Learning from History?

Current Developments in the Restitution of Nazi-Confiscated Property

By *Benjamin Lahusen*

The idea that one can learn from history has a long tradition and has materialized in various different shapes. In its most direct form, it says: History holds a pool of experiences from which guidance for action in the present can be gleaned. In the best case, history immunizes against committing a historical mistake again; in a less optimistic version, history at least allows to take precautions to ensure that certain events cannot happen again. For German history, the keyword "Weimar" receives much attention in this respect. I must confess that l am very skeptical when it comes to drawing certain "lessons" from Weimar, but that is not my topic now.

Not I would like to talk about a much less immediate form of learning from history, namely the German tradition of *Wiedergutmachung* – a typical German noun that is only inadequately translated as "reparation" or "retribution" –, and now *Wiedergutmachung* particularly with regard to cultural assets that were lost under the rule of National Socialism.

It is generally agreed that National Socialism was, among many other things, the greatest robbery in history. Between 1933 and 1945, hundreds of thousands of cultural assets, real estates and companies were sold, confiscated, expropriated, stolen under Nazi pressure in Germany and far beyond. An important goal of the Allies was the reversal of this looting, especially the notorious "Aryanisations". In 1947, Law No. 59 of the US military government was enacted, which pursued the goal of restituting "identifiable assets" to persons persecuted under National Socialism. By shifting the burden of proof and excluding acquisition in good faith, the law went a long way towards accommodating the victims of the Nazi regime. A very short summary: The loss of property of a racially or politically persecuted person was considered to be due to persecution – that is the presumption of confiscation – and was subject to restitution unless the later owner could prove the opposite, i. e. in particular was able to show that an appropriate purchase price had been paid and the persecuted person had the free right of disposal of that purchase price. In principle, the aim of the law was in rem restitution, so the return of the objects themselves, not compensation payments.

For the most part, real estate and companies were not difficult to "identify" because there are corresponding public registers. The fate of looted art collections, however, could often only be clarified after decades; much remains in the dark to

this very day. This was one of the reasons why some topics were once again put on the international agenda in the 1990s, when the political, but also the archival conditions for dealing with the past had fundamentally changed after the fall of the Iron Curtain. The London Conference of 1997, which sought an international settlement of the so-called Nazi gold, should be mentioned here, but then above all the Washington Conference of 1998, whose official title was "Washington Conference on Holocaust-Era Assets".

The term "assets" clearly goes beyond "cultural goods or cultural property". In fact, cultural property, which today is mainly associated with the Washington Conference, was, at the time, not the most important issue. For the German side in particular, the focus was elsewhere. It was the claims against German insurance companies that the German government was most concerned about, up to calls for boycotts against German companies that were threatening in the US at the time. "Cultural property", on the other hand, did not trouble Germany, on the contrary. In this respect, there was the general conviction that everything that could possibly be done had already been done, that claims against German institutions, were only possible to a very small extent – the German government was aware of a total of 21 claims – while, on the other hand, Germany itself could finally claim a huge number of cultural assets that Allied soldiers had looted in Germany after the Second World War. The German government thus believed that from reopening Holocaust era claims German itself would primarily benefit.

The German delegation thus returned from Washington with quite some satisfaction. The report about the Conference states that France, the Netherlands, and Switzerland had had a rough time, where the German policy of *Wiedergutmachung* had received only positive comments. Greece had complained about the 1944 forced bond, but no other country had responded to these accusations, and neither to the Eastern European mourning about forced laborers. Finally, the German delegation claimed to have succeeded in setting their own accent to the final declaration. Purportedly following the German proposition, the declaration says: "The Conference recognizes that among participatory nations there are differing legal systems and that countries act within the context of their own laws." That was some wort of national reserve, which the Germans had defended to protect good faith acquisitions under the German Civil Code.

From the distance of more than 20 years, it is difficult to say how many misjudgments the German government succumbed to back then. The official 21 cases have since been joined by thousands more. Germany has indeed recovered some cultural assets, but the problem of art looted *in* Germany (*Beutekunst*) has lagged far behind the number of art works looted *by* Germany (*Raubkunst*). The real boomerang, however, was the nation-state reservation that the German delegation was so proud of. In 1998, the German legal system already had a tradition of more than fifty years of restitution of identifiable assets and it was precisely this tradition that was now being resorted to again, albeit in a most distant manner. In order to examine

which object had a provenance that mandates its restitution old Military Government Law No. 59 of 1947 were reused, but not in the form of a law, or a decree, but as non-binding "guidelines", i. e. deliberately beyond the law.

This had several reasons for this. First was the recognition that legal recourse for Holocaust Era Assets was excluded anyway. According to German Civil law, all claims had to fail at the latest because of the statute of limitations. Furthermore, it was German federalism that stood in the way of a too far-reaching binding force, because the German states did not want to give up their cultural sovereignty on such a sensitive issue. And finally, one had, supposedly, learned from history: the reparation procedures of the 1950s and 1960s (*Wiedergutmachungsverfahren*) were generally regarded as unpleasantly bureaucratic and formalistic. Jewish claimants who between 1933 and 1945 had been forced to give German authorities intimate insights into their assets before their deportation or to finance the Reich Flight Tax or other special levies were forced in the post-war period, again by German authorities, to again submit detailed documents in order to obtain reparations. At the end of the century, after the Washington Conference, this mistake was to be avoided and for this reason, too, a deliberately unbureaucratic, unformalistic, non-legal procedure was chosen, which in the end was to lead to what the Washington Conference confidently called "just and fair solutions".

This historical lesson soon turned out to be a fatal misconception. The treatment of looted art quickly developed into a field with its very own rules. The historical questions dealt with by provenance researchers are extremely complex and require detailed skills in art history, economic history, and social history. In addition, there are difficult questions of legal history, such as the extent to which it can be relevant today whether a Jewish claimant included a work of art in his restitution claim in the 1960s. If there was no claim, can this be regarded as an incidental renunciation? Are we repeating the formalism of the past if we see it that way, or are we merely giving *Rechtsfriede* (legal peace) the recognition it deserves?

On the whole, therefore, we are dealing with a field in which a concentrated amount of expertise sits on both sides, law firms, historical institutes, legal departments, and which is subject to considerable moral pressure. But although we find a structure which is not the least of legal nature, the subject still eludes legal categories to this day; to a certain extent, it is law that refuses to be law, a law in moral disguise. It would be interesting to take a closer look at this observation. What would Max Weber say to all this? And can a modern constitutional state, following the rule of law, actually commit itself to a certain action while rejecting law as a form of action?

I will come back to that. Before that, the title obliges me to talk about "current developments" in the restitution practice. This is an assignment that puts me in a certain embarrassment. It is not easy to make general statements in this area because there is no general overview of restitutions of cultural property in Germany. Culture is a state matter, so the German states can develop their own standards and act autonomously according to them. There is no central register from which all restitutions of

the last 20 years, or at least the majority of them, could be taken. Data protection concerns are often raised, less often it is admitted that it is also a matter of not creating precedents.

At least it can generally be said that the issue is being taken seriously. While the first positions for provenance researchers at public institutions, which were created around the year 2000, were usually limited to two years, they are now permanent positions. No public institution can afford to do without provenance research anymore.

However, public provenance research is still very much dependent on individual cases. The pragmatic orientation of the subject and the frequent link to current restitution demands have given provenance research the character of a museum fire brigade: There's a fire somewhere, and the provenance researchers are called to put it out. The beginning and end point of their research is the disputed work. There is no institution that could make a system out of the uncountable individual cases, or that could at least set precedents.

I take this as an opportunity to say a few words about the Advisory Commission, for which I served as secretary. The Commission was set up in 2003 as a result of the Washington Conference as an alternative dispute resolution mechanism mentioned there. Unfortunately, the fear or bindingness was also present here. To this day, the Commission can only take action if both sides agree to it – the state can thus unilaterally withdraw from a dispute resolution mechanism that it itself has set up –, the Commission can only make non-binding recommendations, and finally, the Commission is obliged to assess only individual cases, which, as was expressly desired, should have no precedent for other individual cases.

This brought together all the misconceptions that had already inspired Germany during the Washington Conference: we would only have to deal with a few cases at most, the cultural sovereignty of the *Länder* should not be touched, and any hint of normativity should be banned. For a jurist, this is a strange construction: a court of justice that should not be a court of justice; individual cases that should have no connection to each other; precedents that are denied their precedent character. It fits in with all this that until a few years ago the Commission justified its recommendations with one or two sentences, i. e. it cultivated more or less the practice that was last known in Germany from the Imperial Chamber Court, which disappeared in 1806.

Finally, one current development emerges from these observations. The Commission has been criticized ever since it existed. This is unavoidable in an adversarial process in which much is at stake. Initially, the criticism tended to come mainly from the side of the claimants, who accused the Commission of being non-transparent, inefficient and lacking empathy; for about three years now, the opposite accusation has been that the Commission is too friendly towards restitution and has abandoned the Washington Principles to the detriment of the museums. One of the last decisions concerned a sale in New York in 1940, which the Commission regarded as a forced sale, as the Jewish owner had been imprisoned in a concentration camp and completely dispossessed. Just before the sale, he noted he was only selling

to finance his escape. This did not sit well with many museums and Feuilleton writers.

Whether these perceptions of the Commission's work are right or wrong is not my point. It is more interesting to see that the same premise is implicit in all criticism, namely that the Commission is indeed a court of justice for restitution issues. Historically it has never been such a court, nor is it supposed to be to this day. But public perception and public expectation are different. The project of drafting an area of law that should not be allowed to emerge into law under any circumstances does not seem to have worked out. The public, claimants, cultural institutions, expect that there is an institution that offers orientation, that structures expectations and generates commitment, and they criticize the institution by which these hopes are not fulfilled, no matter what the official mandate to this institution may be. Law, in other words, is supposed to be law.

This brings me to the conclusion: German restitution practice has actually learned from history. In a certain way, it can even be described as applied legal history. It takes sources from all epochs of the post-war period in order to gain a normative substrate which can be used to evaluate events and processes from the time of National Socialism. The historical lessons of the 1990s, namely that it was an excess of law that made *Wiedergutmachung* an unpleasant experience for those affected and that one therefore should resort to an excess of morality, have not proven to be sustainable. More morality at the institutional level does not necessarily lead to somehow more moral outcomes. And that is the lesson I would draw from today's perspective: The separation of law and morality seems to make good sense.