**Memorandum of the Advisory Commission on Nazi Looted Property**

1. **Currently no legal regulation**

The Advisory Commission on Nazi Looted Property was established 20 years ago. It consists of ten public figures and advises on particularly complex cases of looted art. The members of the Advisory Commission have a legal, art historical, historical or political background. Among the ten members are - since 2016 - two Jewish representatives. The members of the Commission work on a voluntary basis. Since its foundation 20 years ago, the Advisory Commission on Nazi Looted Property has ruled on 23 cases of looted art. Its recommendations have always received a great deal of attention, as well as approval and criticism. For years, the recommendations have been received as groundbreaking in the specialist literature in Germany and abroad. Without becoming binding, they play an important role in the decision-making process of museums and their state or municipal sponsors and have considerable significance for the art market. The small number of recommendations of the Commission is based on the corresponding small number of joint invocations of the Advisory Commission. The Lost Art Database alone, in which international search and find reports of Nazi looted art are published, records around 74,000 search entries and a further 55,000 find entries of seized cultural assets. Behind these figures are the fates of families affected by persecution. In addition, there are countless other cases of loss for which the information required for registration has not been handed down or has not yet been sufficiently researched to enable a search or finds report to be published. There are no statistics on restitutions that take place outside the procedure of the Advisory Commission on Nazi Looted Property. The DZK also does not publish how many restitutions are reported to the Lostart database.

The Advisory Commission on National Socialist Looted Property was constituted as an institution that is to develop recommendations for the resolution of disputed cases in accordance with the Washington Principles, but only if the parties involved participate voluntarily in the proceedings in which the Advisory Commission acts as a mediation body. The Commission has no legal personality of its own and no binding legal basis. The Washington Principles are not a binding treaty under international law, but a "political and moral commitment" by the signatory states. The Joint Declaration of the Federal Government, the Länder and the leading municipal associations adopted in Germany to implement the Washington Principles, as well as the so-called Handreichung, do not have any legal normative force either. However, it is not a law. The same applies to the rules of procedure of the Advisory Commission, which also do not have the quality of a legal statute. The2questions of restitution with regard to cultural assets seized as a result of Nazi persecution are therefore not regulated by law in Germany. For two decades, Germany has been working with a so-called "soft law". The Advisory Commission was also set up on the basis of this soft law. A legally binding set of rules is lacking; one works with political-moral "declarations of commitment," i.e., with declarations of politically-morally benevolent behavior. The Advisory Commission is therefore also an institution based on such a political agreement between the federal government, the states and the leading municipal associations.

The lack of a legal basis for an institution that is to decide on the restitution of cultural assets lost as a result of Nazi persecution in the country of the perpetrators is inappropriate and insufficient. The current coalition agreement holds out the prospect of improving Nazi looted art restitution by standardizing a "right to information", the exclusion of the "statute of limitations for claims for restitution", a "central place of jurisdiction" and the strengthening of the "Advisory Commission". So far, none of these points has been implemented. Conceivable ways of realizing these points have also not been named so far. Against this background, on the occasion of its 20th anniversary, the Advisory Commission is concerned to point out structural deficiencies and to identify necessary or conceivable approaches to reform.

1. **Structural Deficiencies and their Remedies**
2. Unilateral Invocability

The main obstacle to the Advisory Commission's handling of more looted art cases is that the victims' descendants have no opportunity to initiate proceedings before the Advisory Commission on their own initiative. The Commission can only become active if both sides, i.e. both the descendants of the victims and the museums or other cultural property preservation institutions, agree to the appeal on the part of the claimants. This state of affairs contradicts Principle No. 7 of the Washington Principles: "Pre-war owners and their heirs should be encouraged to register their claims to works of art (...)." The case of "Madame Soler" in particular has gained sad notoriety because the Bavarian State Painting Collections, with the approval of the Bavarian State Government and the Bavarian Parliament, have refused to participate in the proceedings for more than ten years on the grounds that the work of art is not looted art. However, the determination of whether the artwork is to be considered looted art would be precisely the task of the commission and not of the institution affected by this determination.3The former Minister of State Monika Grütters had already announced in 2018 that all museums supported by the federal government with funds for provenance research would be obligated to agree to every application by descendants to refer the matter to the Advisory Commission. This requirement has not been implemented in the past, despite assurances to the contrary from the Commissioner for Culture and the Media (except for the few museums directly subordinated to the federal government)1. In fact, this amounts to a veto right for the vast majority of public institutions that preserve cultural assets. From the point of view of the opera and their descendants, this is unreasonable and inappropriate; they cannot bring their claims before the Commission and have them clarified unless the public institutions agree.

The lack of possibility for victims' descendants to unilaterally appeal to the Commission is met with incomprehension both in Germany and abroad. The procedural rules of other countries, such as the Spoliation Advisory Panel in Great Britain and the Restitutiecommissie in the Netherlands, provide for unilateral appeal by victims. Courts in the U.S. make the acceptance of a looted art case dependent on whether the victims are guaranteed a fair trial in Germany. Victims and their descendants must be given the opportunity to initiate proceedings before the Commission without having to rely on the voluntary cooperation of the cultural institution in whose care the cultural property is located. The most important goal of any reform of the Advisory Commission must be the possibility for the descendants of victims to have possible looted art cases clarified by the Commission even without the consent of the cultural property preserving institutions and their owners.

1. **Binding effect of decisions**

So far, the Advisory Commission can only make recommendations and not issue binding decisions. These cannot be enforced. Their implementation is left to the parties. Although it can be assumed that public institutions will follow the Commission's recommendations, they are not obliged to do so. The Commission's 23 recommendations to date have been implemented, but in some cases against strong resistance and only as a result of public and media pressure. The Commission must be able to issue binding and thus enforceable decisions. This would also improve the Commission's visibility. However, the Commission would then no longer be a merely "advisory" commission. This presupposes that the questions of restitution of cultural assets seized as a result of Nazi persecution are also regulated by law in Germany. It is therefore up to the legislator, who should regulate the establishment, status and composition of the Independent Commission in a legally binding manner. The procedure before the commission would also have to be regulated, including the possibility of unilateral appeal and the designation of the decisions hitherto taken as recommendations as legally binding. Thus, the federal legislature, which is called upon to legislate under Article 74 (1) No. 9 of the Basic Law, could institutionalize the Commission as an upper federal authority or as a legally independent legal entity by virtue of Article 87 (3) of the Basic Law. In this context, the full autonomy of this institution would also have to be legally guaranteed. Above all, the assessment standards according to which the Commission must decide on the restitution request would also have to be regulated by legal norms.

1. **Cultural property in private hands - substantive restitution law indispensable**

The Washington Principles refer to cultural property in public and private hands. However, the implementation of the Washington Principles in Germany means that up to now, cultural assets in public ownership have been the subject of proceedings almost without exception, and the ownership of looted art by private individuals and private institutions has not been touched. Nevertheless, the major auction houses, such as Christies and Sothebys, actively investigate consignments for looted art and, in such cases, recommend that the consignors come to an agreement with the families concerned. The solution then usually consists of a joint sale of the artwork. In such a case, the auction houses waive part of the commission. As a rule, the descendants of those persecuted do not receive more than 50% of the auction proceeds. In these constellations, the heirs do not receive a regulated procedure and there is no recognition of the injustice done by an institution of the perpetrator's country. This is often highly unsatisfactory for the heirs. In the case of cultural objects of lesser value, small auction houses often do not bother to establish provenance at all. The claim that many cases are solved by the market is therefore only true to a very limited extent.

For a long time, there have been calls for private institutions or private individuals who own the cultural property in question to be included in restitution proceedings. If one wants to go beyond the aspect of voluntariness, a comprehensive restitution law is necessary. This is because under current civil law, claims for restitution on the grounds of a seizure as a result of Nazi persecution are no longer justified or enforceable. The plea of statute of limitations is only one aspect that would, to a certain extent, come at the end of the examination. In many cases, the exclusion effect of the Allied Restitution Act would have to be taken into account, according to which claims under civil law would be excluded for a long time. The possibility of the Ersitzung under Section 927 of the German Civil Code would also have to be taken into account. In any case, it must be stated that under current civil law in Germany, claims for restitution with regard to cultural property that was seized as a result of Nazi persecution do not exist or no longer exist. A plea of limitation would not come into play. If one wants to remedy this situation and enable restitution claims also against private individuals or private institutions, the only option is to enact a comprehensive restitution law that establishes new, original 5 restitution claims. In doing so, the legislator would have to specify the prerequisites of a Nazi persecution-related seizure in concrete terms and, in doing so, would have to be guided by the recommendations of the Advisory Commission.

The solution proposed by the Bavarian state government in 2014, according to which the statute of limitations for claims for restitution pursuant to Section 985 of the German Civil Code for cultural property lost in connection with Nazi persecution measures should be abolished, as is now being considered in the coalition agreement, is unsuitable, because even if the thirty-year statute of limitations were abolished, there would still be the possibility of seizure of movable property, which occurs as early as ten years after an acquisition in good faith. In addition, according to the case law of the Federal Court of Justice, claims for restitution are generally precluded due to the registration periods stipulated in the restitution laws.

1. **Statutory Regulatory Alternatives**

In the case of a comprehensive restitution law, constitutional issues must be examined and, in particular, the preservation of the fundamental right of freedom of ownership of Article 14 (1) of the Basic Law must be ensured. If owners are subjected to a newly created claim for restitution by third parties, this is not conceptually an expropriation within the meaning of Article 14 (3) of the Basic Law, but it is a so-called content and limitation provision of property subject to compensation. Owners who were in good faith when acquiring the cultural property in question with regard to a Nazi persecution-related seizure can only be obliged to hand it over to third parties if compensation or indemnification is provided for at the same time. Only if they were in bad faith when acquiring the property, i.e. if they acted knowingly with regard to the Nazi persecution-related deprivation or were only unaware of this Nazi persecution-related deprivation due to gross negligence, are they not worthy of protection in the constitutional sense and could be legally obligated to surrender without a corresponding compensation or indemnification payment. The bona fide owners could only be legally obliged to surrender the cultural property if they were simultaneously granted a claim for compensation or settlement. As far as the amount of this claim is concerned, the legislator would not be obliged to base it on the current market value. It could also remain below this and take as a basis, for example, the acquisition value at the time and subsequent expenses required for the preservation and storage of the cultural property.

It would have to be taken into account here that it is a matter of redressing state injustice, so that the German state is ultimately liable for this injustice committed on behalf of Germany. The financial expenses for such compensation and indemnification payments would therefore have to be borne by the public sector, whereby the establishment of a compensation fund under public law would have to be considered.

As far as the structure of the so-called "advisory" commission is concerned, several solutions would be conceivable in the event of a statutory regulation of this institution.6 For example, a solution under administrative law comparable to that of the Property Act could be considered. The commission would then be entrusted with the decision on the restitution application as an upper federal authority, for example; it would decide by administrative act, and legal action would then be taken against this decision. However, the legislature would not have to provide for the full range of administrative proceedings; it could also provide for the establishment of special administrative courts for cases of looted art.

An alternative would be a purely civil law solution, which would mean that the newly created statutory civil law claims for surrender would in principle be decided by the ordinary courts. Nevertheless, the Commission could be retained in the form of an arbitration court, in which case a statutory mandatory arbitration procedure would be provided for. Such a further development of the Commission would be welcome, as this institution has in the meantime accumulated a great deal of experience and expertise.

1. **Provenance Research**

The provenance research funded by the federal government in Germany is inadequately regulated. In the vast majority of cases, the funds go to the museums. To this day, the evaluation of the research dossiers is not subject to any independent organization or body, but is carried out by the museums themselves. As a result, museums still only react to the problems of their holdings when heirs of the aggrieved parties conduct their own research and bring forward claims. Only since 2018 have the descendants of victims also been able to claim research funds. So far, however, only twelve private research projects have been funded. Foreign descendants can only apply for research funds in cooperation with a German institution. The money for provenance research - after all, a total of almost 50 million euros since 2008 - should not go exclusively to the museums, but to an independent research institute. This could also help to reduce the sometimes immense costs for the victims and their descendants in enforcing their rights. At the instigation of the Commission, for example, this institution would compile dossiers on individual holdings or works, which would then be legally assessed by the Independent Commission.

1. **Concluding Remarks**

The current state of regulation in questions of restitution of Nazi-confiscated cultural property is unsatisfactory. The deficiencies are systemic, because the federal government, the states and the municipalities made it relatively easy for themselves a good twenty years ago and dispensed with a legal normative regulation. This must now be done as a matter of urgency, in order to silence criticism at home and, above all, abroad that the Federal Republic of Germany is neither sufficiently able nor really willing to make adequate reparations for Nazi injustice with regard to cultural property. From the point of view of the Advisory Commission, this criticism is particularly unfortunate because it is likely to discredit the work of the Advisory Commission as a whole, although the achievements of the Commission over the past two decades can be considered successful and effective within the narrow limits imposed by the system.

Berlin, ...The honorary members of the Advisory Commission on Nazi Looted Property Prof. Dr. Hans-Jürgen Papier (Chairman), Prof. Dr. Wolf Tegethoff (Deputy Chairman), Marieluise Beck, Marion Eckertz-Höfer, Prof. Dr. Raphael Gross, Dr. Eva Lohse, Prof. Dr. Jürgen Rüttgers, Dr. Sabine Schulze, Dr. Gary Smith and Prof. Dr. Rita Süssmuth.