Open Forum

Till Vere-Hodge*

What are Some of the Main Challenges When Seeking Restitution of Nazi-Confiscated Artworks?

https://doi.org/10.1515/eehs-2024-0030
Received May 18, 2024; accepted May 21, 2024; published online June 19, 2024

The framework applicable to restitution claims for Nazi-looted artworks is not a straightforward one. Some of its complexities include (i) the scale and context of the looting that occurred in the relevant period; (ii) the passage of time that has passed since then; (iii) the cross-jurisdictional nature of the problem; (iv) the limits and limitations of applicable legal solutions; (v) the relative vagueness of the "moral claims" framework that has developed to deal with claims to Nazi-looted art; and (vi) the fact that (regardless of all general observations), hardly any two cases are the same.

A case-by-case analysis is generally required for each claim to objects looted, stolen, sold under duress or dispossessed in consequence of persecution by the Nazis. The Washington Principles of 1998, endorsed by over forty nation-states globally, require that claimant and current holder/collector find "*just and fair solutions*"[1] to resolve any issues in relation to a red-flag artwork that was "confiscated" by the Nazis in the context of persecution. To do so, it is necessary first to have regard to legal and moral arguments within the framework that has developed over the past 25 years. This is not an easy task, because many cases tend to settle confidentially, rather than before a court of law or a national 'ad-hoc' panel[2] (another element of the Washington Principles).

Ironically, on the face of it, the starting position for analysing a claim to a Nazi-confiscated object appears to be a lot less complex than that for other categories of

1 Principle 8, see https://www.state.gov/washington-conference-principles-on-nazi-confiscated-art/.
2 Principles 10 and 11, see https://www.state.gov/washington-conference-principles-on-nazi-confiscated-art/.

***Corresponding author: Till Vere-Hodge**, Payne Hicks Beach, London, WC2A 3QG, UK,
E-mail: tvere-hodge@phb.co.uk. https://orcid.org/0009-0003-5366-0977

looted objects. Nazi-confiscated art "only" pertains to artworks whose persecuted owners were dispossessed between 1933 and 1945, a mere 12 years.

Nazi-confiscated objects are also generally understood to have been dispossessed in geographic areas under the direct or indirect control of the Third Reich or another "axis power". However, the geographic scope is less clearly defined than the temporal scope. *Fluchtgut* objects have become subject to claims being brought (and sometimes settled). Fluchtgut denotes objects where the act of dispossession, such as an "involuntary sale", took place in geographies that remained neutral during WWII (e.g., Switzerland) or were part of the allied war effort (e.g., North America).

Despite this lack of clarity on relevant geographies, it remains the case that the starting position for defining Nazi-confiscated art is, *prima facie*, easier than it is for "colonial-looted art" for instance. The "colonial era" could conceivably relate to any act of imperialism throughout recorded history that may have taken place in any location in the world.

However, attempts at dealing with Nazi-confiscated art remain subject to a number of challenges that make this category of objects complex to deal with.

1 Scale and Context of Looting

The sheer extent of looting that occurred between 1933 and 1945 sets the category of Nazi-confiscated art apart from all other categories of looted artworks. Indeed, according to Greg Bradsher, Director of the Holocaust-Era Assets Records Project within the US National Archives and Records Administration, "*upwards 20 % of the art of Europe was looted by the Nazis*."[3]

Systematic looting of Jewish collections was carried out by the Einsatzstab Reichsleiter Rosenberg (ERR) in occupied territories. Within the borders of the ("Greater") German Reich, Jewish collections were confiscated and many works auctioned off at a number of infamous auction houses.

The term Nazi-confiscated art also includes a wide range of objects turned into money for the Reich from Jewish households and collections. This included not only paintings and works on paper, but also antique furniture, carpets, tapestries, objets d'art, and antiquities, as well as the "*Möbel-Aktion (M-Aktion; literally 'Furniture Operation'), which stripped furnishings from the homes of Jews who had fled or were deported.*"[4]

The scale of the looting also needs to be put in the context of the Nazis seeking to strip Jews (and other categories of persecuted persons) of what it is generally

3 See https://www.archives.gov/research/holocaust/records-and-research/documenting-nazi-plunder-of-european-art.html#record.

4 See https://www.errproject.org/jeudepaume/about/err.php.

considered as a basic tenet of civilisation: the ability to own, collect and appreciate the arts; decorative objects, collectibles and objects of cultural significance.

The fish literally stank from its head: Nazi-Germany was of course led by a failed artist, whose first right of refusal to looted masterpieces from all over occupied Europe meant that the 'cream of the crop' of looted works were earmarked for Hitler's plans of establishing the Führermuseum in Linz.[5] This left his number two, Hermann Göring, to focus on artworks that were not deemed quite important enough to adorn the museum in Linz. Nonetheless, the Reichsmarschall was able to amass an impressive array of loot for his country pile, Carinhall in East Prussia. Detailed information on the extent of his loot can be gauged by way of a review of allied Interrogation Report on the 'Goering Collection'.[6]

On the allied side, the British government reacted to the scale of Nazi looting while the war was still raging as it became clearer what was happening on the Continent. In early 1943, the British government sponsored an international ("Inter-allied") declaration that expressly made reference to the looting and 'warned the world' of "*the systematic spoliation of occupied or controlled territory [that] has followed immediately upon each fresh aggression. This has taken every sort of form, from open looting to the most cunningly camouflaged financial penetration, and it has extended to every sort of property – from works of art to stocks of commodities, from bullion and bank-notes to stocks and shares in business and financial undertakings.*"[7]

2 Passage of Time

However, it took the world (or at least part of it) until after the end of the *Cold War* to agree on any meaningful approach to dealing with Nazi-confiscated artworks internationally.

During the Cold War, there were ad-hoc attempts to deal with this issue at a national level in various jurisdictions. Following the Inter-allied Declaration of 1943, the allies decreed Military Law 59, which was in effect in occupied (West) Germany.[8] This law was designed to make provision "*to effect to the largest extent possible the speedy restitution of identifiable property (tangible and intangible) to persons whether natural or juristic who were unjustly deprived of such property between the 30th*

5 See http://www.artrestitution.at/F.prerogative.html.

6 See http://www.dfs.ny.gov/consumer/holocaust/history_art_looting_restitution/The%20Allies/OSS%20and%20the%20ALIU/ALIU%20Reports/goering_collection.pdf.

7 See https://www.lootedartcommission.com/inter-allied-declaration#:~:text=The%20Declaration%20is%20in%20the,which%20they%20have%20occupied%20or.

8 See https://dfs.ny.gov/system/files/documents/2019/02/us-military-law-59.pdf and https://dfs.ny.gov/system/files/documents/2019/02/british-military-law-59.pdf.

January 1933 and the 8th May 1945 […] for reasons of race, religion, nationality, political views or political opposition to National Socialism."[9]

Interestingly, Military Law 59 inverted the burden of proof, so as to make it easier for claimants to successfully claim restitution in post-war West Germany. This inversion was based on "*a presumption in favour of the claimant that [the deprivation] constituted an unjust deprivation*", where such deprivation concerned "*any transfer or relinquishment of property made by a person who was directly exposed to measures of persecution*" and by a person who "*belonged to a class of persons which the German government […] intended […] to eliminate in its entirety from the cultural and economic life of Germany*."[10]

Military Law 59 became obsolete when a German civilian government took over the administration and the law-making process for the newly formed Federal Republic of Germany. While further attempts were made to address the problem of Nazi-looted property in the Federal Republic of Germany[11] and in other European countries[12] in whose territories dispossessions occurred, these laws tended to be limited in time and/or scope and were difficult to employ as a matter of practice to achieve restitution of Nazi-looted property. Indeed, most legal initiatives to enable claims for reparations or compensation are no longer in force. This was especially pertinent given the scale of the looting that took place.

The practical difficulties for surviving claimants included the fact that many original owners had perished in the Holocaust. Claims brought by relatives and heirs to the original owners often included less comprehensive information, with accurate descriptions, dimensions, photos, provenance information and other data needed to identify the works in question. Making a claim for a relative may also have been not at the forefront of every possible claimant's mind, given the traumatic experience of the Holocaust just a few years prior.

Apart from ad-hoc efforts undertaken by various European states to allow some restitution and compensation to materialise, the international art market had not been sensitive to issues of provenance in the post war world. There was little awareness of "red-flags", such as gaps in the ownership chain, the names of Jewish owners in provenances between 1933 and 1945, or sales via the infamous auction houses, which sold off vast amounts of Jewish belongings.

9 Allied Military Law 59, Article 1.

10 Allied Military Law 59, Article 3.

11 For example the *Bundesergänzungsgesetz zur Entschädigung für Opfer der nationalsozialistischen Verfolgung (BEG)* of 18 September 1953.

12 For example, in the Netherlands the Royal Decree for the Restoration of Rights.

Instead, from 1945 onwards and until the late 1990s, the international art market helped disperse looted objects without any meaningful checks.

3 Cross-Jurisdictional Nature of the Problem

Partly as a result of the wide dispersal of looted artworks, any legal analysis as to the ownership of a "red-flag" artwork commences by considering the question of applicable law of ownership to the artwork. How and where have current and past owners acquired that artwork? What were the circumstances of such acquisition? And how does the law that applies to such acquisition treat the possible transfer of legal title? The dispersal of artworks and their proliferation across numerous jurisdictions adds additional complexity to the sheer scale of the looting that preceded the dispersal.

Many of the cases that have ended up before a court of law revolve around conflicts of laws analysis and the question what law a court seized to adjudicate over a given claim should apply to the question of legal ownership.

In the course of a dispute between Sotheby's and the German city of Gotha before the English High Court in the late 1990s, the English judge proceeded to analyse the question of ownership of the painting. Moses J. considered the painting under dispute pursuant to the applicable limitation rules under both German and English law. He weighed up what law ought properly to be applied to the matter before him.[13] In that case, the judge found that he was required to apply German law to the pertinent questions of title and limitation. (However, he also commented on the hypothetical scenario whereby the claim might have been barred under German law – in that case, Moses J. noted, it would have been necessary to examine whether such an outcome conflicted with English public policy.)

More recently, courts in the US considered whether "*under a comparative impairment analysis*", California's or Spain's interest was more impaired if California's rule that a person may not acquire title to a stolen work were subordinated to Spain's rule that a person may obtain title to stolen property by adverse possession.[14]

Generally, the outcome of a conflicts of laws analysis in respect of legal ownership to looted artworks is more likely to be crucial where the choice is between two legal analyses from either side of the Atlantic.

---

13 City of Gotha and Federal Republic of Germany v. Sotheby's and Cobert Finance S.A., 9 September 1998 (unrep.).

14 Cassirer v. Thyssen-Bornemisza Collection Found., 596 U.S. 107, 117, 142 S.Ct. 1502, 212 L.Ed.2d 451.

4 Limits and Limitations of Applicable Legal Solutions

The law must always balance two opposing sets of rights in this scenario: the rights of the victim of a past theft and the rights of a purchaser who may have bought the artwork in good faith from a seller who may or may not have been the legal owner of the artwork.

To the east of the Atlantic ocean, the law tends to favour the current possessor over the illegally dispossessed original owner. The main objective here is to ensure legal certainty. In some jurisdictions, the conversion of the title requires the purchaser to demonstrate that the purchase occurred in good faith. In other, mostly civil law, jurisdictions, the mere expiration of a specified period of time suffices to confer upon the purchaser or current possessor legal title as a matter of the applicable jurisdiction and/or it bars the original owner from making a claim.

As a matter of English law, title automatically passes to a good faith purchaser six year after he or she made the purchase in question.[15] On the European continent, many legal systems have the concept of acquisitive prescription, whereby "the law follows the facts" after the expiry of certain specified timelines. This may or may not require good faith. Germany, for example has the doctrine of *Ersitzung* while French law operates the principle of *possession vaut titre*. Broadly speaking, after certain specified timelines have elapsed, uninterrupted possession by a third party will likely prevent the original owner from making a claim to the artwork in question.

Conversely, on the other side of the Atlantic ocean, the question of legal ownership is more in the original owner's favour. This is because certain states in the US have, by and large, retained a purer form of the principle of *nemo data quod non habet*, in accordance with which a thief can never confer good title.

As a result of these different emphases in national jurisdictions, the question of applicable law can therefore lead to opposite outcomes on substantially the same facts on other side of the Atlantic.

5 Vagueness of the "Moral Claims" Framework

Partly in consequence of the above, a more universal approach was required. This became particularly obvious after the end of the Cold War, when the trade became awash with objects that had hitherto been kept away from scrutiny behind the iron

15 Cf. the UK Limitation Act, 1980.

curtain. In 1998, dozens of countries agreed on the so-called Washington Principles on Nazi-confiscated art to address, among others, this point.[16]

Arguably the most important consequence of this set of principles was that the international art market, in particular from its hubs in North America, the UK and the European Continent, fundamentally changed its *modus operandi* by refusing to deal with artworks that were subject to a "moral claim", whether such moral claim was legally enforceable before a court of law or not.

The net result of this approach by the major auction houses, galleries and dealers was that a potentially valuable artwork couldn't be sold using "official channels" if it was known that such artwork was subject to a moral claim because a previous owner in the artwork's provenance chain had been illegally dispossessed. Because it couldn't be sold, loaned for exhibition, used as collateral for a loan, shipped across borders or used in any other way, the artwork's value, for all intents and purposes, fell to zero.

6 Each Case Requires to be Considered on its Merits

Despite the general observations that can be made in respect of artworks whose original owners were persecuted persons during World War II and who were illegally dispossessed, no two cases are the same. This requires each case to be assessed on its merits and requires detailed consideration of provenance information, before turning to what a 'just and fair' outcome might look like.

It is important to remember that the task of dealing with Nazi-confiscated art is far from complete. This is particularly pertinent in a situation where there is pressure to expand the categories of looted artworks subject to moral considerations beyond the core topic of Nazi-confiscated art. As far as restitution policy is concerned: we should learn to walk, before we start to run.

16 https://www.state.gov/washington-conference-principles-on-nazi-confiscated-art/.