moral responsibility, the central government assumes that – irrespective of a categorization – every individual case requires a comprehensive examination. The decisive question for the central government in the sense of the Washington Guidelines is whether a change of hands between 1933 and 1945 had an expropriating effect. In addition to direct confiscation, bogus sales, sales at bargain prices and sales without legitimation also fall under the term "Nazi-looted art." In cases of "escape art," "escape assets," or "displacement due to persecution," it must be correspondingly assessed whether the change in ownership was expropriating and therefore a case of Nazi-looted art, so that just and fair solutions can be found or achieved.

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8. https://www.beratende-kommission.de/media/pages/netzwerk/newsletter-september-2022-n014/8b602c3c46-1673948266/newsletter_2022-14.pdf
9. https://www.gesetze-im-internet.de/vermg/BJNR211590990.html, § 1, 6: "Pursuant to Section II of Order BK/O (49) 180 issued by the Allied Command in Berlin on July 26, 1949 (VOBl. for Greater Berlin I p. 221). The beneficiary is presumed to have lost property as a result of the persecution."

Confiscation
The confiscation of goods or property without compensation; as a rule, by state organs (cf. the term "Nazi-looted art" above).
Cultural assets confiscated due to Nazi persecution
The term "persecution-related withdrawal" is not part of the international regulations. In Germany, it is applied in the "Declaration of the Federal Government, the Länder and the National Associations of Local Authorities of 1999 to find and return cultural assets withdrawn due to Nazi persecution, in particular from Jewish ownership (joint declaration)" and the "German Handout."[10]

The Glossary omits terms from the Terezin Declaration like "forced sale" or "sale under duress"[11] which have an explicit connection to earlier legal wordings and definitions. It also omits the "presumptions"[12] and regulations pertaining to the "shift in the burden of proof."[13] It was important to the signatory parties in Washington to clarify these backgrounds, terms and principles as well as the extent of the transactions. Without the presumption provisions relating to the persecution of entire groups of people, many claims would not be assertable, in either the post-war era or today, particularly because certain acts are barely provable. However, in the eyes of a civil law expert, the term "confiscated" cannot be applied to a sale between private parties. The same must also apply for the reversal of the burden of proof because of the presumption provision.

This "other" approach has a long tradition in Switzerland. It was the Allies who forced Switzerland in 1945 and 1946 to pass two resolutions in the Bundesrat (Federal Council) that suspended the principle of good faith in civil law until at least December 31, 1947. However, the only works of art covered by this suspension were those that had been directly confiscated or expropriated by German authorities or by occupying institutions. Of the hundreds, if not thousands, of artworks that were circulating on the Swiss market at that time, only 70 were returned to their original owners due to a decision by the so-called "Raubgutkammer" (Chamber for Looted Art).

While the claimants did not have to compensate the alleged purchasers when the artwork was returned, the purchasers who returned the art were entitled to compensation from the dealers. At the same time, the purchasers of the works were often able to buy them back again and in doing so exploited the current financial situation of the owners as well as the crumbling art market. In addition, the Swiss courts confirmed during legal proceedings that the legal presumption of "good faith" was difficult to disprove and that collectors like Bührle were not experts but at best only "educated laymen" who could not be subjected to any high standards of care. It is no wonder that, almost without exception, all claims for return in Switzerland have failed right up to this day.

Court Assumptions of Equal Bargaining Power can Frustrate Claimant Success

As part of the work carried out by the "Independent Expert Commission Switzerland Second World War" (UEK) that was established in Switzerland in 1996, two historians introduced the term "escape art/escape assets." These terms do not appear in any previous law, declaration, or regulation, and they only describe a group of persecution-related losses of assets with certain common features from a historical perspective. Here, the perspective of the persecuted person is ignored, as this concept assumes that the persecution had come to an end in the directly occupied territories and therefore the coercion to sell had also come to an end. This point of view also ignores the continuing precarious life situations that were caused by the persecution, as well as the threat to life or physical

10. https://www.bak.admin.ch/dam/bak/de/dokumente/raubkunst/merkblatt_hinweis/glossar-ns-raubkunst-neu-de-fr.pdf.download.pdf/Glossar_NS_Raubkunst_03.22.pdf
11. "Recognizing that art and cultural property of victims of the Holocaust (Shoah) and other victims of Nazi persecution was confiscated, sequestered and spoliated, by the Nazis, the Fascists and their collaborators through various means including theft, coercion and confiscation, and on grounds of relinquishment as well as forced sales and sales under duress, during the Holocaust era between 1933-45 and as an immediate consequence." *See* https://2009-2017.state.gov/p/eur/rls/or/126162.htm
12. U.S. Department of State, "2009 Terezin Declaration on Holocaust Era Assets and Related Issues" (2009), available *at* https://www.state.gov/prague-holocaust-era-assets-conference-terezin-declaration/
13. *See also* Principle 4, "Washington Conference Principles on Nazi-Confiscated Art" (1998), available *at* https://www.state.gov/washington-conference-principles-on-nazi-confiscated-art

condition of the persecuted persons. Switzerland very rarely issued a residence permit, and it was almost impossible for those without one to earn a living.

In cases dealing with the principle of "escape art," the contractual parties are seen to be negotiating partners of equal standing who are free to agree to a price at the time of the sale. The claimant bears the burden of showing that the actual circumstances deviated from this and must show that the principles of freedom to contract and private autonomy under the law do not apply. The primary issue in these cases is that the courts view the circumstances that ultimately led to the sale of the artwork as separate from the claimant's status as a persecuted person.

Appraisals of "Persecution-Related Withdrawal of Assets" Manipulate the Facts to Omit the Effect of Persecution on the Sale and Focus Only on the Concrete Transfer

To be able to reject claims to restitution, it is sufficient for many museums to prove that the former owner had already offered the work of art for sale at least once before 1933. Furthermore, every detail from private relationships is resurrected to weaken, if not completely eradicate, the causal relationship between the persecution of the vendor and the specific sale. This process of "cherry picking" is presented under the auspices of "searching for the truth," and leads to a minimization of the vendor's persecution at the time of the sale. One vendor was accused of having sufficient wealth at his disposal to finance his survival and escape, meaning that a sale "was not really necessary for him." In another case, the fact that a vendor even wanted to negotiate a price to possibly make a small profit was seen as evidence that they had freedom to contract. In another case, the collector lost his wife and all hope and "therefore just wanted to sell."[14] The pressure to flee and the constant threat of deportation hardly play any role whatsoever in such considerations. Those involved in such discussions allow themselves to make appraisals that one can only describe as presumptuous. The result cannot do justice to the requirements of the Washington Principles and their aims.

Switzerland Moves Toward a Context-Based Provenance Research and an Independent Commission

There is, nevertheless, reason to be optimistic. The parliamentary initiative of Jon Pult, a member of the Nationalrat (National Council) from December 9, 2021, states:

> The Bundesrat is instructed to establish an independent commission to make recommendations for "just and fair solutions" in cases of Nazi-confiscated cultural assets in accordance with the "Washington Conference Principles on Nazi-Confiscated Art" from December 3, 1998 (Washington Principles 1998) and the "Terezin Declaration on Assets from the Holocaust Era and Related Matters" from June 30, 2009 (Declaration of Terezín 2009). It should also be examined whether the Commission should make corresponding recommendations for cultural assets from other, specifically colonial, contexts as well.[15]

The part of his motion cited was affirmed by the Swiss government on February 16, 2022, by the Nationalrat on May 11, 2022, and by the Ständerat (Council of States) on September 26, 2022. Earlier, it was said that the lack of an independent commission was due to the lack of cases. But how can there be cases when the claimants have no hope of successfully asserting their claims? We must therefore wait and see what guidelines and scope for action a Swiss commission will be granted. Cases pertaining to art sales between 1933 and 1945 that resulted from Nazi persecution will no doubt turn up.

In this regard, Kunstmuseum Bern has adopted a leading role in the wake of a dispute arising from the bequest of Cornelius Gurlitt of his controversial collection of Nazi-era art to that institution. Gurlitt, who died in 2014, had inherited the collection from his father, a dealer for the Nazis who bought art plundered from the Jews. The question was under what conditions the Kunstmuseum Bern should accept Gurlitt's bequest and what standards should be used to check the provenance of the works of art. It was decided, deviating from the Swiss standards that were common at the time, to use context-based in-depth research according to German standards. Harshly criticized for its dissent of the Swiss position just a year

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14. "Although Glaser emigrated and auctioned off a considerable part of his art collection as a result of Nazi persecution, the extent of the duress to sell his goods (instead of exporting them) is unclear." Decision of the Kunstkommission in the Matter of Curt Glaser, pp. 27-29, available *at* https://kunstmuseumbasel.ch/fr/recherche-scientifique/recherche-de-provenance/curtglaser
15. https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20214403, parliamentary motion of the deputy Jon Pult, Dec. 9, 2021.

ago, an appraisal of the inventory of Kunstmuseum Zürich is now pending. Now, research is to be carried out in line with the principles of context-based provenance research and include all alternative forms of withdrawal, as well as persecution-related sales in Switzerland.[16]

Germany's Advisory Commission Is Criticized for Its Interpretation of the Washington Principles

Switzerland is now determined to adopt a new approach. Instead of ignoring the causal relationship between the persecution and the asset sales that took place in Nazi-controlled territories, Switzerland now considers the persecution process having been uniform and ongoing. However, the former German office supervisor and current consultant to the Advisory Commission criticizes the guidelines and decisions of the Commission in the aforementioned Newsletter of the Advisory Commission from September 2022:

> While the Washington Principles are limited to works of art "confiscated by the Nazis," the Guidelines – in accordance with U.S. Military Government Law 59 – expand the definition of Nazi-confiscated art to include assets lost through foreclosure or for other reasons. U.S. Military Government Law No. 59 was not intended to apply to the appraisal of a sale of cultural assets outside the boundaries of the Nazi sphere of power: The law was aimed exclusively at business transactions that took place within the Nazi area of control. The criteria listed in the Guidelines are therefore not readily applicable to the appraisal of a legal transaction that has taken place outside this scope.[17]

In this context, it becomes clear that once again the role of persecution at the time of a sale is being overlooked, and such sales are being justified based on principles of contract formation under civil law. And yet, the Washington Principles, like all restitution regulations to date, aim exclusively at establishing a causal relationship between the persecution and the legal act that led to the loss of an asset. Generally, those who managed to obtain a visa for a third country did so at great personal risk and at high financial cost. They also faced an uncertain future, including moving to another antisemitic milieu, and in most cases lost their entire wealth in Germany. Works of art were often the only liquid assets that could be exchanged for foreign currency, which made selling them the only available resource to escape National Socialism.

This is why evaluating a restitution claim based solely on an assessment of the vendor's other economic assets is not well suited to achieving the desired goals of the Washington Principles. While on the one hand it is undoubtedly difficult to estimate the actual value and availability of a person's resources, there is the question of what the person needed to accomplish, and what assets could be used to achieve their specific goals. For example, a court may ask how many expenditures a person had to manage, the cost of traveling to one destination versus another, or what life changes seem appropriate from today's point of view. What should the benchmark be? In some of the most recent cases, this approach has led to catastrophic outcomes.

The Washington Principles try to recognize the impossibility of undoing the past by trying to offer a framework to at least return the artworks to their rightful owners. However, a more suitable method of achieving this goal would be to finally remove the remaining obstacles that stand in the way of asserting claims, for example, by allowing the unilateral appealability of cases to the German Advisory Commission and to stop allowing cases to hide behind the federal system, which never presented a problem for uniform regulations.

What Länder arguments against unilaterally commissioning the Advisory Commission stand in the way of a regulation by Germany's central government? The same question applies to the parliamentary initiative in Germany (which simply petered out) to lift the statute of limitations for cases where a sale took place in bad faith.

The British Way of Comparing Moral Fortitude with the Strength of a Legal Title

As the proceedings before the Spoliation Advisory Panel in England show, a purely moral consideration leads to a comparison between the moral strength of the claimant's position and the legal strength of the current owner's interest in the artwork. From the current owner's perspective, their position is far removed from the aims of the Washington Principles, especially when one

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16. Gerhard Mack, "The Kunsthaus Zürich softens its position in the debate about art that was acquired during the Nazi era," MAGAZIN DER NZZ, March 11, 2023, p. 61.
17. https://www.beratende-kommission.de/media/pages/netzwerk/newsletter-september-2022-n014/31cd62e614-1664873516/network_newsletter_14_september_2022.pdf

considers that the Terezin Declaration deems bringing about a "just and fair solution by returning the asset" as the best solution.

This procedure was already criticized during an independent evaluation in 2015:

> Recommendation 14
> The Terms of Reference should not be changed to require the loss to be more closely linked to the actions of the Nazis or their allies.
> Recommendation 16
> I recommend that the Terms of Reference should be clarified to make it clearer that, if spoliation is established on the balance of probabilities, the conduct of the institution will generally be irrelevant. I further recommend that the Panel make it clear that they will not generally entertain arguments about an institution's behaviour.[18]

Based on this, one can conclude that current methods of evaluating such claims always ignore the legal and considerable systematic disadvantages faced by a persecuted group and the resulting factual and decision-making constraints.

Conclusions

Although it is a positive outcome when every solved case (apart from direct rejections) is carried out under the designation "fair and just solution," it must be acknowledged that in many cases, upon closer inspection, the claimants simply give up as they just want the topic to finally end. Moreover, they are realistic enough to realize that they cannot expect assets to be returned if they lack necessary evidence or if there are other legal or factual barriers standing in their way. Therefore, one can hardly claim that every solved case is in fact "just and fair."

I have often come to realize that a court or commission would not successfully handle a case in the near future and therefore recommended a settlement as a means to achieve something resembling justice in the shorter term.

With every country-specific interpretation and differentiation between case categories, we move farther and farther away from the insights that seemed obvious in 1943. Between 1933 and 1945, every tier of society ranging from the institutions and authorities of Nazi Germany, its collaborating public authorities in the occupied territories, to ordinary citizens both inside and outside of the German sphere of power, greatly profited from the predicament of the Jewish population, which had been stripped of its rights. The consequences of such an unprecedented phenomenon cannot be remedied with instruments of civil law that proceed from the notion that the subjects involved have equal status. This is also true in the case of alternative dispute settlement, where the principles of civil law shine through as an evaluation criterion. In these cases, disenfranchised vendors are treated as if they had the same rights of the other party, rather than as a party that was completely stripped of its rights.

Moving forward, we must develop definitions and standards that consider the context of an asset sale, including both the legal and actual positions of the persons and institutions involved. Falling back on civil law to interpret the facts of transactions with such extreme examples of disproportionate positions is not an option for the above stated reasons.

If we continue utilizing so-called "soft law" as a means of avoiding a special legal regulation that deviates from civil law, then an interpretation is left to the discretion of the Commission's members. Experience has shown that legal experts among Commission members tend to fall back on instruments of civil law or try to work without any definitions at all.

There is also a risk that individual cases will be wrenched out of their original context, and that decisions will be taken based on criteria such as the vendor's circumstances upon escaping persecution, their current position in society, or even how closely related today's applicant is to the original vendor.

All these considerations prevent victims of the Nazi regime from retrieving property that they never would have lost without the regime's rule. By squabbling about who has the right to interpret family histories, we run the risk of missing this last opportunity to correct this matter. We should do everything in our power to prevent any further delay. ■

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18. Sir Paul Jenkins KCB QC, Independent Review of the Spoliation Advisory Panel, 2015, available *at* https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/415966/SAP_-_Final_Report.pdf