

Denial of restitution in the United States Court of Appeals' verdict in case of *Marei von Saher v. Norton Museum of Art at Pasadena and Norton Simon Art Foundation*

Von Saher v. Norton Simon Museum of Art at Pasadena, No. 16-56308 (9th Cir. 2018), 30 July 2018

The act of state doctrine requires that the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid, it should not violate the foreign affairs doctrine, and the federal government's exclusive power to make and resolve war, including the resolution of war claims.

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Commentary

1. Factual and legal status

This case centers on the two Renaissance masterworks *Adam* and *Eve* painted by Lucas Cranach the Elder, referred to below as the paintings or the Cranachs. In 1931, Jacques Goudstikker, a Dutch art dealer, purchased the Cranachs from the Soviet Union at an auction in Berlin of what was known as the Stroganoff Collection.¹ The paintings then became the property of the art dealership in which Goudstikker was principal shareholder, referred to below as the Goudstikker firm or the firm.

Goudstikker specialized in paintings by Dutch and Flemish Masters.² He was married to Désirée von Halban-Kurz, a Viennese opera singer. On 14 May 1940, as the war progressed and the Germans invaded the eastern Netherlands, the Goudstikker family

¹ The U.S. district court found that the Stroganoff family "never owned" the Cranachs, a fact that was contested by the museum and muddled by the record of evidence that never appeared in court.

² B. Dermasin, *Art and Cultural Heritage Law: Developments and Challenges in Past and Presents*, Conference, Maastricht, 27–28 March 2011.

decided to flee to England. Goudstikker died during the sea voyage, but his wife and son made the passage safely. The trustee of the art dealership who was appointed by Goudstikker to manage the art collection and business died the day following Goudstikker's death. Goudstikker's other employees, Arie Ten Broek and Jan Dik, requested that Alois Miedl, a German banker and businessman, assume the management of the firm. On 1 July 1940, Miedl purchased the Goudstikker firm by a sale agreement that included all assets together with the trading name of the firm. Shortly afterwards, Miedl concluded another sale agreement with Hermann Göring. These two sale agreements were concluded on 13 July 1940. The first was between Goudstikker, represented by his employee Ten Broek, who was temporarily overseeing the business in the wake of the death of the previous trustee, and Miedl, regarding Goudstikker's real estate (family villa, castle), company name, and co-ownership of the meta-paintings,³ for just NLG 550,000. The second agreement was between Miedl and Göring, Commander-in-Chief of the German Luftwaffe, who was very interested in the collection, for all art objects belonging to Goudstikker's company that were located in the Netherlands on 26 June 1940 for NLG 2,000,000 (the equivalent of over \$20 million at today's value). He subsequently acquired 13 of the meta-paintings, and transferred most of the collection to his mansion near Berlin.

After the Second World War, the Allied Forces in Germany assembled hundreds of art objects formerly owned by Göring that had been taken from Goudstikker, including the Cranachs. The process of restitution for all looted items was organized according to the policy of external restitution, which meant that looted art objects were not returned directly to the dispossessed owners but to their country of nationality. In 1946, the Allies turned the paintings over to the Dutch government. The return of art was administrated by the Netherlands Art Property Foundation (Stichting Nederlands Kunstbezit – SNK).

In 1966, the Dutch government sold the two Cranach paintings to George Stroganoff-Sherbatoff, referred to below as Stroganoff, after Stroganoff filed a restitution claim alleging that he was the rightful owner of the paintings since the Soviets had stolen the paintings from his family in 1931. Stroganoff later sold the paintings to the Norton Simon Art Foundation in 1971 and the Norton Simon Museum of Art in Pasadena, referred to below as the museum, is where the paintings have been on display ever since. In the late 1990s, von Saher tried to recover all the Goudstikker paintings from the Dutch government including the ones from the forced sale. The Dutch Court of Appeals published its final decision denying von Saher's petition for the restoration of her rights to the paintings.⁴ However, a few years later, the Dutch government decided to return the paintings that were still in its possession to von Saher, but it did not return the two paintings it had already sold to Stroganoff because

³ The paintings Jacques Goudstikker referred to in his documents as "meta-paintings" were those (21 in number) which he co-owned with others at the time he fled to England.

⁴ *Marei von Saher v. Norton Simon Museum of Art at Pasadena and Norton Simon Art Foundation* (D.C. No. 16-56308), <https://www.courtlistener.com/opinion/4521921/marei-von-saher-v-norton-simon-museum-of-art/> (accessed: 20.04.2021).

they were already in California. Hence, von Saher decided soon after to sue the museum in federal court.⁵

2. Decision and argumentation

The court applied the act of state doctrine that requires the acts of foreign sovereigns taken within their own jurisdictions be deemed valid. The court held in its decision that von Saher's application of restoration would require the court to make null and void some official acts of the Dutch government concerning both restoration and contract law.

The Allies were surprisingly and openly aware of its officers looting art and decided in early 1942–1943 that all plundered property would be returned shortly after the war to its country of origin; however, no compensation was to be made to the then current owners. As a matter of fact, some art was returned to the countries of origin and not necessarily to the factual owner. Each country established separate bodies responsible for coordinating and supervising these acts. The Americans established the Monuments, Fine Arts and Archives program and in 1945, the Netherlands government set up the SNK. Anyone who was aware of his/her family's art having been stolen during the war could complete an SNK form requesting its restitution.

The Hague Convention No. IV (1907) on the laws and customs of war defines what is forbidden during armed conflict as acts that "destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war."⁶ President Truman admitted an external restitution policy concluded at the 1945 Potsdam Conference under which both the U.S. and the other Allies would restore objects to the countries from which they had been taken.⁷

Despite its long history and vast legal regulations, the U.S. court decided to base its verdict in this case on Dutch law. In 1940, the Dutch government enacted Royal Decree A6 just after the Nazis invaded the Netherlands. The decree prohibited and automatically nullified agreements with the enemy. Decree A6 vested authority in a special committee known as *Commissie Rechtsverkeer in Oorlogstijd*, or CORVO. In 1944, Royal Decree E100 was enacted that established a separate Council for the Restoration of Rights (Raad voor het Rechtssherstel) with broad and exclusive authority to declare null and void, modify, or revive "any legal relations that originated or were modified during enemy occupation of the [Netherlands]." The last important decree worth mentioning

⁵ Opinion by Judge McKeown; Concurrence by Judge Wardlaw, Appeal from the United States District Court for the Central District of California, Argued and Submitted February 14, 2018, Pasadena, California.

⁶ Hague Convention No. IV, Respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, sec. II, ch. I, art. 23(g), Oct. 18, 1907, 36 Stat. 2277, T.S. 539.

⁷ Report, Art Objects in US Zone, July 29, 1945, NACP, RG 338, USGCC HQ, ROUS Army Command, Box 37, File: Fine Art [313574-575].

is Royal Decree E133 enacted in 1944, which permitted expropriating some enemy assets in order to be able to compensate the Netherlands for losses it suffered during the Second World War. Article 3 of Decree E133 provided specifically that within the Netherlands, all “[p]roperty, belonging to an enemy state or to an enemy national, automatically passes in ownership to the State with the entering into force of this decree.” The Act of expropriating enemy properties was conducted automatically until July 1951, when the Netherlands ceased all hostilities with Germany.

The Goudstikker firm decided to pursue restitution for the Miedl transaction and included other artworks and real estate. On 1 July 1951, before the E100 deadline, the Goudstikker firm filed a petition with the council for the restoration of rights concerning only the Miedl transaction and not the subsequent transaction. By August 1952, the firm and the Dutch government settled the firm’s restitution claims by fully exploiting restitution channels for this transaction.⁸ With regard to the art delivered to Göring in 1940 after the first transaction, a ruling was handed down by the court of appeals of The Hague on 16 December 1999 denying the Goudstikker heir’s petition and concluding that the firm had already “made a conscious and well considered decision to refrain from asking for the restoration of rights with respect to the Göring transaction.”⁹

The district court conducted over a year of discovery in this case and considered the parties’ cross-motions for summary judgment. After deciding to apply the Dutch law, the district court granted summary judgment to the museum, concluding that:

- 1) because CORVO revoked the automatic invalidity of the Göring transaction in 1947, this transaction was recognized as “effective” and so the Cranachs were considered to be Göring’s rightful property;
- 2) because Göring was recognized as an enemy within the meaning of Dutch Royal Decree E133, the ownership of all his property that was located in the Netherlands, including the Cranach paintings, automatically passed to the state of the Netherlands according to art. 3 of this decree;
- 3) until and if the council annuls the Göring transaction under Royal Decree E100, all of the Cranach paintings remain the property of the Dutch State;
- 4) and lastly because the second transaction between Miedl and Göring was never annulled using Royal Decree E100, the Netherlands was the rightful owner of the Cranachs when it sold the paintings to Stroganoff in 1966;
- 5) the U.S. court would have to change Dutch law to allow for the restitution of the Cranach paintings from the museum.¹⁰

⁸ United States Court of Appeals for the Ninth Circuit *Marei von Saher, Plaintiff-Appellant, v. Norton Simon Museum of Art at Pasadena; Norton Simon Art Foundation*, No. 16-56308 D.C. No. 2:07-cv-02866- JFW-SS OPINION, p. 10.

⁹ Decision of the Court of Appeals of The Hague, *Amsterdams Negotiatie Campagnie N.V. v. Von Saher-Langenbein et al.*, No. 98/298, 16 December 1999.

¹⁰ United States Court of Appeals for the Ninth Circuit in the case of *Marei von Saher v Norton Simon Museum of Art at Pasadena; Norton Simon Art Foundation* (D.C. No. 16-56308).

3. Assessment of the court's position

For the first time, American judiciary decided to ignore decades of efforts made by Congress, the executive branch, and the courts to resolve particular problems created by the Nazis, especially those connected with the looting of art. The district court decided in its ruling that the Nazi art looter Göring rightfully acquired the title to paintings he received through a forced sale (the sale entailed the promise of security and safety together with the quick purchase of the art after the end of the invasion in the Netherlands for a price that was never fully paid). This odd decision stands both U.S. law and standards on their heads with the ruling that Göring, who is recognized as one of the worst Nazi art looters and who once said "I intend to plunder and to do it thoroughly",¹¹ acquired the title to the property. Both parties concluded that the paintings were the subject of a forced sale (after case recognition in both the Netherlands and the USA, the courts admitted the coercion), and, thus, every sale thereafter was also null and void, including that to the Norton Simon Museum. However, the lower court concluded that the Dutch government received the ownership title from Göring rightfully, despite post-war restitution policies and practices that emphasized the need to return looted objects to the rightful owners who were victims during the difficult times of war. In the case of *Marei von Saher v Norton Simon Museum*, there were no doubts as to who the victim of the alluded contract was.¹² There was also no mystery about applicable U.S. law or policy; victims of Nazi art looting should receive fair, just resolutions of their claims. However, the district court was only able to rule in the defendant's favor in its disappointing decision.

Von Saher sought relief from an American museum in Pasadena that, at first view, had no connection to the wartime injustices that were committed against the Goudstikkers. Earlier, von Saher sought relief from the Dutch government itself. A letter from the Dutch Minister for Education, Culture, and Science of 2006 claimed that "the State of the Netherlands is not involved in this dispute" between von Saher and the museum; however, the fact that the claimant is of Dutch origin and the first restitution was made in the Netherlands involved this country in the case.¹³

The United States supposedly determined that the Dutch state provided the Goudstikker family with an adequate opportunity to recover the artwork that was the subject of the litigation in the U.S. They decided that according to foreign policy their duty is to respect the finality of previous Dutch restitution proceedings, and, thus, it decided to avoid any involvement in the ownership dispute over the Cranachs, which is quite disappointing.

¹¹ W.L. Shirer, *The Rise and Fall of the Third Reich: A History of Nazi Germany*, Simon & Schuster, New York – London – Toronto 1960.

¹² A. Roet, "The Netherlands is Still Hoarding a Massive Collection of Art Looted From Jews by Nazis", *Haaretz*, 7 September 2017, <https://www.haaretz.com/world-news/europe/.premium.MAGAZINE-netherlands-still-hoards-massive-collection-of-nazi-looted-art-1.5449074> (accessed: 16.04.2021).

¹³ *Von Saher v. Norton Simon Museum of Art at Pasadena*, <https://caselaw.findlaw.com/us-9th-circuit/1669025.html> (accessed: 12.04.2021).

4. Conclusions

The decision made by the Dutch court in 2006 concerning the Goudstikker case was supposed to have had international repercussions and to have opened an avenue for the reclamation of other looted artworks from Goudstikker's collection. However, in these legal proceedings the case was completely turned upside down.

In addition to this legal case, von Saher has made claims on many others paintings that are either in litigation or have been settled. Her latest triumphs include settlements with the Cummer Museum of Art and Gardens (a still life by Jacques Adolphz. De Claeuw) and the settlement with Harald Hein (owner of the painting *Portrait of a Hunter With Dog* by Aelbert Cuyp). Working with her team of experts, von Saher has undertaken extensive efforts to retrieve other missing works that were recorded on the list of Goudstikker's business holdings. Artworks looted from Goudstikker because of the two first null transactions have been located in many institutions in over a dozen countries, including in some U.S. museums. The efforts of Von Saher and her legal team have led to numerous voluntary restitutions made by governments, private collections, museums, dealers, and also, extraordinarily, auction houses.

Literature

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Summary

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Denial of restitution in the United States Court of Appeals' verdict in case of *Marei von Saher v. Norton Museum of Art at Pasadena and Norton Simon Art Foundation*

In a disappointing ruling that rejected the appeal of Holocaust claimant Marei von Saher, the United States Court of Appeals for the Ninth Circuit decided on 30 July 2018 that the Norton Simon Museum in Pasadena (respondent) can keep Lucas Cranach the Elder's works *Adam* and *Eve*. Von Saher is the sole heir of the Jewish art dealer Jacques Goudstikker, who died in 1940 leaving behind a vast art collection that was then sold to German officer. The family has been trying to regain these items as they were sold in a very peculiar manner. This was von Saher's third attempt at obtaining the restoration of the paintings. The district court in 2007 dismissed the

action with prejudice. Von Saher appealed, and the court of appeals affirmed the sentence. After von Saher appealed for the last time, the court gave its final decision.

Keywords: artworks, restitution, judicial claim, ownership, war plunder, institutional facilitator

Streszczenie

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Odmowa restytucji w orzeczeniu Sądu Apelacyjnego Stanów Zjednoczonych w sprawie *Marei von Saher przeciwko Norton Museum of Art w Pasadenie i Norton Simon Art Foundation*

W bardzo rozczarującym orzeczeniu, w którym sąd odrzucił apelację Marei von Saher, Dziewiąty Obwód Sądu Stanów Zjednoczonych zdecydował 30 lipca 2018 r., że Norton Simon Museum w Pasadenie (pozwany) może zatrzymać prace Lucasa Cranacha Starszego pt. *Adam i Ewa*. Von Saher jest jedyną spadkobierczynią żydowskiego handlarza dziełami sztuki Jacquesa Goudstikka, który zmarł w 1940 r., pozostawiając po sobie ogromną kolekcję dzieł sztuki, zakupionych przez niemieckiego oficera. Rodzina próbowała odzyskać te rodzinne dobra, ponieważ zostały sprzedane w bardzo specyficzny sposób. Była to trzecia próba restytucji malowideł przez von Saher. Sąd rejonowy w 2007 r. oddalił powództwo na podstawie meritum sprawy, co spowodowało, że powód nie mógł w przyszłości wytoczyć powództwa, używając tych samych argumentów. Von Saher wniosła jednak apelację, a sąd apelacyjny utrzymał w mocy poprzedni wyrok. Po ostatniej apelacji von Saher sąd wydał ostateczną decyzję.

Słowa kluczowe: dzieła sztuki, restytucja, roszczenie sądowe, własność, grabież wojenna, pośrednik instytucjonalny