WŁASNOŚĆ INTELEKTUALNA A DZIEDZICTWO KULTUROWE

red. M. Jankowska, P. Gwoździewicz-Matan, P. Stec

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Matthias Weller[1]

TOWARDS 25 YEARS OF WASHINGTON PRINCIPLES ON NAZI-CONFISCATED ART: TIME FOR A „RESTATEMENT OF RESTITUTION RULES"?

1. Introduction

Wojciech Kowalski is amongst the most imminent voices in the field of restitution of nazi-looted art and cultural heritage or, to put it in his words, the liquidation of the effects of World War II in the area of culture. His academic works have received wide attention and acclaim both in Poland and within the international academic scene. To mention only two of his achievements as a legal scholar in this area: His works "Art treasures and war. A study on restitution of looted cultural property pursuant to Public International Law" which appeared in 1993[2] and "Liquidation of the Effects of World War II in the Area of Culture" which appeared in 1994[3] were among the first to provide a comprehensive historical and legal study of the concepts on the restitution and reparation of looted cultural assets that were discussed in post-war Poland and far beyond. Both works have become standard references in the field of restitution law.

In 1998, the jubilee was part of the Polish delegation at the Washington Conference on Holocaust-Era Assets which took place November 30

[1] Universität Bonn, Germany.

[2] KOWALSKI W., *Art treasures and war. A study on restitution of looted cultural property pursuant to Public International Law* (published in Polish), Katowice 1993, English version London 1998.

[3] KOWALSKI W., *Liquidation of the effects of World War II in the area of culture*, Warsaw 1994.

through December 3, 1998 at the U.S. Department of State in Washington D.C. His contribution to the overall turnout of this conference cannot be underestimated. He was among the voices urging for a consolidated effort of all participating states to achieve solutions that would reconcile the need to restore cultural heritage unlawfully displaced during the war and the necessity to maintain stable amical relations between the states in a post-war Europe. Thus, by rule of principle, confiscation where unlawful should give way to restitution. However, these efforts ought to happen "in the spirit of concord and reconciliation"[4].

Judging by the scope and the spirit of the final declaration of the conference (officially referred to as the "Washington principles on Nazi-Confiscated Art" or in short the "Washington Declaration") these considerations have resonated with the majority of the delegations present at the conference. In fact, the Washington Declaration, far from imposing specific legal mechanisms and procedures, opened a path for participating states to develop "own solutions consistent with their own legal systems"[5]. In this text, the 44 participating states agreed on eleven non-binding principles regarding the restitution of "art that had been confiscated by the Nazis and not subsequently restituted" (Principle No. 1). Most famously, the Washington Declaration states that:

> "[i]f the pre-War owners of art that is found to have been confiscated by the Nazis and not subsequently restituted, or their heirs, can be identified, steps should be taken expeditiously to achieve a just and fair solution" (Principle No. 8) and that

"Nations are encouraged to develop national processes to implement these principles [...]" (Principle No. 11).

The declaration suggests that such national processes could take the form of alternative dispute resolution mechanisms. In the ensuing years, a few states, five in total, including Germany, France, the Netherlands, Austria and the United Kingdom, put in place alternative dispute resolution mechanisms for dealing with individual restitution claims regarding nazi-looted art. In over 20 years of practice, the respective committees

[4] KOWALSKI W., *Restitution Policy of the Polish Government Post-war to Present* [in:] *Proceedings of the Washington Conference on Holocaust-Era Assets*, Chapter IV Nazi-Confiscated Art Issues, pp. 483-484.

[5] EIZENSTAT S., *In Support of Principles on Nazi-Confiscated Art*. Presentation held at the Washington Conference on Holocaust-Era Assets in Washington DC, 3 December 1998, online: http://fcit.usf.edu/holocaust/resource/assets/art.htm, (access: 15.06.2019).

have dealt with a large variety of cases and have adopted different, sometimes singular approaches to achieve "just and fair" solutions[6].

In 2012, almost 14 years after the Washington Conference, the first meeting of these five European-only restitution commissions was held in The Hague in the Netherlands followed by a public conference in the Peace Palace with scholars from all over the world attending. Back then, I had the great privilege and honour to contribute to this conference. In view of growing divergences within the recommendation practice of the respective panels and commissions – the case law, so to speak – I started thinking about something that I referred to as a „restatement of restitution principles"[7]. Restatements of the law, as we know them from the American Law Institute, the ALI, respond to a growing and thereby inevitably diverse, if not in some points contradictory case law. Upon mission by the ALI, a reporter's team gathers and examines all relevant cases and attempts to infer the respective ratio from these cases – the *ratio decidendi* – in order to restate black letter rules of law and comments as well as annotations to these rules[8].

The 28 restatements of the law by the ALI which have been published since 1923 are surprisingly influential, they guide and direct the case law to a good extent, and their harmonizing effects on an otherwise colourful, if not sometimes chaotic case law in the jurisdictions of the 50 United States of America, are equally surprising, even though these restatements do not have and do not intend to have any binding effects but only persuasive authority: The ALI's "[...] authority derives [...] from its competence in drafting precise and internally consistent articulations of law"[9].

[6] For a comprehensive study of the application of the "just and fair" soft law rule in these European states: CAMPFENS W., *A Note in Favour of Clear Standards and Neutral Procedures*, "Art Antiquity and Law", 2017, Vol. XXII, Issue 4, pp. 323-331; MARCK A., MULLER E., *National Panels Advising on Nazi-looted Art in Austria, France, the United Kingdom, the Netherlands and Germany* [in:] *Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War, International* Symposium *Fair and just solutions? Alternatives to litigation in Nazi looted art disputes: status quo and new developments*, ed. E. Campfens, The Hague 2015, pp. 41-91.

[7] WELLER M., *Key elements of just and fair solutions: The Case for a Restatement of Restitution Principles* [in:] *Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War, International Symposium Fair and just solutions? Alternatives to litigation in Nazi looted art disputes: status quo and new developments*, ed. E. Campfens, The Hague 2015, pp. 206-210.

[8] For further information on the nature and style of restatements of law: The American Law Institute, *Capturing the Voice of The American Law Institute: A Handbook for ALI Reporters and Those Who Review Their Work*, revised edition, Philadelphia 2015. online: https://www.ali.org/media/filer_public/08/f2/08f2f7c7-29c7-4de1-8c02-d66f5b05a6bb/ali-style-manual.pdf, (access: 18.06.2019).

[9] The American Law Institute, ibid., p. 6.

Last year in 2018, the German Federal Government and the *Deutsche Zentrum Kulturgutverluste* invited to Berlin to discuss „20 years of the Washington Conference: Roadmap to the Future" (*20 Jahre Washingtoner Prinzipien: Wege in die Zukunft*)[10]. On day one, M. Masurovsky, historian at the Holocaust Art Restitution Project in Washington DC, asked Stuart E. Eizenstat in the public discussion session whether the Washington Principles should not generally be applied in a way that always improves the claimant's position. Eizenstat replied that this would be a fundamental misunderstanding. The Washington Principles, he explained, looked for just and fair solutions between the claimant and the other party. According to Eizenstat, they do not intend to solely take into account the claimant's interests. They also look at the other party's position. On day two of the conference, the latest recommendation of the Dutch Restitution Commission[11] in the Lewenstein case[12] was publicly criticized by S. Eizenstat. It would be a fundamental misunderstanding to include in the search for just and fair solutions a weighing of interests between the claimant and the other party, as the Dutch Commission had done in this case.

These two moments in the conference drew me into what I would call a cognitive dissonance. The views expressed in these two statements can hardly be reconciled. It would have to be checked with S. Eizenstat what he exactly said and what he exactly intended to say, but I think it is fair to conclude from these two moments that there is at least room for discussion, if not uncertainty, maybe even inconsistency, as to how the Washington Principles are to be perceived and applied on the most fundamental level. In other words, while proceeding towards the 25th anniversary of the Washington Declaration, the overall objective and intention of its principles remain controversial. Furthermore, we are facing increasing divergences between the recommendation practices of the different national commissions.

In order to remedy this situation, my proposition would (still) be to start working on a restatement in the style of the American Law Institute, a "Restatement of Restitution Rules". In the following I will sketch a few building blocks of such a restatement.

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[10] For more general information on the content of the conference (in German): https://www.kulturgutverluste.de/Content/02_Aktuelles/DE/Veranstaltungen/2018_20-Jahre-Washingtoner-Prinzipien/Programm-20-Jahre-Washingtoner-Prinzipien-Wege-in-die-Zukunft.pdf?__blob=publicationFile&v=4 (access: 15.06.2019).

[11] *Adviescommissie Restitutieverzoeken Cultuurgoederen en Tweede Wereldoorlog* (*Restitutiecommissie*), https://www.restitutiecommissie.nl/en/the_restitutions_committee.html (access: 15.06.2019).

[12] Binding opinion of the *Restitutiecommissie* No. RC 3.141 regarding the dispute about restitution of the painting Painting with Houses by Wassily Kandinsky, currently in the possession of Amsterdam City Council of 22 October 2018.

2. Overall objective: „Just and fair solutions“

First, we need to clarify how „just and fair” solutions are to be conceptualized on a fundamental level. In order to do so we have to agree on a common understanding of the terms „justice“ and „fairness“ as the underlying concepts of any recommendation. We could look for guidance in the wording of Principle No. 8, but we will not find any answers beyond the point that „just and fair“ solutions are required. Yet, for example, uncertainty remains as to what the addition of „fair“ contributes to „just“ solutions[13].

We could once more go back to the materials of the Washington Conference, but so far, I could not spot any additional insights.

If we then go back to the text and take the wording seriously, we could connect it to a powerful theory of justice from the United States, namely „justice as fairness“ by J. Rawls[14]. Although the preparatory works of the Washington Principles suggest no historical link between this particular theory and Principle No. 8, this theory – in my view − appears to be particularly adequate for the subject-matter. But there may be other more suitable theories, and this would be a first issue of a restatement to assess in its general or theoretical part.

In a nutshell, J. Rawls argues that a society’s conceptions of justice can be established, evaluated and assessed (only) by reference to principles that the free and rational members of a society would have agreed to in a hypothetical status quo, a fair starting point – the so-called “original situation“ as he puts it[15]. The description of such an original situation var-

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[13] DAVIDSON D., *Just and fair solutions* [in:] *Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War, International Symposium Fair and just solutions? Alternatives to litigation in Nazi looted art disputes: status quo and new developments*, ed. E. Campfens, The Hague 2015, 91-93.

[14] RAWLS J., *Justice as Fairness: Political not Metaphysical*, “Philosophy and Public Affairs” 1985, Issue 14, pp. 223–251; *A Theory of Justice*, Revised Edition, Cambridge (Massachusetts) 1999.

[15] RAWLS J., *A Theory of Justice…*, pp. 10-11: “[…] the guiding idea is that the principles of justice for the basic structure of society are the object of the original agreement. They are the principles that free and rational persons concerned to further their own interests would accept in an initial position of equality as defining the fundamental terms of their association. […] This way of regarding the principles of justice I shall call justice as fairness. […] In justice as fairness the original position of equality corresponds to the state of nature in the traditional theory of the social contract. This original position is not, of course, thought of as an actual historical state of affairs, much less as a primitive condition of culture. It is understood as a purely hypothetical situation characterized so as to lead to a certain conception of justice. Among the essential features of this situation

ies depending on the purpose for which justice is meant to be produced. Rawls developed his theory with regards to the distribution of opportunities within a given society. His theory deals with distributive justice.

In our case, I would believe, we operate in a context of corrective civil justice – a form of justice whose objective it is to undo wrongs committed in the past by means of restitution to the former state or compensation[16]. Nevertheless, I believe that the setting of an original situation of fairness which allows us to develop principles and rules of justice, quite well characterizes the situation in which we find ourselves vis-à-vis the Washington Principles. What else would be a plea for „just and fair" solutions without almost any further instructions than our own established convictions of justice.

What secures fairness in such an original situation? A first element of fairness is that the parties who are to decide on the basic principles and rules of justice are ignorant of any fact that might distort their impartial judgement, in particular on which side and in which position they will find themselves once the rules are applied to them in a specific case. They are only aware of "general facts of human society". This is what Rawls refers to as the "veil of ignorance"[17]. Rawls argues that such a starting point guarantees a balanced drafting of impartial principles and rules of justice. Every individual following the mentioned line of reasoning would eventually come to the same conclusion[18].

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is that no one knows his place in society, his class position or social status, nor does any one know his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like. I shall even assume that the parties do not know their conceptions of the good or their special psychological propensities. The principles of justice are chosen behind a veil of ignorance. This ensures that no one is advantaged or disadvantaged in the choice of principles by the outcome of natural chance or the contingency of social circumstances. Since all are similarly situated and no one is able to design principles to favor his particular condition, the principles of justice are the result of a fair agreement or bargain".

[16] ZEIDLER K., *Restitution of Cultural Property, Hard Case Theory of Argumentation, Philosophy of Law*, Warsaw 2016, pp. 143-144.

[17] RAWLS J., *A theory of Justice...*, p. 118: "[...] the only particular facts which the parties know is that their society is subject to the circumstances of justice and whatever this implies. It is taken for granted, however, that they know the general facts about human society. They understand political affairs and the principles of economic theory; they know the basis of social organization and the laws of human psychology. Indeed, the parties are presumed to know whatever general facts affect the choice of the principles of justice".

[18] Ibid., p. 120: "[...] we can view the agreement in the original position from the standpoint of one person selected at random. If anyone after due reflection prefers a conception of justice to another, then they all do, and a unanimous agreement can be reached".

Another central element of fairness is what John Rawls called a „reflective equilibrium“. In order to produce stable rules of justice, conceptions of justice are to be confronted with initial intuitions of justice amongst the participating parties – Rawls refers to them as “considerate convictions of justice” or “considerate judgments” – whereby conceptions of justice can find themselves either confirmed or challenged. This confrontation of the parties’ own moral convictions with conceptions of justice derived from the original situation may lead the parties in question to adapt their own convictions or to revise the concept of justice which does not align with their own judgement in a particular situation. The whole process is thus characterized by a rational, argumentative approach in which arguments for and against a specific conception are assessed in order to determine the most adequate solution for a specific case (from a philosophical point of view).

In the words of John Rawls, “[...] this state is one reached after a person has weighed various proposed conceptions and he has either revised his judgments to accord with one of them or held fast to his initial convictions (and the corresponding conception)”[19].

In short, the “reflective equilibrium” is achieved through a weighing of different convictions and conceptions of justice, or, more generally, conflicting interests.

If we endorse this theory of justice and apply it to the Washington Principles, we get a better understanding of two fundamental points. First, the balancing and weighing of interests to reach a reflective equilibrium is inherent to justice. Thus, it is equally inherent to applying “just” rules that emerge from the original situation and form a common standard of “justice”.

This theoretical proposition is further substantiated by the wording of Principle No. 8, as this Principle reads „[...] just and fair solution, recognizing this may vary according to the facts and circumstances surrounding a specific case“. How should anyone take any decisions on “just and fair”

[19] Ibid., pp. 42-43: “According to the provisional aim of moral philosophy, one might say that justice as fairness is the hypothesis that the principles which would be chosen in the original position are identical with those that match our considered judgments and so these principles describe our sense of justice. But this interpretation is clearly oversimplified. [...] From the standpoint of moral theory, the best account of a person’s sense of justice is not the one which fits his judgments prior to his examining any conception of justice, but rather the one which matches his judgments in reflective equilibrium. [...] [T]his state is one reached after a person has weighed various proposed conceptions and he has either revised his judgments to accord with one of them or held fast to his initial convictions (and the corresponding conception)”.

solutions without any balancing and weighing of interests in line with the facts and circumstances of a specific case?

This is further substantiated by a statement by S.tuart E. Eizenstat in his presentation on the Principles at the Washington Conference back in 1998:

> „After existing art works have been matched with documented losses comes the delicate process of reconciling competing equities of ownership to produce a just and fair solution – the subject of the eighth and ninth principle”[20].

Reconciling competing equities of ownership – what else should this be than a balancing and weighing of interests of both parties similar to the argumentative approach supported by Rawls in his theory on justice as fairness.

This brings me to the second point that we can take from connecting John Rawls' theory of justice as fairness to the "just and fair" solutions in the Washington Declaration. We have not yet fully reached the reflective equilibrium that would allow us to produce justice in a particular case. But how can we achieve such a state of reflective equilibrium in respect to rules emerging from the original situation as a prerequisite to finding just solutions?

For this, we should take a closer look at the main reason for developing a restatement of restitution rules: inconsistencies in practice.

3. Reasons for a Restatement: Inconsistencies in Practice

Let me illustrate this point by a telling example: The controversy surrounding what we call in German *Fluchtgut*. *Fluchtgut* or flight-related sales concern sales of works of art outside the sphere of Nazi power in safe states by formerly persecuted persons in order to secure their living[21]. What would be a just and fair solution in such cases?

The first of all recommendations by the German Restitution Commission (*Beratende Kommission*[22]) in the year of 2005 had to deal with this spe-

[20] S. Eizenstat, ibid.

[21] CAMPFENS E., ibid., pp. 329-331.

[22] *Beratende Kommission im Zusammenhang mit der Rückgabe NS-verfolgungsbedingt entzogener Kulturgüter, insbesondere aus jüdischem Besitz*, online: https://www.kulturgutverluste.de/Webs/DE/BeratendeKommission/Index.html, (access: 15.06.2019)).

cific issue. This was the case of Julius Freund who had managed to transfer his collection to Switzerland at the end of 1933. Julius and his wife Clara emigrated to the UK in 1939[23]. After Julius' death in 1941 Clara needed money for living and sold the collection at the Gallery Fischer in Luzern in 1942. The work was acquired by the German Reich as part of the so-called *Sonderauftrag Linz*[24] (special assignment Linz).[25] The German Commission decided in favour of restitution, but was partly criticized for doing so, and one of the arguments put forward was that the old post-war restitution legislation, Military Law no. 59 of the German US occupation zone and its corresponding legislations in the other Western Allied zones, did not apply to such extraterritorial sales. The implementation of the Washington Principles in Germany is indeed, in principle, envisaged along the lines of this old legislation of the Allied Force which, in principle, is favourable to the claimants: for example, the quite far-reaching presumption for a forced sale that is reapplied in today's recommendations directly derives from Article 3 of this US Military Law no. 59[26].

In 2016, the Austrian Commission[27] had to decide about works from the collection of Julius Freund, and the Austrian Commission, based on the same facts, decided not to recommend restitution.[28] Similarly in 2006, the Austrian Commission had decided against restitution in the case of George

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[23] Recommendation of the *Beratende Kommission* in the case of Julius Freund ./. Germany of 12 January 2005, official press release, online: https://www.kulturgutverluste.de/Content/06_Kommission/DE/Empfehlungen/05-01-12-Empfehlung-der-Beratenden--Kommission-im-Fall-Freund-Deutschland.pdf?__blob=publicationFile&v=6 (access: 15.06.2019).

[24] A special mission charged by Adolf Hitler with the acquisition of paintings and other works of art for the *Führermuseum* in Linz (Austria): Lost Art-Database, online: http://www.lostart.de/Content/051_ ProvenienzRaubkunst/DE/Glossar/S/Sonderauftrag%20Linz .html (access: 15.06. 2019).

[25] Provenance Database of the Federal Republic, online : https://www.bva.bund.de/SharedDocs/Provenienzen/DE/45000_45999/45139.html?nn=264024 (access: 15.06. 2019).

[26] Der Beauftragte der Bundesregierung für Kultur und Medien, *Handreichung der Bundesregierung zur Umsetzung der „Erklärung der Bundesregierung, der Länder und der kommunalen Spitzenverbände zur Auffindung und zur Rückgabe NS-verfolgungsbedingt entzogenen Kulturgutes, insbesondere aus jüdischem Besitz" vom Dezember 1999*, revised edition, Berlin 2007, p. 82.

[27] *Kunstrückgabebeirat*, online: http://www.provenienzforschung.gv.at/de/empfehlungen-des-beirats/ (access: 15.06.2019).

[28] Recommendation of the *Kunstrückgabebeirat* in the case of heirs of Julius Freund ./. Austria of 23 June 2016, online: http://www.provenienzforschung.gv.at/beiratsbeschluesse/Freund_Julius_2016-06-23.pdf (access: 15.06.2019).

Grosz[29], as well as in 2008 in the case of Hugo Simon[30]. The reasoning was always the same: There may be a line of causality between persecution and loss of property, but the loss took place outside the sphere of Nazi power.

In 2009, the Dutch Commission decided in the Semmel case about a sale in 1933 in Amsterdam that "Semmel lost possession as a result of circumstances directly related to the Nazi Regime" and thus recommended restitution.[31]

In 2012, the Spoliation Advisory Panel in the United Kingdom had to decide on *Fluchtgut* in the case of Otto Koch. Otto Koch died in 1919. Otto's widow Ida married E. Netter in 1930. Emil died in 1936. Otto Koch had been a collector of watches and clocks, which Ida inherited. She managed to bring to England some 161 watches and clocks, and these were then sold by Christie's in London in June 1939. The panel held – on a balance of probabilities – that this was a forced sale, but

> "[...] the Panel, nonetheless, considers that the sale is at the lower end of any scale of gravity for such sales. It is very different from those cases where valuable paintings were sold, for example, in occupied Belgium to pay for food or where all assets had to be sold in Germany in the late 1930s to pay extortionate taxes. The sale was not compelled by any need to purchase freedom or to sustain the necessities of life"[32].

In 2014, the German Commission dealt with its next case on *Fluchtgut*, this time in the case of C. Levy[33]. Clara Levy had managed to emigrate to

[29] Recommendation of the *Kunstrückgabebeirat* in the case of George Grosz ./. Austria of 4 December 1998, online: http://www.provenienzforschung.gv.at/beiratsbeschluesse/Grosz_George_2006-03-29.pdf, (access: 15.06.2019).

[30] Recommendation of the *Kunstrückgabebeirat* in the case of Hugo Simon ./. Austria of 4 December 1998, online: http://www.provenienzforschung.gv.at/beiratsbeschluesse/Simon_Hugo_2008-11-21.pdf. (access: 15.06.2019).

[31] Recommendation of the *Restitutiecommissie* regarding Semmel No. 1.75 of 1 July 2009, online: https://www.restitutiecommissie.nl/en/recommendations/recommendation_175.html, (access: 15.06.2019).

[32] Report of the Spoliation Advisory Panel in respect of 14 clocks and watches now in the possession of the British Museum, London (HC 1839) of 7 March 2012, online: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/78037/SAP-report-BM-HC1839.pdf (access: 15.06.2019).

[a] Recommendation of the *Beratende Kommission* in the case of Levy Levy ./. Bayerische Staatsgemäldesammlungen of 21 August 2014, online: https://www.kulturgutverluste.de/Content/06_Kommission/DE/Empfehlungen/14-08-21-Empfehlung-der-Beratenden-Kommission-im-Fall-Levy-BSTGS.pdf?__blob=publicationFile&v=5 (access: 15.06.2019).

Luxemburg in order to join one of her children, her son. She had managed to transfer large parts of her belongings to Luxemburg, including 78 paintings. Clara died in 1940 and passed on her assets to her four children. One of these children, her daughter Else Bergmann, had emigrated to New York already in 1938. Part of Clara's household stored in Luxemburg was shipped to New York, and on a quite clear balance of probabilities the painting in question, Lovis Corinth's "Drei Grazien" (Three Graces) from 1904 was shipped out as well. The remaining parts of the belongings were taken by the Nazis. In 1941, the Three Graces were put up for public auction and sold to Curt Valentin, Buchholz Gallery, New York. In 1949, the Kunstmuseum Bern acquired this painting, but already in 1950 the museum resold the painting to the Bavarian State Gallery. The German Commission held: no forced sale, since "[i]t cannot be assumed that the Washington Principles, even in its most extensive interpretation, intended the rescission of otherwise valid transactions by the rightful owner".

In 2016, the German Commission had its next case on *Fluchtgut*, this time in the case of Alfred Flechtheim in connection with an auction in London[34]:

> "If an art dealer and collector who was persecuted by the National Socialists sells a painting in a safe foreign state in an auction or otherwise, there must be very specific reasons, before such a sale could be recognized as a forced sale. In the case of Flechtheim's painting by Juan Gris, Nature morte ('violon et encrier') from 1913 no such reasons became apparent"[35].

This recommendation marks an interesting step in the development of the case law. Finally, we may be able to identify a sort of *ratio decidendi*: In principle, *Fluchtgut* does not result in restitution, unless there are very specific reasons to the contrary. This a principle that appears to be more favourable to claimants than the absolute position on *Fluchtgut* taken in Austria and the United Kingdom. However, the recommendation does not shed any light on what might constitute such very specific reasons.

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[34] Recommendation of the *Beratende Kommission* in the case of Alfred Flechtheim Erben Stiftung Kunstsammlung Nordrhein-Westfalen, Düsseldorf of 21 March 2016, online: https://www.kulturgutverluste.de/Content/06_Kommission/DE/Empfehlungen/16-03-21-Empfehlung-der-Beratenden-Kommission-im-Fall-Fleichtheim-Kunstsammlung-Nordrhein-Westfalen.pdf?__blob=publicationFile&v= (access: 15.06.2019).

[35] Translation by author.

In March of this year of 2019, the latest recommendation on *Fluchtgut* was handed down in the case of Max Emden[36]. Max Emden was the founder of leading department stores in Germany in the 1920ies, Kaufhaus des Westens in Berlin, Oberpollinger in Munich, 30 department stores, 10.000 employees. Emden sold all of that to Karstadt in 1926, emigrated to Switzerland in 1927 and bought two islands, the Brissago Islands, in the Lago Maggiore and ultimately became a Swiss citizen, but large parts of his assets remained in Germany and were later taken by the Nazis. Facing increasing economic difficulties in Switzerland after 1937, he sold several paintings by Canaletto in Switzerland. The German Commission decided to recommend the restitution since "[t]he policy of persecution within National Socialism was [...] causal for the financial collaps of Max Emden"[37].

Does all of this fit together? Not really. This poses a fundamental issue for the legitimacy and acceptance of all recommendations lacking a serious amount of consistency. If we know one thing about justice, it is that like cases should be treated as like and unlike cases should be treated unlike. This issue must be addressed, otherwise the "reflective equilibrium" cannot be achieved and if we are not at least close to this reflective equilibrium we will not be able to secure just and fair solutions as best as we can. As part of a restatement all cases related to *Fluchtgut* would have to be duly considered and evaluated in order to see whether there are grounds for making a distinction between specific cases. Finally, a restatement would attempt to deduce a general rule usually based on the majority rule. However, if more compelling reasons suggest to follow the minority rule, a restatement would do so or would go as far as to suggest a different approach.

4. Conclusion

The reader will not be surprised to see me saying: „The time for a ‚Restatement of Restitution Rules' has come!". We are looking back at thousands of cases after 20 years of practice of the five most active jurisdictions in Europe and – obviously and inevitably – we are facing growing inconsistencies with many more cases to come. It is time to work on a restate-

[36] Recommendation of the *Beratende Kommission* in the case of Dr. Max James Emden / Federal Republic of Germany of 23 April 2019, online: https://www.kulturgutverluste.de/Content/06_Kommission/DE/Empfehlungen/19-03-26-Empfehlung-der-Beratenden-Kommission-im-Fall-Emden-Deutschland.pdf?__blob=publicationFile&v=4 (access: 15.06.2019).

[37] Translation by author.

ment while we are approaching the 25th anniversary of the Washington Principles in 2023.

This is basically what I told the German government after the conference in Berlin last year, and I am pleased and honoured to be able to mention that the German Federal Government, as of 1 April of this year, represented by its Commissioner for Culture and Media, Monika Grütters, decided to finance such a project of a comparative „Restatement of Restitution Rules“ which is indeed now taking place as an academic research at the University of Bonn[38]. However, one thing that is clear: We will need input, comments, arguments, constant critique from third parties – like the reader – in order to come closer and closer to the „reflective equilibrium“ on each normative point that we will face in the process of deducing just and fair solutions. This input from all perspectives is also what the American Law Institute relies on for its restatements and it is what makes such a restatement valuable. And we would be particularly delighted to receive input from such eminent scholars in the field like the jubilee – *ad multos annos*!

[38] Press release on the official website of the research project, online: https://www.jura.uni-bonn.de/professur-prof-dr-weller/forschungsprojekt-restatement-of-restitution--rules (access: 18.06.2019).