

ARTICLES

Street Scenes and Other Scenes from Berlin - Legal Issues in the Restitution of Art after the Third Reich

By Anna Blume Huttenlauch*

A. The Restitution of Kirchner's "*Berliner Strassenszene*" - Background Facts

The news that Ernst Ludwig Kirchner's painting "*Berliner Strassenszene*" (Berlin Street Scene) will be up for sale in New York on November 8, 2006 has stirred up the international art scene for the past two months.¹ The sale was announced shortly after the Berlin state senate had returned the painting to the heirs of its original owners, Jewish art collectors Alfred and Tekla Hess. For the past 26 years the piece had been hanging in the Brücke Museum in Berlin and formed a cornerstone of the museum's expressionist collection. Bought, from public funds, in 1980, for a little over \$ 1 Million US, the painting is expected to sell this fall for \$ 18 Million to \$ 25 Million US.²

Alfred Hess, a shoe factory owner and famous German art collector of expressionist painters like Pechstein, Schmidt-Rottluff, Heckel and Kirchner, was the original owner of the painting "Berlin Street Scene." He died in 1931. When fleeing from the Nazis in 1933, his family brought the collection to Switzerland, where it was exhib-

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¹ Christie's Press Release from August 3, 2006; see also DW Staff, *Kirchner Painting at Heart of Restitution Debate*, DEUTSCHE WELLE, 19 September 2006, <http://www.dw-world.de/dw/article/0,,2140203,00.html?maca=en-rss-en-all-1124-rdf>; Lam Thuy Vo, *Politicians, Art experts voice criticism over Berlin's restitution of Kirchner painting*, ASSOCIATED PRESS, <http://www.lawinfo.com/index.cfm/fuseaction/News.story/msgID/db876080-e85f-4fda-b85e-2ba01210d9c7>; Catherine Hickley and Linca Sandler, *Battle Rages Over Kirchner Picture Returned To Heir*, BLOOMBERG, 28 August 2006, <http://www.bloomberg.com/apps/news?pid=20601088&refer=muse&sid=a3aGCe1h.8c8>

² Michael Kimmelman, *Klimts Go to Market; Museums hold their breath*, NEW YORK TIMES, 19 September 2006; Heinrich Wefing, *Was kostet ein Kirchner*, FRANKFURTER ALLGEMEINE ZEITUNG, 22 August 2006, <http://www.faz.net/s/Rub117C535CDF414415BB243B181B8B60AE/Doc~E72597F2E4E4C496F8A8D920FF2FA12AA~ATpl~Ecommon~Scontent.html>

ited in major art museums in Zurich and Basel, until eventually, in 1936, seven paintings were sent back to Cologne in order to be sold. Carl Hagemann, an influential collector in Frankfurt, bought Kirchner's "Berlin Street Scene" in 1936 or 1937. His heirs later gave the painting to Ernst Holzinger, the former director of the Städel Museum Frankfurt as a present.³ Eventually, in 1980, the state of Berlin bought the painting with public funds for the Brücke Museum.

In September 2004 the Berlin Senate received a letter from a German law firm, asking for restitution of the painting "Berlin Street Scene" to Anita Halpin, an heir of the Hess family living in London. After long and secret negotiations, the Senate decided to restore the painting. This restitution by the state of Berlin – the owner of most artwork in Berlin's public museums – was based on the grounds that the Hess family had been persecuted under the Nazi regime and that Tekla Hess had sold the painting during the Hitler era, in 1936 or 1937.⁴

The Kirchner case has turned into one of the most dramatic restitution debates. Rarely before has a return been so heatedly protested against. One of the reasons for the passions involved certainly is the painting itself: *Berlin Street Scene* is strongly connected to Berlin by its subject matter – a Street Scene in Berlin, which vividly captures the capital's atmosphere in 1913. It is also considered one of Kirchner's most important works.

Yet, this is not really the point – other major artworks have been restituted where, no doubt, the satisfaction that justice could finally be served always outweighed any such factors. Clearly, the subject of the current debate is not the general legitimacy of restitutions as such because there is absolutely no question about the moral and legal necessity to restore looted artworks to their original owners who suffered brutal injustice from the Nazi regime.

Instead, the case stifled a fierce public debate in Germany about the legal framework for restitution of Nazi-looted art and its application in this specific case. Politicians and art professionals have contended there was, in fact, no legal necessity to part from this important piece of Germany's cultural heritage, because the Kirchner painting did not qualify for restitution under either the Washington Principles or

³ According to Rose-Marie Gropp, the gift expressed the family's gratitude to Holzinger for saving part of Hagemann's art collection from the Nazis by storing them in the museum's basement. Hagemann's collection contained many works considered "degenerate" by the Nazis, see *Ein Bild für Christie's*, in: FRANKFURTER ALLGEMEINE ZEITUNG 16 August 2006.

⁴ Press Release, Berlin Senate, Kirchner zurecht zurückgeben, (17 August 2006), available at <http://www.artnet.de/magazine/sonder/pdf/20060907zuechtzurueck.pdf>

German restitution law.⁵ The Berlin Senate has been harshly criticized for negligently giving away museum property, which was lawfully purchased in 1980, without prior research of the factual basis of the restitution claim. The board of the Brücke museum even announced to induce criminal proceedings against the Senator on the basis of embezzlement.⁶ A second major point of criticism concerns the secrecy of the process: Although negotiations between Berlin and the Hess heirs had been underway for about 2 years, they were kept from public attention. Had the issue been brought to light earlier, critics now say, there might have been at least a chance to buy the masterpiece back with financial support from private sponsors.⁷

The Berlin Senate defends the restitution as the only possible decision in line with legal guidelines.⁸ Both under the Washington Conference Principles and under German restitution law, the state government felt obliged to return the painting even though it was purchased in good faith in 1980. In addition, state officials invoked a strong sense of moral obligation.

Apart from this moral obligation, the Kirchner case provides an opportunity to examine the legal framework of art restitution cases in Germany.⁹ After a summary of the main historical facts, a look at the underlying general rules and principles may shed some light on the opposing lines of argument in the current debate.

⁵ Christoph Stöelzl, former state culture senator of Berlin said this in the public expert hearing in front of the Berlin Parliament on 28 August 2006; *see also*, Press Release, Ernst Ludwig Kirchner archive in Switzerland and Brücke Museum, *Laienspieler im Berliner Kultursenat*, (18 August 2006) available at <http://www.artnet.de/magazine/sonder/pdf/20060813Presseerklaerung.pdf>; Letters from Bernd Schultz to the Berlin Senate available at <http://www.artnet.de/magazine/sonder/pdf/KIRCHNER-SKANDAL11aug2006.pdf>

⁶ The decision was reached at the Board Meeting on 5 September 2006 and announced publicly at a press conference the next day; *see also* Thomas Eller, *Was soll man darauf antworten?* ARTNET, 7 September 2006, available at, <http://www.artnet.de/magazine/news/eller/eller09-07-06.asp>

⁷ *See*, Press Release, Ernst Ludwig Kirchner archive in Switzerland and Brücke Museum, *Laienspieler im Berliner Kultursenat*, (18 August 2006) available at <http://www.artnet.de/magazine/sonder/pdf/20060813Presseerklaerung.pdf>

⁸ Barbara Kisseler, Berlin State Secretary of Culture, Address Before a Parliamentary Hearing (28 August 2006) available at <http://www.artnet.de/magazine/sonder/pdf/20060912kisseleruflerl.pdf>

⁹ *See*, for a general overview for example www.lostart.de - including an English version of the Statement by the Federal Government, the Laender (federal states) and the national associations of local authorities on the tracing and return of Nazi-confiscated art, especially from Jewish property of 14 December 1999, <http://www.lostart.de/stelle/erklaerung.php3?lang=english>

The core question, which determines whether there is a legal claim for restitution, is whether the family did in fact lose the painting due to their racial persecution by the Nazis. Was the Hess family coerced into selling the painting? Or was the 1936/37 sale of "Berlin Street Scene" to Claus Hagemann an act of free will? Since free trade in art still existed even during the Hitler era, the answer is not historically pre-determined.

If the sale to Hagemann was based on voluntary decision and economic rational, there would be no legal reason for the state of Berlin to reconstitute the painting, since in this case, the painting's loss would not be related to the family's racial persecution - a condition precedent for restitution. If, however, Tekla Hess was somehow coerced into selling "Berlin Street Scene" by the Nazis in 1936/37, it is subject to restitution to her heirs today.

B. The Legal Framework of Restitution Claims

In Germany, there are three possible sources upon which a restitution claim may be based: (1) Specific restitution statutes for property expropriated during World War II (2) General property law provisions in the German Civil Code (*Bürgerliches Gesetzbuch*, BGB) and (3) the international, not legally binding Washington Conference Principles on Nazi-Confiscated Art.

I. Specific restitution statutes

After World War II, special laws were passed in Germany, which granted a statutory right of restitution to anybody who had been subject to unlawful expropriation by the Nazi regime. Whereas at first such rules were established by the Allied Forces for each of the Western Sectors, they were later replaced by a common statute concerning the restitution of all property located in the territory of the former German Federal Republic, the "*Bundesrückerstattungsgesetz*" (BRüG).¹⁰ These statutory claims are no longer available today because they were limited. In order to guarantee a speedy restitution process and to allow Germany to return to some degree of legal certainty, given that most of the claims concerned land ownership, these claims had to be filed by April, 1 1959 (BRüG Para. 27 (2)).

II. Legal Claims arising from Ownership

¹⁰ BGBl. 1957 I, 734. After the reunification the "Gesetz zur Regelung offener Vermögensfragen" was adopted with regard to property located in the territory of the new Länder, BGBl. 1997 I, 1974, available at, http://bundesrecht.juris.de/br_g/BJNR007340957.html and <http://www.gesetze-im-internet.de/vermg/index.html>.

In most cases in which artworks lost during the Hitler era are claimed back today, the original owner has lost ownership and therefore maintains no enforceable title under general property law (BGB Para. 985). Frequently, these works have passed through the hands of several owners during the last sixty years by lawful transactions. Even where the original owner did not willfully transfer his property, in many cases he lost his title either to the first good faith purchaser or by way of expropriation – provided his property was lawfully confiscated by Nazi officials. In addition, often too much time has lapsed in the meantime because the statute of limitations has usually run 30 years after the claim could have been first enforced (BGB a.F. Para. 195 (1) No. 1)¹¹

1. German Law on Purchasers in good faith

German law allows for good faith acquisition of ownership from a non-owner (BGB Para. 932). The purchaser of a looted work of art is in good faith if he does not know about the piece's provenance at the time of purchase.¹² However, one general exception is especially relevant for stolen art: Under German law – as in most legal orders – there is no valid transfer of title with regard to lost or stolen goods (BGB Para. 935 (1)). If an artwork is stolen from its owner, a later purchaser will not acquire ownership under BGB Para. 932 (1) even if he is in good faith. In this case, the original owner does not lose ownership and can claim it back.

Applying these rules turns out to be difficult: Is Nazi-looted art generally to be considered "stolen" from a legal perspective? Must one distinguish different methods of "looting"? Is there a legal difference between confiscations and coerced sales, carried out by private collectors under duress? Must the reason for a confiscation be taken into account when judging its lawfulness?

2. Confiscations of "degenerate" art

Artworks seized by the Nazis as "degenerate art" are generally not considered "stolen" from the museums where they were confiscated.

In 1937, Heinrich Goebbels ordered that all works of painting and sculpture created after 1910, which did not conform to the Nazis esthetic standard, be collected from

¹¹ According to Art. 229 Para. 6 (1) *Einführungsgesetz zum Bürgerlichen Gesetzbuch* (Introductory Act to the Civil Code, EGBGB) the former Para 195 still applies to claims originating before January 1, 2002. After the reform, the rules concerning the statute of limitations have changed. According to para 199 (1) it does not start running until the claimant has some kind of knowledge of the claim.

¹² Cf. Linda F. Pinkerton, *Due diligence in fine art transactions*, 22 JOURNAL OF INTERNATIONAL LAW 1, 18 (1990).

German museums in order to be shown in a big exhibition "Degenerate Art" in Munich.¹³ Later, in 1939, four art dealers and a Swiss auction house were commissioned to sell the works.¹⁴

In retrospect, even though there can be no doubt about the brutal and barbarian nature of the operation "degenerate art", all the transactions involved were in accordance with the law. First of all, the operation "degenerate art" concerned mostly art in state-owned public museums. Therefore, these confiscations did not expropriate from private individuals but the state basically seized its own property. Secondly, there was a German law formally legitimizing the seizures: the "*Act on Confiscations of Degenerate Art*" ("*Gesetz über Einziehung von Erzeugnissen entarteter Kunst*")¹⁵ was passed on 31 May 1938 and provided a formal legal basis.

After the war, the Allied Control Council upheld this Act. Not all law adopted during the Hitler era was retrospectively declared invalid. Whereas the Allied Control Council expressly annihilated statutes, which contained racial, religious, political or ideological discriminations, others were upheld in order to maintain a certain degree of legal certainty.¹⁶ On request of the Restitution Branch, Economic Division, the Legal Advice Branch/Office of the Military Government for Germany (OMGUS) scrutinized the *Act on Confiscation of Degenerate Art* in order to decide whether the Act and its effects could be sanctioned. Since the statute did not discriminate against anybody based on racial or any other personal grounds but authorized confiscations of "degenerate" artwork regardless of its owners race, religion, nationality or political belief, it was not annulled.

In German jurisprudence, decisions regarding the legitimacy of Nazi statutes are guided by "Radbruch's formula", which addresses the conflict of positive law and natural justice. Gustav Radbruch, a German law professor and former minister of justice, argued that statutory law that is incompatible with the requirements of justice "to an intolerable degree", or that was obviously designed in a way that deliberately negates "the equality that is the core of all justice", must be disregarded in

¹³ See Stephanie Barron, "DEGENERATE ART," THE FATE OF THE AVANT-GARDE IN NAZI GERMANY (1991).

¹⁴ The four art dealers were Ferdinand Möller, Bernhard Böhmer, Karl Buchholz and Hildebrand Gurlitt. In 1939, 125 works were auctioned by the Galerie Fischer, Luzern, Switzerland. See also, Thomas Boumberger, RAUBKUNST UND KUNSTRAUB, DIE SCHWEIZ UND DER HANDEL MIT GESTOHLENE KULTURGÜTERN ZUR ZEIT DES ZWEITEN WELTKRIEGS (1998) and GALERIE FERDINAND MÖLLER, EIN BEITRAG ZUR GESCHICHTE DER KUNST UND DER KUNSTGESCHICHTE IM 20. JAHRHUNDERT (1984).

¹⁵ RGBl. 1938, 612.

¹⁶ Art. 2 KontrollratsG Nr. 1 (20 September 1945); see, Carl-Heinz Heuer, *Die Kunstraubzüge der Nationalsozialisten und ihre Rückabwicklung*, NEUE JURISTISCHE WOCHENSCHRIFT 1999, 2558.

favour of natural principles of justice.¹⁷ Even though some German legal scholars argue that even the *Act on Confiscations of Degenerate Art* must be considered unbearably unjust according to this formula¹⁸, the courts did not adopt this view.

It follows that confiscations of “degenerate” Art under Nazi law are, at least in general, considered legally valid as well as all following transactions concerning such works. In contrast, Nazi-laws authorizing art confiscations from private individuals on the mere ground that the owner was Jewish¹⁹ are clearly in breach of fundamental principles of justice. Accordingly, they were not upheld by the Legal Advice Branch and these seizures were not formally legitimized. The original owners did not lose title to their property because the “expropriations” lacked a valid legal basis.

3. Transactions among private individuals

Generally, sales or other legal transfers carried out under duress cannot be regarded as acts of free will and are therefore also to be considered as “stolen” or “lost” for the purposes of BGB Para 935 (1). Therefore, if Jewish art collectors sold their art in the 1930s and the sale was in fact coerced by the Nazis or carried out under the duress of persecution, it cannot be regarded today as a valid transfer of title. Rather, such transfers must be considered as “lost” in the sense of BGB Para 935 (1), granting the original owner a right to replevin.

Still, this does not automatically guarantee a former owner the return of his property, since in order to enforce his claim he must substantiate the factual basis supporting it. In many cases – as in the present Kirchner case – it is almost impossible to gather specific evidence seventy years later, proving that coercion or duress was exercised on a specific transfer. The Hess heirs cite an affidavit of April 1, 1958 in which Tekla Hess stated that she was coerced by two Gestapo agents in 1936 to have seven paintings returned from Switzerland to Germany. They also cite the protocol of an interview held in the German Embassy in London with Hans Hess,

¹⁷ Gustav Radbruch, *Gesetzliches Unrecht und Übergesetzliches Recht*, 1 SÜDDEUTSCHE JURISTENZEITUNG 105 (1946), English translation as *Statutory Lawlessness and Supra-Statutory Law*, 26 OX. J. LEG. STUD. 1 (2006); for English analysis, see Stanley L. Paulson, *On the Background and Significance of Gustav Radbruch's Post-War Papers*, 26 OX. J LEG. STUD. 17 (2006).

¹⁸ Steven Reich/Hermann Fischer: *Wem gehören die als „entartete Kunst“ verfemten, von den Nationalsozialisten beschlagnahmten Werke*, NEUE JURISTISCHE WOCHENSCHRIFT 1417, 1420 (1993).

¹⁹ Most of these confiscations were based on the “Verordnung über die Anmeldung des Vermögens von Juden” (26 April 1938), the “Verordnung über den Einsatz des jüdischen Vermögens” (3 December 1938), and the “Verordnung über den Verfall des Vermögens emigrierter oder deportierter Juden an das Reich” (25 November 1941).

the couple's son, in 1961. He speaks about the Gestapo's threat to his mother and says she had no choice but to divest individual pieces of the collection at unfavorable prices to maintain her subsistence.²⁰ However, it is not specified, whether the Kirchner painting was one of these paintings. Other historical sources indicate the opposite, as will be discussed shortly.²¹

4. Artwork Sold in Public Auction

Finally, German law differs from many other legal regimes in one essential aspect. Although there is usually no valid transfer of title with regard to lost or stolen goods (Para. 935 (1), this legal obstacle may be overcome by way of public auction: if sold through a certified auction house in Germany, good title passes even with regard to lost/stolen art – provided the purchaser is in good faith as to its provenance (Para. 935 (2)). Since the law applicable to the transfer of ownership is generally determined by where the property is situated at the time of the transfer,²² this means that the venue of auction may determine whether a good faith bidder can acquire good title to a looted artwork or not: in London, no – in Berlin, yes.²³ Needless to say, assessing the legal regime that applies to a specific case may influence other aspects as well.

One famous decision to be mentioned in this context is the decision of the London High Court *City of Gotha, Federal Republic of Germany v. Sotheby's and Cobert Finance S.A.* (1998).²⁴ The Federal Republic claimed a 17th century-painting by *Joachim Wte-*

²⁰ Press Release, Hess Family, Hess Heirs Commend Berlin For Returning Kirchner Paintin, (18 August 2006), [available at](http://www.mmdnewswire.com/index2.php?option=com_content&do_pdf=1&id=517), http://www.mmdnewswire.com/index2.php?option=com_content&do_pdf=1&id=517

²¹ See, for example a letter Tekla Hess wrote to the gallery owner Ferdinand Möller in 1953 available at, <http://www.artnet.de/magazine/sonder/pdf/20060906briefhess.pdf>. This letter indicates that many works of the Hess collection were in fact stored through the war in the basement of the Cologne Art Association. It is argued that this fact makes it highly unlikely that coercion was exercised – at least with regard to those works – because had the Gestapo demanded them back to Germany, they would have included them in the exhibition "Degenerate Art", see e.g. Ludwig v. Pufendorfs arguments reported in Thomas Eller, *Was soll man darauf antworten?* ARTNET, 7 September 2006, available at, <http://www.artnet.de/magazine/news/eller/eller09-07-06.asp>

²² There are exceptions especially for artworks. For some of the problems in US law, see Patricia Youngblood-Reyhan, *A Chaotic Palette: Conflict of Laws in Litigation Between Original Owners and Good-Faith Purchasers of Stolen Art*, 50 DUKE L.J. 955 (2001) ; with specific reference to Nazi-looted artwork, see Hans Henning Kunze, *RESTITUTION "ENTARTETER KUNST"*. SACHENRECHT UND IPR (2000).

²³ See, for example, *Winkworth v. Christie Manson & Woods Ltd et al.* [1981] Ch. 496.

²⁴ *City of Gotha, Federal Republic of Germany v. Sotheby's and Cobert Finance, S.A.*, Queens Bench Division Case No. 1993, C. 3428 and Case No. 1997 G 185. For analysis, see Michael H. Carl, Herbert Güttler, Kurt Siehr, *KUNSTDIEBSTAHL VOR GERICHT* (2001).

wael which had been stolen from the museum of the Castle of Gotha in the end of WW II and brought to the Soviet Union. Since German substantive law was applicable to questions of ownership, the English court deciding the case became the first judicial authority on a provision of the German Civil Code, para. 221 (now para. 198).²⁵ At issue was the question whether the plaintiff's claim to the painting was barred by the statute of limitations even though the defendant had not been in good faith at the time of purchase. Under German law, lapse of time may overcome such bad faith under certain conditions (BGB a.F. Para 221). However, the English court held that such a rule was contrary to public policy in England because "time is not to run either in favour of the thief nor in favour of any transferee who is not a purchaser in good faith". Therefore, the defendant was barred from invoking the statute of limitations and the plaintiff was granted his recovery claim.

III. The Washington Conference Principles

1. Purpose and overview

In the absence of a clear legal claim, returns are often based on other sources, such as the Washington Principles declared at the Washington Conference in 1998.²⁶ 44 governments endorsed international guidelines for dealing with Nazi-looted art and committed to the common goal of achieving "just and fair solutions" while recognizing the specific circumstances of every individual case.

Taking into consideration, that the main problem of a restitution claim frequently lies in proving the factual basis of a restitution claim, the Washington Principles allow museums to exercise discretion in accepting claims concerning art stolen during the Hitler era. Even though not legally binding, the Principles have proven influential. In Germany, publicly-owned museums accept them as quasi-binding rules. In addition to the rather general principles, various administrative guidelines have been adopted by the German government and by the individual Länder – most importantly the so-called "Handreichung", which specifies certain procedural rules and establishes the burden of proof.²⁷ The "Handreichung" also governed the recent restitution of Kirchner's "Berlin Street Scene".

²⁵ For a German analysis of the provision in light of the English decision, see Thomas Finkenauer, *Zum Begriff der Rechtsnachfolge* in § 221 BGB, 55 JURISTENZEITUNG (JZ) 241 (2000); see also Nils Jansen & Ralf Michaels, *Die Auslegung und Fortbildung ausländischen Rechts*, 116 ZEITSCHRIFT FÜR ZIVILPROZESS (ZZP) 3, 52 (2003).

²⁶ http://www.lootedartcommission.com/lootedart_washingtonprinciples.htm

²⁷ <http://www.lostart.de/stelle/handreicherung.php3?auflage=5>

2. *The rules of the burden of proof*

German restitution practice takes consideration of the fact that Nazi victims should not be burdened with the task of proving the injustice suffered in order to recover their damages. Instead, German publicly-owned museums accept the assumption that virtually *any* transfer of artworks by Jews between 30 January 1933 and 8 May 1945 was improper because it was probably related to the owner's racial persecution. Even if formally proper, it is presumed unlawful until the opposite can be substantiated.²⁸ This alleviates original Jewish owners from the burden of proving that their art collections were illegally confiscated or sold under duress.

The assumption is rebuttable: the museum confronted with a claim need not restate the piece if it offers sound evidence that the transaction in question was in fact based on free will and economic rational. Of course, it is difficult to say, what kind of factual proof may accomplish such rebuttal. For instance, a few years ago, the same Hess family claimed another Kirchner painting once part of their collection, "Potsdamer Platz" from the Neue Nationalgalerie in Berlin. However, a photograph existed showing the painting in the private home of an art collector in 1931. This was considered sound proof that the work had actually been sold properly among private individuals without any undue Nazi influence. Eventually, "Potsdamer Platz" was not subject to restitution.²⁹

3. *Procedural Rules*

For hard cases, where a family seeking restitution and the museum confronted with the claim are unable to find a mutually satisfying solution, the guidelines refer the parties to a mediator.³⁰ The so-called "Limbach-Commission" is an expert committee and sort of arbitration panel specialized in problematic restitution matters. The parties can consult them for assistance in achieving a "fair and just solution".

C. Application in the Kirchner case

Notwithstanding the difficult issues involved in restitution claims under general property law as discussed above, the Berlin Senate argues that it clearly felt obliged to return the painting according to German restitution guidelines. The government

²⁸ <http://www.lostart.de/stelle/handreichung.php3?lang=english>

²⁹ <http://www.artnet.de/magazine/sonder/pdf/KIRCHNER-SKANDAL11aug2006.pdf>

³⁰ <http://www.lostart.de/stelle/kommission.php3?lang=english>

contends that the 1936/1937 sale cannot be regarded as a transaction of free will and economic rational, simply for want of evidence. Since the Senate bears the burden of proof, it would have been necessary to substantiate that the Hess family had received a reasonable payment for the Kirchner painting from Hagemann. However, Berlin was unable to discharge this burden and to rebut the guideline's assumption for the transaction's unfairness.

Critics claim that such rebuttal was not even sufficiently attempted. First of all, they say, the government failed to gather evidence. Wolfgang Henze from the Kirchner-Estate in Switzerland says, the Berlin government never inquired with him about any circumstances of the sale, although relevant documentation might have been found in the Estate's archive. He says, various letters do substantiate that a payment was made to the family. One of them was written by Kirchner himself expressing his satisfaction with the purchase of "Berlin Street Scene" by Claus Hagemann. Another one was written by the collector Arnold Budczies to Hagemann, commenting on the sale as follows: "Congratulations on your new painting. I am sure you will enjoy this purchase, even though the price was very high". Henze also says, it would have been important to take into consideration the shoe factory's bankruptcy in 1929 because after the family's financial crisis during the World Depression Hess had sold parts of the collection on a regular basis.³¹

Secondly, they criticize the Senate for not negotiating a compromise. According to the guidelines, it would have been appropriate to consult the "Limbach-commission" at some point during the 2 year process. This, critics argue, would at least have counted as an effort to keep the painting in the Brücke-Museum.

From a legal point of view, there is certainly no clear cut answer. This debate is about levels of certainty and the burden of proof in German restitution law: What kind of evidence is necessary to prove a specific transaction was fair? Under what conditions has a museum discharged its burden of proof? Do the guidelines require direct evidence or can indirect proof be sufficient – such as the letters cited by Henze –, also taking into account that formal receipts are not necessarily a common practice in art sales and that much of the historical evidence has perished meanwhile? Finally, are there certain procedures, which public institutions faced with restitution claims should follow in order to guarantee the democratic legitimacy of their final decision?

³¹ These arguments were brought forward by Henze during the parliamentary hearing in the Berlin Parliament on August 28, 2006.

Apart from these legal issues, a political aspect has been thrown into the debate. The question whether the Berlin Senate followed a restitution claim too readily without sufficient scrutiny of its factual basis was linked with suspicions raised by Christie's speedy acquisition of the Kirchner piece. Both the chairman of the Brücke Museum board and a museum director from Dresden have commented critically on the recent rise of restitution claims – suspecting they might be related to the art market's boom and its hunger for fresh works.³² The Kirchner painting is only the latest in a series of recently returned artworks which were up for sale shortly after their restitution: In January 2006 the Austrian government returned five paintings by Gustav Klimt to the Bloch-Bauer heirs after years of legal quarrels.³³ A few months later, Klimt's 1907 portrait "Adele Bloch-Bauer I" was sold to Ronald S. Lauder for \$ 135 million US, the other four pieces will be up for auction this fall. In June, Egon Schiele's 1914 painting "Herbstsonne" (Autumn Sun) sold in London for nearly \$ 22 million US. Others have cautioned against such assumptions. They say the suspicion that moral issues are being instrumentalized for commercial gain only caters to anti-semitic clichés.³⁴

At this moment it remains pure speculation whether there is reason to believe that market interests are at stake rather than moral justice.³⁵ What the current debate shows, however, is a growing public awareness and a demand among art professionals for closer scrutiny of restitution claims in the future.

D. Conclusion

The overview has shown that there is no clear-cut legal answer to the questions raised in the Kirchner case. In addition, in restitution matters, purely legal arguments are often not the most appropriate way of reasoning. Where moral responsi-

³² See, Thomas Huetlin, Ulrike Knöfel and Joachim Kronsbein: *A Mona Lisa for America*, SPIEGEL ONLINE, 26 June 2006, available at <http://service.spiegel.de/cache/international/spiegel/0,1518,423651-2,00.html>

³³ See, *Republic of Austria v. Altmann*, 541 U.S. 677 (2004). The parties later agreed on arbitration; the arbitrator held for the Bloch-Bauer heirs; an English translation of the holding is available at http://www.writelyle.com/View.aspx?docid=ahjqm32fn79x_bad4zpv4j253. For an account by their lawyer, see E. Ranold Schoenberg, *Whose Art is it Anyway*, in HOLOCAUST RESTITUTION: PERSPECTIVES ON THE LITIGATION AND ITS LEGACY 288 (Michael J. Bazylar/Roger Alford eds., 2006).

³⁴ Hanno Rauterberg: *Werden die Museen geplündert?*, DIE ZEIT, 24 August 2006, available at <http://www.zeit.de/2006/35/Spitze35>.

³⁵ See also Michael Kimmelmann: *Klimts go to Market; Museums Hold Their Breath*, NEW YORK TIMES, 19 September 2006, available at http://www.nytimes.com/2006/09/19/arts/design/19kimm.html?_r=2&ref=arts&oref=slogin&oref=slogin

bility is evident, the ambiguity of an obligation in law should be of subordinate importance. However, regardless of how one eventually judges the obviousness of a moral obligation in the Kirchner case: The overriding and determining factor of any final decision to be reached in restitution matters must be the goal of restitution policy as laid down in the Washington Principles – to achieve a fair and just solution.

