20. Wahlperiode

Deutscher Bundestag
Ausschuss für Kultur und Medien

Ausschussdrucksache 20(22)105

5. März 2024

Stellungnahme Dr. Agnes Peresztegi

zu der öffentlichen Anhörung am 11. März 2024 zum Thema
„Restitution von NS-Raubkunst“

Public Hearing "Restitution of Nazi-confiscated art" (11 March 2024)

Memorandum on the Key Concepts for Invited Experts
by Agnes Peresztegi[1]

"We will continue to take on the task of returning cultural assets seized as a result of Nazi persecution to their owners in accordance with the Washington Declaration. We are improving the restitution of Nazi-looted art by **standardizing a right to information**, **excluding the statute of limitation for restitution claims**, striving for a **central place of jurisdiction** and **strengthening the "Advisory Commission"** – Coalition Agreement

There is a broad political and public consensus that Germany is committed to redress, as much as possible, the human rights violations committed during the Holocaust, including restituting Jewish cultural property. Germany has enacted a comprehensive restitution and compensation system after World War II and has regularly amended that system since to fit current needs and policy goals. Germany is committed to the Washington Conference Principles, to the Terezin Declaration and to all other international declarations and agreements regarding the issue of restitution of Jewish cultural assets lost as a result of Nazi persecution. Germany established one of the five Commissions who deal with claims, installed the Magdeburg Center and then reformed it, and allocates substantial funds for provenance research of Nazi era looted cultural assets.

However, it is clear to all that the current German system of addressing claims for the return of Nazi era looted cultural assets is not ideal. My objective is not to criticize the current system as the matter is extremely complex. I am here to provide a few thoughts intended to improve the process of restitution. The current situation is a result of many factors. It was difficult to bring claims for artworks right after 1945. Cultural assets had no registries, like businesses and real estate. Survivors and heirs often had no documentary evidence left to prove ownership, nor did former owners have knowledge of the location of their lost art. Many were just happy to be alive and did not have the strength and resources to follow a claim procedure. Information in the pre-digital age was scarce, and possessors of stolen cultural assets were able to hide their objects.

As time went by, the situation became much more complicated legally. Cultural assets were transferred, national borders including the oceans were crossed, identification marks were erased. The art market turned a blind eye to provenance, and the issue was rarely brought up for decades. Then many things changed; archives became accessible, digitization and database projects started, and the third generation of survivors started to ask questions about how their families lived before the war. These and other factors generated a heightened interest in the lost cultural valuables, and the Washington Conference that dealt with many other issues is remembered today as the conference, where looted art was in the center.

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Under the Washington Conference Principles, all countries have to deal with the issues in accordance with their national legal system. Enacting a restitution law was not deemed feasible in Germany, hence the Advisory Commission was established. However, despite good intentions, the Advisory Commission was not structured properly from the beginning. Its mission states that it is supposed to mediate, but the Commission does not mediate, since parties only ask for its assistance when mediation/negotiation failed. Nor does it arbitrate, since its decisions are only advisory and are not binding. Nor is it advisory in the true sense, since both parties have to appear, and one side to the dispute cannot request advice alone. Since the Commission was not keeping minutes for years and the decisions were short, it did not even develop jurisprudence for many years.

That being said, I am very much in favor of maintaining **the Commission process.** It is a much more suitable forum to treat claims of restitution than the courts. **The Commission has the necessarily flexibility in evaluating the evidence and applying notions of equity.** The Commission can more readily apply the Washington Conference Principles, which suggest to review the evidence on an equitable way and to find a just and fair solution. The Commission is a suitable entity to apply the relaxed standard of proof, and to make an equitable advisory opinion. It all depends on its membership. The membership of the Commission was already revised once. A further change could make the **membership selection process more transparent and allow all interested groups to have a voice**. Allowing the Commission to be seized **by only one party and subsequently issue an advisory opinion** would substantially strengthen the effectiveness of the Commission. While its advisory opinions are not binding, so far, they were followed.

Whether a comprehensive reform of the Commission is possible or not, depends on whether a restitution law would be considered.

Again, in theory, a **restitution act** would make the current situation **more predictable**. That, in itself, is a worthwhile goal. However, a restitution act would have to deal with, among others (i) the **types of spoliation**; would inevitably invite discussions about (ii) a sun-set period, i.e. **time limitation**; would have to deal with (iii) the **financial consequences**, and the difficulty to factor in (iv) **equity** into a continental legal procedure.

(i) German public institutions restitute cultural assets that were clearly taken as a result of discriminatory legislation and/or by German officials and their allies from a Nazi persecutee. The problems start when there is a gap in the provenance, when the facts are not clear, or where the former owner in some way possibly participated in the transfer of the claimed assets. While the Commission is equipped to deal with such gaps and probable interpretations, a consensus would have to be reached to be able to properly legislate the applicability of the law, i.e. the **types of cultural property loss** that is covered by a restitution law.

(ii) If a restitution law is contemplated at all, it should also be clear that no deadline is possible. Research, while going on for over 20 years, is not even close to being finished. As long as all relevant public archives are not accessible digitally and cannot be easily and comprehensively searched, one cannot discuss a **deadline** for claims.

(iii) Another issue is the financial consequences as under German law, and under the European Convention on Human Rights too, a property right acquired cannot be taken away by the state without compensation. Therefore, in case of a comprehensive restitution law, private owners will have to be compensated. Assessing the **financial consequences** of a restitution law used to be an unsurmountable obstacle to such law. Today, it seems to be less of an issue as the

necessary information to assess the financial burden may already exist. Moreover, the financial compensation offered for private owners does not necessarily have to equal to the full current market value of the cultural asset planned to be restituted. Actual financial losses can be factored in, like original purchase price and funds spent in connection with the particular object. Based on the restitution trends and databases, especially the Lost Art Database, art market experts and insurance actuaries can jointly analyze the data and trends in Germany and make predictions of a financial plan for the next 10 years, which can then be approved by the Treasury.

(iv) The Restitution law would have to create **rules of evidence that are specific to restitution** and are more flexible. In addition, the **use of provenance experts** should be considered when drafting the applicable procedural and evidentiary rules.

One consideration that applies both to a restitution law and to the procedure before reaching the Commission is time. While time is needed to complete research, **claims should be expeditiously adjudicated**. If a law is contemplated, the drafters have to include provisions that the procedure has to be expeditious. The same should apply for provenance research, see below.

A more limited law related **only to public institutions** could set aside the financial consequences if there is a decision to do so. While it would be easier to enact, it would also be easier to evade. Many publicly displayed cultural asset are not owned by the institution which houses the exhibitions, but by private entities. All efforts to bring charitable foundations under the same rule as the public cultural institutions failed so far.

If a law is to be enacted, a **uniformed place of jurisdiction** should be enacted simultaneously. It would probably make sense to choose either a special chamber, or to designate one of the administrative courts that may have more experience with **offering advice to settle a dispute**. There must be mandatory mediation before any judicial decision on a restitution case.

As mentioned before, **statute of limitations** cannot be overcome both because of the German legal system and the rules of the European Convention on Human Rights. It was possible in the United States, because statute of limitations is a procedural defense. In addition, there is no prescriptive acquisition in American law. As a result, the Holocaust Expropriated Art Recovery Act of 2016 was successfully enacted in the United States. Continental legal systems could apply both statute of limitations and prescriptive acquisitions. While one party may opt not to invoke **prescriptive acquisition**, like the German Historical Museum Foundation did in the Sachs case, if it is mandated by law, it would have the same effect as lifting statute of limitations. It would result in the state **taking the property** and therefore would have to be compensated. The HEAR Act especially states that it does not provide a legal basis for a claim, as it does not have to, the claims exist under general legal notions. It is completely the opposite in Germany, where a new restitution law would have to be the **legal basis of bringing an action** for restitution. Eliminating the applicability of the rules on statute of limitations in restitution cases in itself would not solve the legal barriers to bring a civil claim in Germany, in addition, it may open further problems, as the law may be found discriminatory and the definition of the cases where statute of limitations do not apply may be widened or narrowed by court challenges to the new law.

A new cause of action is also needed to achieve res judicata for all adjudicated cases. If a lawsuit is successful for a current possessor in Germany because of technical defenses like statute of limitations, and there is no decision on the merits of the case, despite the favorable German

court decision, the cultural asset concerned could not be exported to the United States or to some other countries without a threat of litigation.

Factoring in **good faith acquisition** into a restitution law is quite problematic as there is no clear definition of what is good faith. If one accepts the notion that good faith is what someone is expected to do in the ordinary course of business in the relevant place and time, it would make restitution based on bad faith acquisition impossible. The art market turned a blind eye to the issue of stolen Nazi era cultural assets, and the regular course of business was to sell and buy art without regard to its provenance. One may read the current headline about a museum's supposed "willful blindness" in acquiring a drawing in 1966, but it is for the press and is not a factual finding. A law may declare, and a court may, of course, decide that in case of Nazi looted cultural assets, there is no such action as good faith purchase, like the French courts did a few years ago. However, while French courts may reach such interpretation based on a 1945 decree, it is my understanding that German law would not allow the same.

The idea of a **clearing house as a central point of contact** has been on the table for over 20 years. It is not a feasible idea at the moment, because there are no uniformed rules around the world regulating the restitution of Nazi era looted cultural assets. In addition, the necessary research is far from having been concluded and access to documents and information is very complicated, timely, and costly. A clearing house institution would spend most of its resources defending itself against lawsuits.

Many of the issues discussed above center on more effective **information rights**. It is still difficult to know today where information may be located about a particular fact that is needed to solve a provenance question. More funds should be invested in making holdings of archives digitally searchable. The Jewish Digital Cultural Recovery Project, was a good start to realize a digitally searchable database. The JDCRP and similar efforts should be funded. Needless to say, museums should also be supported to enable them to publish their treasures online with accompanying provenance information. The Lost Art Database should also be strengthened to enable it to follow up on older registrations and to ask, for example, for images of the listed asset, recto and verso, detailed markings and any updates on provenance. There is one particular issue that needs to be resolved, namely that no German institutions should commission provenance research that cannot be freely shared with any interested party.

Successful provenance research should be completely transparent. No researchers hired by German institutions and/or paid (at least partially) by public funds should have a right to not share their research in its entirety with interested parties.[2] Not only the edited results should be available to interested parties, but the plans, the goals, and all materials of the research.

Professional provenance research starts with a detailed research plan, clear goals, and a realistic timeframe. It ends with the digital surrogates of the files reviewed, a summary of findings in general and also in specific, and a recommendation whether the research is completed. If the research is not completed, it should then also include a new detailed research plan with goals and a timeframe. Research should be done jointly with the interested parties, if possible, and it should not contain any types of legal commentary. That should be left for qualified lawyers.

Successful provenance research needs appropriate funding; facilities, both paper and digital to store and make accessible the research materials and findings; unified methods to draft provenance information; and quality control.

[2] Such requirement, of course, should not apply for research done privately, for scholarly purposes, and such.