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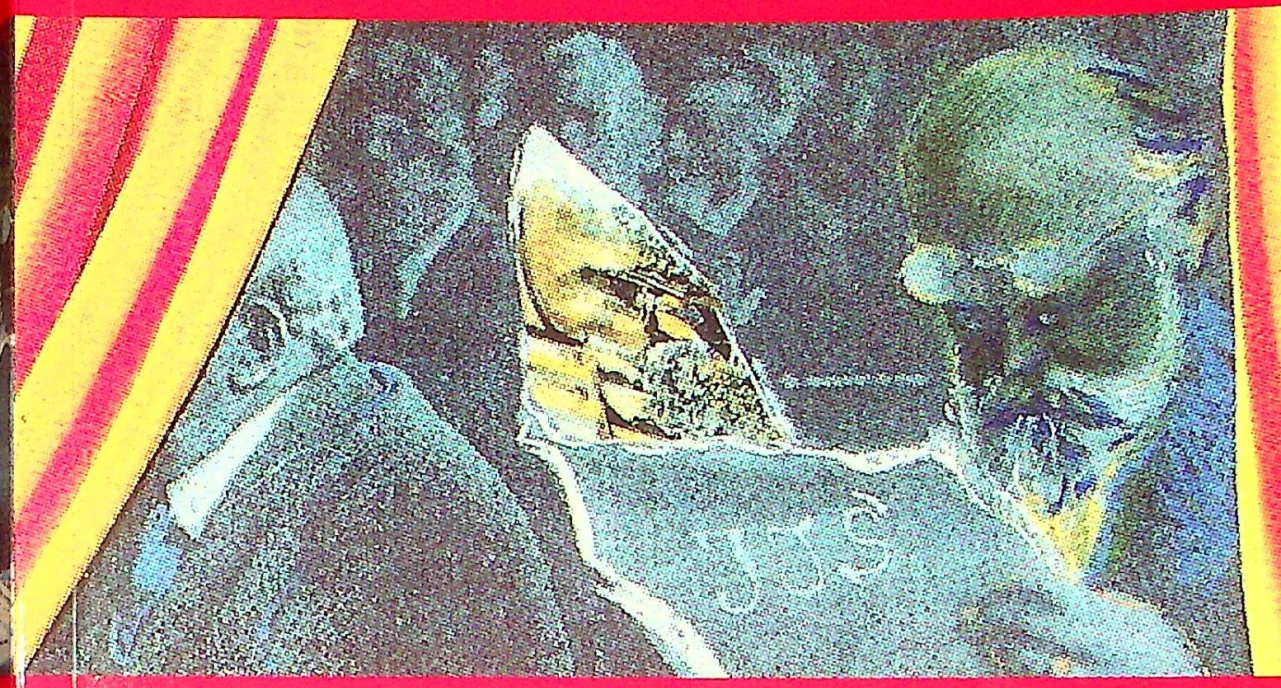

Communities and the(ir) Law

recht als kultur
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Contents

Old and New Community Forms and the(ir) Law

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Just and Fair Solutions? – Fundamentals of a Restitution Culture for Works of Art and Cultural Property Confiscated During Nazi Persecution*

I. Introduction

The Nazi regime was obsessed with art.[1] Hitler,[2] Göring[3] and others[4] built up their own »collections« and looted works of art they were interested in from everyone and everywhere, often from persecuted persons, especially Jews. Objects rejected for ideological reasons such as so-called »degenerate art«, [5] or objects of no cultural interest to the Nazi regime were turned into money, often in order to generate foreign currency by sale on foreign markets.[6] Most of the persecuted persons were targeted by systemic expropriations[7] and, upon their flight from the reach of Nazi power, often had to leave their property behind or had to sell it in forced sales.[8] The persecution of Jews amounted to a comprehensive confiscation of their assets. Targeting their cultural objects was by no means a by-product and not »only« motivated by building up »collections« or by making profit from looting,

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1 E. g. Palmer: Art and the Nazi Terror, in: Museums and the Holocaust, pp. 1 et seq. (see also Weller: Review of Norman Palmer: Museums and the Holocaust, 2nd ed.), with numerous further references. For early and ground-breaking accounts see e. g. Nicholas: The Rape of Europe; Petropoulos: Art as Politics in the Third Reich.

2 See e. g. Kirchmayr: Sonderauftrag Linz; Schwarz: Hitlers Museum.

3 E. g. Petropoulos: Goering's Man in Paris.

4 E. g. Heinrich Himmler, Joachim von Ribbentrop, Martin Bormann, see Eizenstat: Imperfect Justice, p. 188.

5 Hüneke: Kunst am Pranger; Zuschlag: »Entartete Kunst«.

6 In respect to Switzerland as a market place see e. g. Bergier et al.: Die Schweiz, der Nationalsozialismus und der Zweite Weltkrieg, pp. 375 et seq.; see also e. g. Kunze: Restitution »Entarteter Kunst«, p. 189; see generally Rudolph: Restitution von Kunstwerken aus jüdischem Besitz, p. 48.

7 E. g. Bazyler: Holocaust, Genocide, and the Law, pp. 7 et seq. on legal measures against Jews. See also Schwarzmeier: The looting of Art from Jewish property, pp. 8 et seq.

8 Bazyler: Holocaust, Genocide, and the Law, drawing on Hilberg: The Destruction of the European Jews, distinguishes the following four phases of the Holocaust: (1) Identification and definition (1933–1935); (2) Expropriation and emigration (1935–1939); (3) Concentration or ghettoization (1939–1941); (4) Extermination or annihilation (1941–1945).

but an integral part of the attempt to eradicate the Jewish culture in Europe in its entirety – a crime of unprecedented character and dimension, in terms of motivation, means and measures, for which Raphael Lemkin developed the abstract term »genocide«;[9] a crime, which, he explained, typically includes »cultural« annihilation.[10] It is estimated that millions of objects of cultural relevance were looted in Europe during the time in which the Nazi regime was in power, including in particular Jewish religious objects as well as approximately 600.000 artworks.[11] Despite efforts for restitution after the war, up to an estimated 100.000 objects remained in the hands of others than the original owners or their heirs.[12]

On 3 December 1998, 44 States therefore agreed on the Washington Conference Principles on Nazi-Confiscated Art.[13] These principles are »soft law«,[14] and they call on the participating states to identify works of art that were »confiscated«[15]

9 Lemkin: Axis Rule in Occupied Europe, at p. 79: genocide is »a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. ... Genocide has two phases: one, destruction of the national pattern of the oppressed group; the other, the imposition of the national pattern of the oppressor. This imposition, in turn, may be made upon the oppressed population which is allowed to remain, or upon the territory alone, after removal of the population and colonisation of the area by the oppressor's own nationals«. The attribute »national« would have to be nuanced, as Lemkin explained himself (op.cit.), as the greek »genos« would be more »community« or »tribe« than »nation«, i.e. groups of any kind but of strong identity.

10 Bazyler: Holocaust, Genocide, and the Law, pp. 33 et seq.; Bilsky: Cultural Genocide and Restitution, pp. 351 et seq., building on Lemkin.

11 Eizenstat: Testimony on the Status of Art Restitution Worldwide, p. 2; Eizenstat: Imperfect Justice (Chapter 9: »The Barbarians of Culture«, pp. 187 et seq.); Petropoulos: Evidence submitted to the [British] Parliament Inquiry.

12 Eizenstat: Testimony on the Status of Art Restitution Worldwide, p. 2.

13 Washington Conference on Holocaust-Era Assets, 30 November to 3 December 1998, Washington Conference Principles on Nazi-Confiscated Art, https://www.state.gov/washington-conference-principles-on-nazi-confiscated-art/.

14 From a theoretical point of view, »soft law« is a difficult and rather generic term, see e.g. Seinecke: Das Recht des Rechtspluralismus, pp. 3, 25, 34, 62, 236, 298. Given the large impact of the Washington Principles since 1998 resulting, via national implementations of the Washington Principles (in particular in Germany, Netherlands, France, UK, and also, to some degree, in Switzerland) or parallel initiatives (Austria) in the restitution of at least 60.000 objects, sociological theories of »law« would certainly refer to the Washington Principles as law. The same applies to the entire doctrine of legal pluralism, whereas only state-centered theories of law would refer to the Washington Principles as »soft« law, as opposed to »hard« state law and treaties, see Seinecke: Das Recht des Rechtspluralismus, at pp. 94 et seq. (on Eugen Ehrlich's concept of living law).

15 »Confiscation« is to be understood as a generic term to include any kind of loss that appears sufficiently connected to the Nazi regime in order to establish a »moral« claim for a just and fair solution today, irrespective of the legal status of the object under the applicable law. In particular, »confiscation« includes transactions by persecuted persons under duress (»forced sales«), although a sale cannot be equated with confiscations by state entities in the literal sense. This point was clarified in the Terezin Declaration of 30 June 2009 at the Prague Holocaust Era Assets Conference in June 2009, a follow-up to the Washington Holocaust Era Asset Conference in December 1998, in its preamble to the section on »Nazi-confiscated and looted art«: »... various means including theft, coercion and confiscation, and on grounds of relinquishment as well as forced sales and sales under duress, during the Holocaust era between 1933–45 and as an immediate consequence.« In addition,

by the Nazi regime and to find »just and fair solutions« for them.[16] In five of the 44 states, commissions such as the German »Advisory Commission on the return of cultural property seized as a result of Nazi persecution, especially Jewish property«[17] were established shortly after 1998 pursuant to Washington Principle Nos. 10 and 11.[18] Since 1998, thousands of recommendations and decisions on just and fair solutions were issued by these commissions or directly by public (and also sometimes private) holders of objects of works of art and cultural property, in particular museums.[19] Nevertheless, the entire process has remained strongly controversial.[20] To a large extent, such controversies are inevitable: The road towards post-conflict justice cannot be harmonious but always remains painful.[21] The thesis of this text is nevertheless that, additionally, certain fundamentals are neglected in this process – fundamentals that must be observed in order to design and conduct the restitution process as »productive« as possible for each side. Productivity in this sense refers to the greatest possible degree of post-conflict peace.

»confiscation« was the translation of the German term »Entziehung« in Military Government Law No. 59 that primarily focused on restitution after forced sales. Re-translating this technical term as »Konfiskation« or »Beschlagnahme« has lead to the misconception that only direct state action would be addressed by the Washington Principles – which is obviously not the case. Nevertheless the argument keeps recurring in the discourse.

16 Washington Principle No 8: »If 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, recognizing this may vary according to the facts and circumstances surrounding a specific case«.

17 Beratende Kommission im Zusammenhang mit der Rückgabe NS-verfolgungsbedingt entzogenen Kulturguts, insbesondere aus jüdischem Besitz: www.beratende-kommission.de.

18 Washington Principle No 10: »Commissions or other bodies established to identify art that was confiscated by the Nazis and to assist in addressing ownership issues should have a balanced membership.« No 11: »Nations are encouraged to develop national processes to implement these principles, particularly as they relate to alternative dispute resolution mechanisms for resolving ownership issues. Switzerland and also Israel are in the process of establishing such commissions.«

19 The German Government reported in 2019 that since 1998 until September 2018 more than 5,700 cultural objects have been restituted, in addition around 11,700 books and bibliographic objects as well as a larger number of archival objects (more precise and/or more recent numbers seem not available, as there is no central registry for restitutions), see response of the German Federal Government on the parliamentary question by members of the parliamentary group »Die Linke«, German Parliamentary Minutes (BT-Drucks.) 19/6921 of 9 January 2019, p. 17.

20 In Germany, public debate culminated after the restitution of Ernst Ludwig Kirchner's »Berliner Straßenszene« by the Senate of the City of Berlin from its Brücke Museum in July 2006, see e.g. Weller: The Return of Ernst Ludwig Kirchner's Berliner Straßenszene; Schnabel & Tatzkow: Berliner Straßenszene – Raubkunst und Restitution – der Fall Kirchner. See also, more than ten years later, the critical analysis by von Pufendorf: Erworben – Besessen – Vertan. In the years after 2013, the Gurlitt »trove« was discussed very controversially, see e.g. Prütting: Der Fall Gurlitt. In 2021, public debate again culminated after the return of Franz Marc's »Füchse« by the City of Düsseldorf, to the extent that citizens filed criminal complaints against the city's officers for embezzlement of public property whereas the President of the Jewish World Congress Ronald Lauder appeared in the press at the eve of the city council's decision to urge the council to restitute according to the Advisory Commission's recommendation. On this current case, see in more detail below in this text.

21 See below sub III. on »emotions«.

»Peace« does not mean reconciliation[22] but a state of affairs in which victims and their heirs may be ready to recognise that all reasonable steps have been taken to complete the »unfinished business«[23] of undoing remaining unjust enrichments. Fundamentals underpinning and directing this process may form the basis of what could be called a »restitution culture« for works of art and cultural property confiscated during Nazi persecution. Obviously, the term »culture« here is used to mean something entirely different than in the contexts of »cultural« genocide and »cultural« property, namely as describing the entirety of achievements and desiderata (»achievables«) in a particular and difficult field that, despite all outstanding desiderata, has become a historical fact. Obviously, the entirety of these achievements and desiderata is huge and multifaceted and cannot be fully explored here. Rather, certain selected aspects of such a restitution culture will be considered as starting points:

II. Acknowledgement

On 11th April 2021, the President of the Federal Republic of Germany, Frank-Walter Steinmeier, commemorated the liberation of the concentration camp of Buchenwald 76 years before, on 11 April 1945.[24] In his speech, Steinmeier reminded us that at least 56.000 human beings were murdered in Buchenwald. The iron front door of the concentration camp bears the inscription: »*Jedem das Seine*« – each to their own, »*suum cuique*«, a phrase coined by Cicero,[25] thereby relying on thoughts by Plato on justice. Steinmeier observed in this respect: »It is not only the number of the murdered, it is as well the way human beings were deprived of

22 »Reconciliation« (»Versöhnung«), often connected to »forgiveness« (»Vergebung«) is a concept deeply rooted in Christian religion, see e.g. Lucas, 23, 34; 2 Kor 5, 19. Obviously, such a concept does not directly fit for Holocaust-related post-conflict challenges, as it will not be shared by the vast majority of victims. Further, reconcilation and forgiveness in Christian theology does not depend on any condition but emerges from the mercy of God for mankind. Even overtones in this direction must be irritating for victims and their heirs, as mercy is certainly too much to ask from others than God, in particular for systemic expropriations within a genocide and remaining unjust enrichments therefrom. Even after undoing unjust enrichments e.g. by restitution of Nazi-confiscated art, the tort of illegal taking remains a historical fact and is only undone in relation to its material conseqences. Therefore, reconciliation should neither be expected nor asked for, it may be simply »there« at some point, in a distant future and a long time after all »unfinished businesses« have been completed. Rather, restitution should look more at Jewish concepts, possibly inspired e.g. by concepts such as »tikkun olam« (»repairing the world«), see e.g. Dorff: The Way Into Tikkun Olam.

23 Eizenstat: Imperfect Justice; see also e.g. Bindenagel: Die unvollendete Geschichte von NS-Raubkunst.

24 https://www.bundespraesident.de/SharedDocs/Reden/DE/Frank-Walter-Steinmeier/Reden/2021/04/210411-Buchenwald.html.

25 Cicero: De natura deorum, Cic. N.D. 3.38.

their rights, exploited, tortured and murdered (...). It is the reverse of all values, the perversion of the law, of morality and humanity«. This appears to be a central issue that makes it particularly and specifically difficult to return to any kind of justice after the Holocaust between the group of victims and their heirs and the group from where the perpetrators came.

Full, outspoken, and uncompromising acknowledgement of the atrocities of the Holocaust is but one step towards rebuilding relations for a restitution process. Acknowledgement in the legal sphere must follow.[26] In 1999, the German Federal Constitutional Court explained that the legal order of the post-war Federal Republic of Germany intends and is designed, in all of its parts, to be the absolute opposite of that under the Nazi regime. In particular, it held that indemnification of national socialist injustice as well as the right of persecuted persons to reparation constitute a particularly important public interest (*»besonders gewichtiges Gemeinwohlziel«*) of the Federal Republic of Germany.[27] Recognition and implementation of such an interest generate a number of effects in legal controversies connected to the Holocaust.

For example, provenance research as called for by Washington Principles Nos. 2, 3, 5 and 6[28] relies and depends on exchange and processing of information and data. However, the European Union has put into place strong regulations for data protection through its General Data Protection Regulation.[29] Article 6 regulates the »lawfulness of processing« of data and thus constitutes the core of the Regulation; nevertheless, it operates mainly with general principles that need to be concreticized. According to Article 6 (1) lit. e of the Regulation, processing of data is lawful without consent[30] if »processing is necessary for the performance of a task

26 For a comprehensive account of the history and structures of legal reactions see Bazyler: Holocaust, Genocide, and the Law (Part Two: Legal reckoning with the crimes of the Holocaust, pp. 69–234).

27 Federal Constitutional Court of Germany, judgment of 23 November 1999, on the time limits for restitution claims under section 4 (2) of the Law on the Settlement of Open Property Issues (*Gesetz zur Regelung offener Vermögensfragen*) of 23 September 1990, Collection of the judgments of the Federal Constitutional Court (BVerfGE) Vol. 101, pp. 239 et seq., at p. 268: »die Wiedergutmachung nationalsozialistischen Unrechts als auch das Restitutionsinteresse der Verfolgten stellen ein besonders gewichtiges Gemeinwohlziel dar«.

28 Washington Principle No. 2: »Relevant records and archives should be open and accessible to researchers, in accordance with the guidelines of the International Council on Archives«; No. 3: »Resources and personnel should be made available to facilitate the identification of all art that had been confiscated by the Nazis and not subsequently restituted«. No. 5: »Every effort should be made to publicize art that is found to have been confiscated by the Nazis and not subsequently restituted in order to locate its pre-War owners or their heirs«. No. 6: »Efforts should be made to establish a central registry of such information.«

29 Regulation (EU) 2016/679 of the European Parliament and oft he Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), O.J. L 119/1 of 4 May 2016.

30 Which is hardly possible to retrieve from all persons, natural and living; see Recital 14 and Article 1 of the Regulation, potentially affected by data transfers for provenance research.

carried out in the public interest ...«. Article 6 (3) lit. b of the Regulation further specifies that »[t]he basis for the processing referred to in point ... (e) of paragraph 1 shall be laid down by Member State law ...«. Many other elements of the Regulation add to further specify these very general rules. It is not the purpose here to go into detail, but it should have become apparent that acknowledgement by the highest judicial authority of a Member State that indemnification of national socialist injustice as well as the right of persecuted persons to reparation constitute a »particularly important public interest« of the state that has to take the historical responsibility for the Holocaust contributes significantly to pave the way for a transfer of data on Holocaust-related provenance research.[31]

Another example of the legal relevance of the acknowledgement by the German Federal Constitutional Court relates to donations to public museums. Often, these donations, be it by will, be it by gift, be it by establishing a foundation, are put under the condition that none of the objects donated must be deaccessioned. These stipulations may conflict with moral claims for restitution as Nazi-confiscated art under the Washington Principles and its national implementations.[32] A first step to resolve this conflict would be to interpret the donor's will: did the donor really intend to exclude the restitution of the donated object as Nazi-confiscated art or did he or she not aim solely at preventing the sale or other disposal of the donated object in the »regular business« of the museum, e.g. to raise money for the museum's budget? In light of the »particularly important public interest« in indemnification and restitution identified by the German Federal Constitutional Court, it should be assumed that donors usually do not intend to damage the museum's reputation by hindering them to comply with said interest to which the public museums in Germany even committed themselves publicly.[33] This is at least the German Government's position in relation to a donor's will in setting up a foundation (»Stiftung«) holding the donor's objects of art, as expressed in the legislative

[31] See also Recital 158 of the Regulation: »Member States should also be authorised to provide for the further processing of personal data for archiving purposes, for example with a view to providing specific information related to the political behaviour under former totalitarian state regimes, genocide, crimes against humanity, in particular the Holocaust, or war crimes«. The precise meaning and effects of this Recital are unclear, and it would be desirable to implement express legal bases for data processing in Holocaust research, both on the European Union's as well as on the Member State's level, see e.g. Matthias Weller, Statement in the Hearing on cross-border restitution claims of works of art and cultural goods looted in armed conflicts and wars of the Jury Committee of the European Parliament of 3 December 2019.

[32] See e.g. recently on this question (as party-retained legal expert) Finkenauer: Restitutionsverbot durch Auflage.

[33] All state holders have declared, in the »Joint Declaration« of 1999 by all levels of the Federal Republic of Germany, to endorse the Washington Principles and to embark on provenance research accordingly and to proceed to just and fair solutions based on such provenance research, see Joint Declaration of the Federal Republic, the Federal States and the Municipalities, December 1999, https://www.kulturgutverluste.de/Webs/EN/Foundation/Basic-principles/Common-Statement/Index.html.

materials for the new legislation on foundations.[34] If nevertheless interpretation leads to the result that the donor did intend to prohibit restitution,[35] or if the text of the will expressly and specifically excludes restitutions of donated objects as Nazi-confiscated art, the question is whether such agreement is invalid for violating public policy. The clear acknowledgement by the highest German court of the particularly important public interest in indemnification and restitution suggests such a violation of public policy, thus invalidating such agreements.[36] In a similar case, the Austrian Restitution Commission (»*Kunstrückgabebeirat*«), in its decision of 10 October 2000 in re Jenny Steiner on Gustav Klimt's »Landhaus am Attersee (Sommerlandschaft)« recommended restitution from the Austrian Gallery despite the donor's term not to dispose of the object.[37] Strikingly, the Commission did not even make the effort of constructing a legal justification (e.g. invalidation of the donor's term for violating public policy) but simply recommended breaking the obligation laid down in the notarial deed for the donation in favour of Austria's strong public policy in favour of restitution.

Acknowledgement includes taking note of delivered efforts for indemnification, for example by the Federal Republic of Germany: In 1949, first according to the legislation by the US Military Occupation Government, the restitution of property[38] and, sometime later, compensation schemes started,[39] providing for

[34] Law on the Unification of the Law for Foundations (Gesetz zur Vereinheitlichung des Stiftungsrechts und zur Änderung des Infektionsschutzgesetzes) of 16 July 2021, Federal Gazette of Laws (Bundesgesetzblatt, BGBl.) I No. 46 of 22 July 2021, pp. 2947 et seq. The Government's Explanations, German Parliamentary Minutes (BT-Drucks.) 19/28173, read, at p. 51: »Die Restitution von NS-verfolgungsbedingt entzogenen Kulturgütern ist ein wesentliches Element der Aufarbeitung des nationalsozialistischen Unrechtregimes. Es ist der erklärte Wille der Bundesregierung, der Länder und der kommunalen Spitzenverbände, dass auch Privatpersonen und privatrechtlich organisierte Einrichtungen der Gemeinsamen Erklärung folgen, die ihrerseits die Washingtoner Erklärung umsetzt. Zudem liegt die Rückgabe von Kulturgut nicht nur dann im wohlverstandenen Interesse einer Stiftung, wenn ein Rückgabeanspruch nach dem Kulturgutschutzgesetz besteht, sondern regelmäßig auch in jedem Fall, in dem durch die Rückgabe unrechtmäßig verbrachtes Kulturgut anderer Staaten an diese zurückzugeben werden kann.«

[35] Finkenauer: Restitutionsverbot durch Auflage, at p. 135, considers this to be the regular case.

[36] But compare Finkenauer: Restitutionsverbot durch Auflage, at p. 135.

[37] Austrian Restitution Commission (*»Kunstrückgabebeirat«*), Decision of 10 October 2000 in re Jenny Steiner, https://provenienzforschung.gv.at/beiratsbeschluesse/Steiner_Jenny_2000-10-10.pdf: »Die Intentionen des Rückgabegesetzes sind aber höher zu gewichten als diese seinerzeit vom Bund im Rahmen des Notariatsaktes übernommene Verpflichtung, deren Einhaltung somit vom Bund nicht empfohlen wird«.

[38] Militärregierung Deutschland – Amerikanisches Kontrollgebiet, Gesetz Nr. 59, Rückerstattung feststellbarer Vermögensgegenstände, Bavarian Gazette of Laws and Regulations (*Bayerisches Gesetz- und Verordnungsblatt*) No. 18 of 29 December 1947, pp. 221 et seq, also known (in its English translation) as »Military Government Law no. 59.«

[39] Bundesgesetz zur Regelung der rückerstattungsrechtlichen Geldverbindlichkeiten des Deutschen Reichs und gleichgestellter Rechtsträger (Bundesrückerstattungsgesetz – BrüG, Federal Act on Restitution) of 19 July 1957, Federal Gazette of Legislation (Bundesgesetzblatt, BGBl.) I No. 32 of 23 July 1957, p. 734; Bundesgesetz zur Entschädigung für Opfer der nationalsozialistischen Verfolgung

individual compensations for the loss of lives, health, businesses, property, sales under value, costs of emigration etc., combined with public welfare schemes for Holocaust survivors and their families in need.[40] Acknowledgement includes the realization that no payment of money can bring back a single life that was taken in the Holocaust. Yet, the efforts of Germany for Holocaust reparation are internationally acknowledged.[41] These efforts have reached the equivalent of more than 80 billion Euros by now,[42] and these efforts are ongoing. For example, recently, the German Federal Government provided for a fund of 500 Million Euros to support survivors of the Holocaust in the Covid-19 pandemic.[43]

Acknowledgement must include the fact that the current process of the restitution of Nazi-confiscated art under the Washington Principles in Germany takes place against the background and in the context of these efforts. In their (aforementioned) Joint Declaration of 1999, the German Federal Government, the German States (the »Länder«), and the municipalities declared:

»In accordance with the requirements of the Allied restitution provisions, the Federal Act on Restitution and the Federal Indemnification Act, the Federal Republic of Germany has fulfilled merited claims on grounds of confiscation of works of art by the Nazi regime after WW II. ... The restitution law and the general civil law of the Federal Republic of Germany thus finally and comprehensively provide for issues of restitution and indemnification of Nazi-confiscated art, especially from Jewish property. ... Irrespective of such material compensation, the Federal Republic of Germany declared its readiness at the Washington Conference on Holocaust-Era Assets on 3 December 1998 to look for and identify further Nazi-confiscated cultural property in so far as the legal and factual possibilities

(Bundesentschädigungsgesetz – BEG, Federal Act on Compensation) of 29. Juni 1956 (effective as of 1 October 1953, last modified as of 1 August 2021), Federal Gazette of Legislation (Bundesgesetzblatt, BGBl.) I No. 31 of 29 June 1956, p. 559 et seq. See comprehensively Schwarz (ed.): Die Wiedergutmachung nationalsozialistischen Unrechts durch die Bundesrepublik Deutschland, 6 Vols.; see also Schwarz: Die Wiedergutmachung nationalsozialistischen Unrechts durch die Bundesrepublik Deutschland. Ein Überblick.

40 Eizenstat: Imperfect Justice for Holocaust Survivors and Families of Victims. All of that, »the German model«, as it is sometimes referred to, became »the most famous reparations« in a comparative analysis of legal design and moral foundation by Posner & Vermeule: Reparations for Slavery and Other Historical Injustices, at p. 694.

41 Stuart E. Eizenstat, Testimony on the Status of Art Restitution Worldwide, US House of Representatives, July 27, 2006, https://archives-financialservices.house.gov/media/pdf/072706see.pdf: »No country has accepted its wartime responsibilities more fully and faithfully, having paid [at the time] over 60 billion US-Dollars in Holocaust reparations since the early 1950s (...). I have enormous admiration for Germany«. See also Eizenstat: Imperfect Justice for Holocaust Survivors and Families of Victims, p. 12: »a history of which post-war Germany can be proud of«.

42 Federal Ministry of Finance (Bundesfinanzministerium), Wiedergutmachung, Provisions relating to compensation for National Socialist injustice, Berlin 2021, p. 24.

43 https://www.bundesfinanzministerium.de/Content/DE/Standardartikel/Themen/Oeffentliche_Finanzen/Vermoegensrecht_und_Entschaedigungen/2020-10-19-covid-19-unterstuetzung-fuer-holocaust-ueberlebende.html (19 April 2022).

allow and, if necessary, take steps in order to find a just and fair solution«.[44] This specific history of indemnification plays a role when it comes to controversial lines today between restitution of artworks and compensation of damages from persecution in connection with the loss of artworks.[45]

Last but not least, acknowledgement includes that the German restitution and compensation schemes had their limits and flaws: all too often judges who had been involved in the Nazi regime were sitting on the benches, proceedings were all too often delayed, and claims were all too often systemically diminished.[46]

All of the aforementioned aspects demonstrate that first and foremost remembrance of the dimensions and characters of the Holocaust is a key element of a productive restitution culture for works of art and cultural property confiscated during Nazi persecution.[47] For non-Jewish Germans whose parents or grandparents were actually or potentially involved in the Holocaust, remembrance is to a large extent congruent with acknowledgement. Such acknowledgement is always painful, until today, where we deal with the second and third generation after the generation of the tortfeasors, because these succeeding generations, by their family relations and citizenship, are much closer to Nazi Germany's crimes than they would wish. No such non-Jewish German can avoid taking a stand on Germany's historical responsibility for the Holocaust. However, reactions to this strong and unescapable demand differ and include everything between overwhelming feelings of guilt and shame on the one hand, and on the other hand a kind of guilt-ridden »rejective« anti-semitism. Victims and their heirs thus face the dilemma that without constant »activist« pressure for their rights, nothing would have happened about indemnification but raising claims too forcefully might trigger anti-semitic stereotypes – a danger against which Washington Principle No. 7 seems to be directed: »Pre-War owners and their heirs should be encouraged to come forward and make known their claims to art that was confiscated by the Nazis and not subsequently restituted«. Activist interventions on the part of the claimants must be absorbed adequately in a productive process towards post-conflict justice, whereas any kind of anti-semitic overtones, let alone explicit attacks, are obviously absolutely inacceptable. One element in approaching this delicate task of a restitution culture for works of art and cultural property confiscated during Nazi persecution is a reflected attitude towards emotions:

44 Joint Declaration (above note 33).

45 On this issue in more detail below.

46 See e.g. Lillteicher: Raub, Recht und Restitution, pp. 308 et seq.; Goschler: Wiedergutmachung; Goschler: Schuld und Schulden.

47 Efforts to support »Holocaust education, remembrance and research« was a key part of the Washington Conference on Holocaust Era Assets, see Bindenagel (ed.): Washington Conference on Holocaust Era Assets, pp. 803–908.

III. Emotions

Cultural objects and works of art taken from Jews represent formative elements of the crime that ultimately culminated in the genocide of the Holocaust.[48] Even today, where mostly the second and third generation of Holocaust survivors raise claims as heirs of victims, the emotional »baggage« from the family's fate affected by the Holocaust is often huge, and for the second generation it typically encompasses their entire lives and forms their identities because many of the children from the second generation intensely witnessed, accompanied and shared the suffering of their parents.[49] Psychological studies suggest that traumata may be transferred to the next generation,[50] by behavioural imprinting and also, potentially, »epigenetically«.[51] Many of the second generation's Holocaust survivors conceive it as their duty and as an expression of their loyalty to continue pursuing justice for their parents and the Jewish community.

These emotions often focus on an »imperfect justice« today,[52] in particular a persistent deficit in »corrective justice« in the sense of Ernest Weinrib:[53] remaining unjust enrichments between two sides of a »justice relation«,[54] one of which is the victim's side. On the opposite side there may be a private invididual, e.g. a collector, a legal entity incorporated under private law, e.g. a foundation, or even a municipality or a state, but always a party that currently benefits from the former wrong, be it as direct tortfeasor or its heir, be it as intentional beneficiary of the initial wrong, be it as a third party without any participation, support or other responsibility for the initial wrong. Emotions out of concrete and identifiable remainders of unjust enrichments particularly deserve our attention and respect, and we should share, adopt and reinforce them. This is because unjust enrichment constitutes one of the clearest cases for the need to complete an »unfinished business«[55] of »undoing the wrong«,[56] conceptually much more obvious, almost

48 See above at notes 1 et seq., and accompanying text.

49 E.g. Horowitz: Nostalgia and the Holocaust.

50 E.g. Goldberg: Motherland: Growing up with the Holocaust: »defined by their parents' history«; Nir: Transgenerational Transmission of Holocaust Trauma and Its Expressions in Literature. See also, for another context of injustice and related traumata Trobisch-Lütge & Bomberg (eds.): Verborgene Wunden.

51 E.g. Yehuda et al.: Holocaust Exposure Induced Intergenerational Effects on FKBP5 Methylation: »idea that there may be a molecular mechanism behind«.

52 See once more Eizenstat: Imperfect Justice.

53 E.g. Weinrib: Corrective Justice: »Pure« private law as bilateral relationship in which one party's right is always a function of another party's duty, for example in case of unjust enrichment. This excludes punitive elements such as »punitive damages«. See also Weinrib: The Idea of Private Law.

54 von der Pfordten: Rechtsethik, pp. 216 et seq.

55 Bindenagel: Die unvollendete Geschichte von NS-Raubkunst.

56 Such remaining unjust enrichments are often personalised and thereby emotionalised, e.g. as »the last prisoners of war« of World War II, see e.g. Yonover: The »Last Prisoners of War«, with

trivial, compared to any measurement of compensation in money for material and immaterial losses – obvious because undoing the unjust enrichment by an illegal taking of a physical object is the part of the wrong that can be entirely rectified by an *actus contrarius*. Of course, undoing unjust enrichments enters into delicate zones of »reconciling competing equities of ownership«[57] when it comes to the question which losses are sufficiently »wrong«, for example which losses should be attributed to direct or indirect effects of the Nazi regime[58] or to what extent an innocent third party should be held liable today for restitution of an object acquired in good faith. Given the binary concept of undoing unjust enrichments that calls for »either-or« solutions, it is inevitable that strong and conflicting emotions are connected to the question which claims are to be recognised and which are to be excluded.[59] If the opponent does not believe in the proposed solution, such opponent is prone to perceiving it as blatant injustice, much more than in the case of damages in response to the violation of material or immaterial interests or even loss of lives. The strong demand for corrective justice by undoing unjust enrichments may explain both particularly strong claims in this respect and particularly strong stamina amongst victims and their heirs in pursuing these claims as well as particularly strong struggles over normative tipping points in favour of or against restitution, and also obstruction and resistance on the part of the holders.[60] Nevertheless, it remains inevitable to conduct an intense and meaningful dis-

further references in note 1. See also recently the student paper by Monica May Thompson, The Last Prisoners of War: How Nazi-Looted Art is Displayed in U.S. Museums (2021), which received the Geifman Prize in Holocaust Studies, https://digitalcommons.augustana.edu/geifmanprize/17.

57 Stuart E. Eizenstat, Under Secretary for Economic and Business Affairs, In Support of Principles on Nazi-Confiscated Art, Presentation at the Washington Conference on Holocaust-Era Assets, Washington, DC, December 3, 1998, https://1997-2001.state.gov/policy_remarks/1998/981203_eizenstat_heac_art.html, explaning the essence of Washington Principles Nos. 8 and 9 on finding »just and fair solutions«: »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«.

58 In the context of Nazi-confiscated art, this question of attribution mainly comes up in connection with transactions of persecuted persons under duress (»forced sales«). The systemic persecution of the Nazi regime resulted in countless forms and degrees of direct or indirect pressure. It is inevitable that any assessment framework for restitution must draw a line between unaffected »voluntary«, i. e. legitimate transactions by otherwise persecuted persons and transactions under a sufficient degree of duress to establish a claim for restitution or a more nuanced solution. And indeed, each of the assessment frameworks of Germany, Austria, the Netherlands, France and the United Kingdom as well as Switzerland does it in its own words and structures. Whereas terminology and structures are contingent, their functions are comparable, see Matthias Weller et al.: Restatement of Restitution Rules for Nazi-confiscated Art, approx. Bonn 2024, forthcoming.

59 This is mitigated by Washington Principle No. 8 at its end, where it expressly recgonizes that just and fair solutions »may vary according to the facts and circumstances surrounding a specific case«. And of course, any law on unjust enrichments contains its own elements of mitigation, see e. g. section 812 et seq. of the Geman Civil Code. See also American Law Institute (ALI), Restatement of Restitution and Unjust Enrichment (3rd, 2011).

60 See once more Lillteicher: Raub, Recht und Restitution, pp. 308 et seq.; Goschler: Wieder-

course on how to construct the balance in order to reconcile competing equities of ownership involved. Even in the context of Nazi-confiscated art, it is no scandal to consider elements of good faith[61] or, to go on a more abstract level, to operate with balancing mechanisms – how should it be otherwise in constructing »just and fair solutions«.[62]

After the Washington Principles had been agreed upon in 1998, the moral impetus emerging from the imperfect status of post-conflict justice in relation to Nazi-confiscated art spread, spilled over more and more, were increasingly shared and reinforced by many and ultimately started cracking the front of denial and rejection. At the same time, it is observable that similar emotions have been growing to unprecedented intensity in other contexts of historical injustice, in particular the dark and largely unresolved history of slavery, specifically in the United States of America,[63] and, in connection with it, the question of restitution of objects of »colonial« origin.[64]

Sharing the moral impetus that emerges from an imperfect justice means that supporters will react with sensitivity to their perceptions of injustice in today's restitution practice, irrespective of whether such injustices in the process result in disadvantages for the claimants or the holders of contested works of art. Claimants, on the other hand, will have strong emotions about critique, as they will easily interpret critique as another round of attempts to obstruct and deny justice fundamentally, and they will feel threatened in their just cause and in their »normative empowerment«.[65] In turn, supporters of the claimants' just cause may feel misunderstood by the claimants and denied of recognition of their efforts.

Despite these protracted constellations of emotions, there is no other way than demanding from claimants as well as defendants as well as the public and in particular the media to accept the rule of reason in restitution proceedings – beyond and sometimes against initial intuitions – as a sign of mutual recognition. In the

gutmachung: Goschler: Schuld und Schulden; see also, building on telling correspondence with the Dresdner Bank post-war, Ossmann: One collection, one persecution, one decision.

61 Stuart E. Eizenstat recently negotiated a settlement with a claimant on behalf of a private holder in the United States and – of course – put emphasis on the fact that the private holder had acquired the object in good faith. Nevertheless, critique emerged, see Bowley: A Tricky First Case for the Man Who Wrote the Rules on Nazi Looted Art.

62 Weller & Scheller: Why a »Restatement of Restitution Rules for Nazi-Confiscated Art«?

63 It is striking how more and more patterns of systemic expropriation of black people in the United States come to surface, see e. g. the case of discriminatory seizures of land against black people by the state of California at the beginning of the 20th century and its recent restitution, see e. g. Mullen & Darity Jr.: Op-Ed: Why Bruce's Beach may be an outlier in terms of reparations for Black Americans, to say nothing of property-unrelated racial atrocities. On the level of literature see e. g. Whitehead: Underground Railroad, and the influential Netflix series based on the book, describing many patterns of persecution applied by the Nazis in the Holocaust.

64 For an account of the early, largely unsuccessful struggle of the newly independent African states and quite typical patterns of obstructions see e. g. Savoy: Afrikas Kampf um seine Kunst.

65 Compare e. g. Regner: Anerkennung und Normatives Empowerment bei SED-Verfolgten.

words of Axel Honneth, recognition in this fundamental sense refers to the act that expresses that the other person shall have value as a human being and is the source of legitimate claims, and such recognition of the other is the condition for oneself being recognized in return.[66] If this is taken as a foundation for social ordering, restitution is a cooperative project that first and foremost aims at mutual recognition of the participants, both claimants and respondents, as well as the groups involved, i.e. the generations following both the victims and the perpetrators. Whereas the exchange of emotions alone regularly ends up in deadlocks. As an expression of recognition, emotions must be channelled, refined and transcended to render them productive, in particular when it comes to divergent emotions about »justice«, all the more in a context of »transitional justice«. The core of such transitional justice, i.e. recognition of the victims, are adequate remedies and reparation. The General Assembly of the United Nations' Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law of December 2006,[67] in Chapter IX, para. 20, calls for reparation for harm suffered by restitution, including return of property, and compensation. However, »compensation should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case ...« – as an expression of the recognition of the respondent.

The dinstict dynamics and functional limits of emotions in the production of justice, combined in expressions of mutual recognition – this is the second fundamental point of any restitution culture that should be taken into account.

66 Honneth: Unsichtbarkeit, at pp. 15, 22, 27: »Akt, in dem zum Ausdruck kommt, daß die andere Person Geltung besitzen soll [und] die Quelle von legitimen Ansprüchen ist«. And further (Honneth: Verwilderungen, at p. 38): »Aufgrund ihres intersubjektiven Charakters ist in die alltäglichen Praktiken zwischenmenschlicher Anerkennung ein Zwang zur Reziprozität eingelassen: Die sich begegnenden Personen sind gewaltlos dazu genötigt, auch ihr soziales Gegenüber in einer bestimmten Weise anzuerkennen, um sich in dessen Reaktionen selbst anerkannt zu finden – die Anerkennung des Gegenübers wird zur Bedingung des eigenen Anerkannt-Seins«.

67 General Assembly of the United Nations, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, A/RES/60/14 of 16 December 2005.

IV. Justice

General theory about justice confirms this position: It has been considered repeatedly whether ethical propositions are at all capable of being grounded on a rational basis, as most thinkers on ethics are convinced of (»cognitivism«).[68] Otherwise »thinking« on ethics and »justice« in particular would not make sense. If ethics were outside the realm of rationality (»non-cognitivism«),[69] emotions or moral sentiments alone would remain for moral discourse (»emotivism«). Such discourse would merely consist of the exchange and expressions of such emotions, combined with »emotional influencing«, as opposed to rational argument.[70] Such emotive discourse would be particularly prone to operating with strategically coined terms (»persuasive definitions«[71] or »concept creeps«[72]). Moral discourse would often be no more than propaganda. Rational agreements on the contents of justice would not be possible.[73] Rather, »a better sort of answer [than reasoning on the question why one should behave morally] is the sort of long, sad, sentimental story« and it would be such story-telling alone that would make ethical positions plausible.[74] Obviously, moral judgments would become very volatile. All of this is observable in the discourse about and in the tactics for »finding« just and fair solutions for Nazi-confiscated art.

If we nevertheless follow the majority of theories on »justice« in that they claim that justice can be »revealed« or at least produced by reason, rationality and reflection and thus be »strived« for,[75] a promising offer how to do this concretely

[68] See e. g., with further references, Sen: The Idea of Justice, with special reference to »Eastern« traditions (e. g. Preface, p. xiii., pp. 4 et seq., »Reasoning and Justice«, Part II, pp. 155 et seq., »Forms of Reasoning« etc.); Rawls: A Theory of Justice, in particular Chapter 1 (»Justice as Fairness«, at pp. 3 et seqq.); see, from a compiling and comparative perspective, e. g. Hübner: Einführung in die philosophische Ethik, p. 57; Mahlmann: Rechtsphilosophie und Rechtstheorie, p. 149: »cognitive contents« of »justice«; »constitutive fundamental principles of moral judgments« exist.

[69] A prominent representative of an »ethical anti-rationalism« is David Hume, see Norton &. Norton (eds.): David Hume, A Treatise of Human Nature: A Critical Edition.

[70] Hübner: Einführung in die philosophische Ethik, p. 57: »boo-and-hooray ethics«.

[71] Stevenson: Persuasive Definitions. The very first sentence of this paper gives the following definition: »A ›PERSUASIVE‹ definition is one which gives a new conceptual meaing to a familiar word without substantially changing its emotive meaning, and which is used with the conscious or unconscious purpose of changing, by this means, the direction of people's interests« (p. 331).

[72] See Haslam: Concept Creep. Concept creeps in this sense describe creeping extensions of originally narrow concepts such as e. g. »trauma« etc. There is nothing inherently good or bad in such concept creeps but in ethical discourses, concept creeps may be intentionally set on road (»discrimination«).

[73] Ayer: Language, Truth and Logic, Chapter VI, at p. 63: »statements of value ... are simply expressions of emotion which can be neither true nor false«, and then p. 68: »ethical terms do not serve only to express feeling. They are calculated also to arouse feeling, and so to stimulate action.«

[74] Rorty: Human Rights, Rationality and Sentimentality, p. 133.

[75] See the title of the report by the Raad voor Cultuur, Committee for the Evaluation of the

was submitted by John Rawls. In his seminal »Theory of Justice«[76] he integrates emotions as »initial intuitions«[77] about what justice could be in a particular constellation, but then transcends them in a fair procedure – »justice as fairness« – towards the production of justice, in which the participants, in an »initial situation«,[78] do not know in advance on which side of a conflict they will be (»veil of ignorance«[79]), which ensures that after considering all arguments as well as conflicting intuitions (»reflective equilibrium«[80]) rules of a balanced character, i.e. rules of justice, will emerge, to which each side can agree as a matter of reason: »By going back and forth, sometimes altering the conditions of the contractual circumstances, at others withdrawing our judgments and conforming them to principle, I assume that eventually we shall find a description of the initial situation that both expresses reasonable conditions and yields principles which match our considered judgments duly pruned and adjusted. This state of affairs I refer to as reflective equilibrium«.[81]

To put it differently:[82] »According to the method of reflective equilibrium, we begin with a set of moral intuitions about particular cases, filter out those that are the obvious products of distorting influences, and then seek to unify the remaining intuitions under a set of more general principles. We seek principles that both imply and explain our particular judgments. But the match between principles and intuitions will inevitably be very imperfect in the first instance. A candidate principle may imply a great many of our intuitions and yet have some implications that conflict with other intuitions. In that case we may modify or even abandon the principle; but, if the principle has considerable explanatory power with respect to a wide range of intuitions and cannot be modified without significant sacrifice of this power, we may instead decide to reject the recalcitrant intuitions. In this way we make reciprocal adjustments between intuitions and principles until our beliefs at various levels of generality are all brought into a state of harmony, or

Restitution Policy for Cultural Heritage: Striving for Justice, Den Haag 2020, evaluating the Dutch restitution practice for Nazi-confiscated art.

76 Rawls: A Theory of Justice, in particular Chapter I (pp. 3 et seqq.) on »Justice as fairness« – can it be by accident that the Washington Prinicples call for »just and fair« solutions, textually so close to the concept of justice as fairness? No one could so far convincingly explain what the addendum »and fair« in Washington Principle No. 8 intended to add to »just« solutions. Nevertheless, referring to »just and fair« solutions and also, against the wording, »fair and just solutions« became a slogan in the restitution process to explain all and everything, thereby explaning nothing.

77 Rawls: A Theory of Justice, Chapter 1, at p. 41: »No doubt any conception of justice will have to rely on intuition to some degree«.

78 Ibid., Chapter III (»The Original Position«), pp. 118 et seqq.

79 Ibid., p. 12.

80 This famous term has been used in many different ways since Rawls coined it, most of which depart from its original meaning, see Hübner: Three Remarks on »Reflective Equilibrium«.

81 Ibid., p. 20.

82 McMahan: Moral Intuition, p. 110, explaining Rawls.

reflective equilibrium. This method is generally interpreted in coherentist terms, in that it is understood to make coherence with other beliefs the sole criterion of a belief's credibility«.

Obviously, emotions, in particular strong but imprecise emotions, about injustices are not identical with more refined initial intuitions about justice in specific constellations, but nevertheless Rawls offers a procedural concept of processing such »raw« emotions via initial intuitions towards balanced rules of justice. While Rawls's theory directly addresses the challenge of distributive justice, namely how to construct a just society, starting from a hypothetical initial situation, the setting for the production of society – initial situation, initial intuitions, veil of ignorance, iterative process of converging emerging principles of justice with conflicting intutions towards a reflective equilibrium – works equally well for challenges of corrective justice and may offer a workable theoretical framework for concreticising convincingly the abstract call for »just and fair solutions« in the Washington Principles[83] and for criticizing meaningfully national implementation as well as emotional exaggerations and manipulative interventions from a theoretical viewpoint – a third core aspect of a restitution culture.

This is not a task that can be undertaken here.[84] Rather, in the remainder of this text, some concrete challenges for and pitfalls in the production of »just and fair solutions« for Nazi-confiscated art will be presented pars pro toto, on the basis of the recommendation of 26 March 2021 by the German Advisory Commission in the case of Kurt and Else Grawi,[85] in order to underline the need for theory-based reason and rationality in the discourse about just and fair solutions for Nazi-confiscated art.

Kurt Grawi had purchased the painting »Füchse« (»Foxes«) by Franz Marc in 1928. After 1933, Kurt Grawi and his family were persecuted by the Nazis. Besides measures against family members, all of Kurt Grawi's enterprises and share-holdings were liquidated under duress or »aryanized« after 1935. After the November

[83] Obviously, the material principles for rational preferences would need to be changed as the famous principle of equality as well as the »maximin principle« (see Rawls: A Theory of Justice, pp. 150 et seqq.) are not designed to answer questions of corrective justice. On these and other questions relating to the theoretical foundations of »just and fair solutions« as well as the striking lack of theoretical foundations in the discourse about Nazi-confiscated art see Leva Wenzel: Rechtstheoretische Grundlagen der Restitution nationalsozialistischer Raubkunst, PhD thesis, Bonn, forthcoming.

[84] The author is working on a »Restatement of restitution rules for Nazi-confiscated art« as a tool to rationalise, standardise and facilitate the process towards what Rawls might call a »reflective equilibrium«. The project is financed by the German Federal Commissioner for Culture and Media for five years. Results, i.e. a set of rules distilled from the practice in six jurisdictions – Germany, Austria, Netherlands, France, United Kingdom, Switzerland – as well as critical commentaries are expected for 2024.

[85] Advisory Commission on the return of cultural property seized as a result of National Socialist persecution, especially Jewish property (»German Advisory Commission«), Opinion of 26 March 2021 in the case of the Heirs of Kurt Grawi ./. Landeshauptstadt Düsseldorf.

pogroms on 9 and 10 November 1938, Grawi was imprisoned in the concentration camp Sachsenhausen for several weeks. At the end of April 1939, he emigrated via Belgium to Chile. He was not allowed to take any assets with him. His wife Else followed shortly afterwards. She sold off all of their remaining assets but had to pay »Jewish property tax, emigration tax and Golddiskontbank levy«.[86] With the help of friends, however, they managed to ship the painting in question to New York. The painting was offered for sale to the Museum of Modern Art to raise money for their living in South America. In 1940, Grawi telegraphed from Montevideo a minimum limit for the purchase price which the museum did not meet. The sale consequently failed. Later in 1940, the painting was sold to other emigrees in New York. In 1961, the painting was sold to Helmut Horten. In 1962, Helmut Horten donated the painting to the museum in Düsseldorf. In 2015, the heirs raised a claim for restitution under the German implementation of the Washington Prinicples.

What would be »initial intuitions« in a Rawlsian sense for producing a just and fair solution in this case? There are at least the following two on the level of abstract principles: consistency and procedural fairness, and both were violated fundamentally in the concrete case:[87]

»Treat like cases alike« [88] – since Aristotle, consistency (next to proportionality[89]) has been one of the most fundamental elements of any justice.[90] In order to live up to this fundamental element of justice, any restitution commission must make up its mind how to approach cases of »flight-related sales« (»Fluchtgut«), such as the one in question here.[91] A commission, in working towards a »reflective equilibrium«,[92] could initially hold that causality between persecution, emigration and then sale, even if in a safe third state by an owner outside the reach of the Nazi regime, nevertheless is enough to justify restitution. The commission could consider additionally that a line of causality is never and nowhere enough to establish attribution and responsibility, and therefore the deciding body might want to see established more than just causality, for example a »closer« connection between Nazi persecution and the loss of the property in question. Thus, it could require a »forced sale« or a »sale under duress«, whatever that means concretely;

86 Ibid., p. 2.

87 See also Weller: Restitution nationalsozialistischer Raubkunst, pp. 94 et seq.

88 Aristotle, Nicomachean Ethics, Book V, Chapter 5, p. 106, para 20 (1131a) (translations from the German edition).

89 Ibid.: »justice is ... something proportional«.

90 See also Rawls's focus on coherence in conceptualising justice as fairness, see above at note 82.

91 On this highly controversial category of cases see, from a comparative and normative perspective, Weller & Dewey: Warum ein »Restatement of Restitution Rules for Nazi-confiscated Art«?, presenting and comparing the practice from Germany, Austria, the Netherlands, and the UK. This survey revealed strikingly differing solutions.

92 See above at notes 80 et seq. and accompanying text.

it could also exclude transactions outside the confines of Nazi power, especially sales in safe states under safe conditions outside. The commission should include in its considerations that the economic losses of emigration due to Nazi persecution could be compensated under the German post-war compensation schemes mentioned above.[93] In narrowing down the field of reflection and analysis in this way, the issue of »Fluchtgut« boils down to the question: Is emigration caused by the Nazi regime due to persecution enough to justify restitution of an artwork that has been sold by the emigrant after emigration to generate funds for their living in exile. Whatever a commission does, it should do it coherently and consistently, not least with a view to previous of its own initial intuitions on the issue.[94]

In 2005, the German Advisory Commission held in the case of Julius Freund[95] – in fact the first case before the Commission – that a sale in Switzerland after emigration by heirs of the original owner should be restituted, without giving any specific reasoning beyond noting, somewhat incidentally, that given the heir's »financial situation, Clara Freund felt compelled« to sell. No further information was given on the concrete financial situation, nor on the question how such a situation should look like in abstract terms in order to generate a claim for restitution today. We may speculate retrospectively that the real reason for recommending restitution might be seen in the fact that the beneficiary of the auction at the Galerie Fischer in Luzern was the German Reich, represented by Hans Posse, Hitler's »Special Commissioner« who regularly acquired objects for Hitler's »Führermuseum« on such auctions.[96] Additionally or alternatively, a role may have been played by the fact that the holder of the painting at the time of the claim was the Federal Republic of Germany itself, i.e. the entity that is legally identical with the one that carried the »German Reich«[97] and thus will certainly be seen, and will see itself, under a particularly strong historical responsibility, which might mean in turn that the ratio of the recommendation does not apply to other holders. This first recommendation, with all its open questions and unadressed issues, thus presents itself as a perfect example of an initial and as such incomplete intuition that definitively needs more reflection until anything like a »reflective equilibrium« would be reached. Opportunities for proceeding further towards a reflective equilibrium indeed came about:

93 See above at notes 38 et seq. and accompanying text.

94 See once more McMahan: Moral Intuition, p. 110: »coherence« is of the essence.

95 Recommendation of the German Advisory Commission of 12 January 2005 in re Freund ./. The Federal Republic of Germany.

96 See above at note 2.

97 E.g. German Constitutional Court (Bundesverfassungsgericht), judgment of 31 July 1973, docket no. 2 BvF 1/73, Collection of the judgments of the Federal Constitutional Court (BVerfGE) Vol. 36, pp. 1 et seq., sub III, para. 55 (in translation [M.W.]): »The Federal Republic of Germany ... is not a ›legal successor‹ of the German Reich but as a state identical with the state ›German Reich‹, however, as far as its territorial reach is concerned, [only] ›partially identical‹.«

In 2014, the German Advisory Commission, in the case of Clara Levy in relation to a sale of an artwork in New York after emigration,[98] became more reflected and decided on the opposite of restitution, namely rejection of the claim: »If the painting was sold ... in New York, i. e. in a safe country outside Germany, in 1940 or 1941, there is no doubt that she obtained what was the market price at the time. It is not to be presumed that the Washington Declaration even if it is interpreted in the widest possible sense and thus extended to cover also forced sales or other forms of persecution-related confiscation, aims to reverse sales transactions such as this one (which was effectively concluded under civil law by the rightful owners in New York) and the subsequent re-sales of the painting«. If this is the case, it remains unexplained why the previous case of Julius Freund was decided differently because the interpretation of the Washington Principles proposed in Levy is so broad and all-encompassing that it obviously includes the constellation in the case of Julius Freund. In leaving unadressed this pressing question of coherence and consistency, the Commission abstained from embarking on a meaningful process towards a Rawlsian reflective equilibrium. As such this would be no problem. No commission is directly bound to a theoretical concept. However, such concepts are offers, inter alia to a commission set up to recommend »just and fair solutions« in the sense of Washington Principle No. 8, to follow a well-reasoned path towards constructing something that could be called »justice« and thus generates chances for acceptance and peace. The German Commission missed out on this chance.

The next change came about in 2016, when the German Advisory Commission had to decide in the case of Alfred Flechtheim on the point in question,[99] and it held: »If an art dealer and collector persecuted by the Nazis sold a painting on the regular art market or at auction in a safe country abroad, there would have to be very specific reasons to recognize such a sale as a loss of property as the result of Nazi persecution«. Again no attempt to reconnect this new evaluation to earlier decisions, again no efforts for coherence and consistency, again chances missed out for working towards a Rawlsian reflective equilibrium on this matter. To be on the safe side: this critique does not target the result. There might be good reasons to insert exceptions to the general rule formulated in Levy, for example in order to respond to particularities in a specific case such as the one of Julius Freund, where the German Reich directly participated in the sale and today's holder is the Federal Republic of Germany. Unfortunately, however, the Commission did not explain any further which »specific reasons« would count for it to recognize a »forced sale« despite the sale taking place outside the sphere of Nazi power.

98 Recommendation of the German Advisory Commission of 21 August 2014 in re Clara Levy ./. Bayerische Staatsgemäldesammlungen (Bavarian State Painting Collections).

99 Recommendation of the German Advisory Commission of 21 March 2016 in re Alfred Flechtheim Erben ./. Stiftung Kunstsammlung Nordrhein-Westfalen, Düsseldorf.

In 2019, the German Commission had to decide in the case of James Emden.[100] James Emden was a leading department store entrepreneur establishing the »Kaufhaus des Westens« in Berlin and »Oberpollinger« in Munich, running an empire with 10,000 employees, but decided to sell large parts of this conglomerate to the Rudolf Karstadt AG in 1926 and to relocate to Switzerland where, in 1927, he bought the two Brissago Islands on Lake Maggiore. He received Swiss citizenship in 1934. Considerable parts of his wealth remained located in Germany, partly frozen under tightening general foreign currency regulation, partly confiscated by the Nazis after 1933 as measures of persecution against Emden.[101] In 1937, Emden sold two paintings in Switzerland that ultimately came into the possession of the Federal Republic of Germany. The German Commission held that due to the »economic plight«, these sales were to be characterised as »forced sales« and thus recommended restitution. An »economic plight« is not very plausible to assume for someone who possesses, according to the findings of the Commission, (at least) two islands in the Lago Maggiore, all the more when »the properties on the Brissago Islands became more and more of an unmanageable burden«.[102] In addition, this case does not exactly qualify as a flight-related sale, as there was no flight but a voluntary emigration years before the Nazis came to power. Thus, even if the »economic plight« was partly caused by Nazi persecution against Emden's assets located in Germany, it was caused to a considerable degree by general disadavantages of Germany's foreign currency policies against foreigners. Therefore, a strong intuition in this case should have been to ask abstractly about a rule for handling cases of mixed causalities:[103] under a »preponderance rule«, i. e. 50% or more of causality contribution by the Nazi regime is necessary to justify a claim for just and fair solution today, it appears more likely than not that the balance would have been tipped against the claimant in this constellation. Nevertheless, one might still have argued again that the Federal Republic of Germany as a holder is under a stricter moral obligation than other holders, and additionally there was again evidence that representatives of the German Reich were involved in the acquisition,[104] so the case could have been brought in line with the case of Julius

[100] Recommendation of the German Advisory Commission of 23 April 2019 in re Dr. Max James Emden ./. The Federal Republic of Germany.

[101] Emden had converted to Protestantism as early as in 1893. However, this was irrelevant for the Nazi's discriminatory politics against persons they targeted as Jews.

[102] Op.cit., p. 3.

[103] This is an intuition that the United Kingdom's Spoliation Advisory Commission quite intensely elaborated, in particular in respect to cases of mixed motives for sales, see e. g. Annika Dorn: The Practice of the United Kingdom's Spoliation Advisory Commission, PhD thesis, Bonn, forthcoming 2023.

[104] According to the findings of the Commission, »art dealer Anna Caspari arranged the sale of the works to Karl Haberstock, who was a[nother] buyer of artworks for Adolf Hitler and his planned ›Führermuseum‹ in Linz. [...] In Haberstock's inventory books, both the receipt and the resale of the

Freund and could have been rationally distinguished from the cases of Clara Levy and Alfred Flechtheim. None of these efforts for coherence and consistency were undertaken by the Commission, but at least objectively some kind of lines of reasoning from the disconnected intuitions of the Commission were emerging.

However, these lines volatilized in the last of the German Commission's recommendations on flight-related sales in the case of Kurt Grawi,[105] a constellation of flight-related sales that strongly resembled the cases of Clara Levy and Alfred Flechtheim but nevertheless resulted in the opposite recommendation than these two former cases: in unconditional restitution (not even in a nuanced »just and fair solution« such as a [partial] compensation). There is a lengthy reasoning, but truly surprisingly, it does not offer any examination of what distinguishes this case from its previous decisions; it does not even mention them, let alone the two principles that were set up in two of these cases: first the broad basic principle in Levy that the Washington Principles cannot be interpreted as intending to cover flight-related sales in safe states after emigration, and then its limitation in Flechtheim that the Washington Principles may nevertheless apply if there are »very specific reasons«.[106] In addition, the recommendation in Grawi is in a similar opposition to almost 10 decisions from other commissions in Europe[107] – a quite strong indication of opposing intuitions from elsewhere, but still neither efforts were made nor any sensitivity shown to at least try to achieve a Rawlsian equilibrium of reflections and reasoning. This is certainly not the road towards restitution culture.

At least on an abstract level, the German Commission introduced a promising new intuition (albeit disconnected to the German assessment framework in the »Handreichung«[108] and previous practice): a qualification of causality through the requirement of a »direct« connection with Nazi persecution.[109] This is a proper criterion for normative attribution of a loss to the Nazi regime that strongly resembles the principal criterion in the Dutch framework (»related directly«),[110] and

paintings to the Reichskanzlei on June 30, 1938 are recorded, which confirms that Haberstock was working officially on behalf of Hitler on this occasion [...]« (op.cit., p. 1).

105 German Advisory Commission, Opinion of 26 March 2021 in the case of the Heirs of Kurt Grawi ./. Landeshauptstadt Düsseldorf.

106 See above at note 98 and note 99 and accompanying texts.

107 Weller & Dewey: Warum ein »Restatement of Restitution Rules for Nazi-confiscated Art«?

108 Minister of State of the German Federal Government for Culture and Media, Guidelines (»Handreichung«) for implementing the Statement by the Federal Government, the Länder and the national associations of local authorities on the tracing and return of Nazi-confiscated art, especially Jewish property, of December 1999, New edition 2019.

109 German Advisory Commission, Opinion of 26 March 2021 in the case of the Heirs of Kurt Grawi ./. Landeshauptstadt Düsseldorf, p. 6: »The sale was a direct consequence of the forced emigration. The decision to sell and the arrangements for the sale directly resulted from National Socialist repression.«

110 Decree issued by the Minister for Education, Culture and Science on 15 April 2021, no. WJZ/27740278, establishing an Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War and laying down the assessment framework to be

as was indicated above, causality alone cannot be enough but must be qualified in order to carry attribution,[111] but of course such »direct relation« of the loss to the Nazi regime would need to be concreticized convincingly for flight-related sales. In addition, the attribute »direct« makes clear that there must (of course) be constellations where a sufficiently direct relation is missing.

Incoherence and inconsistency as well as underdeveloped sensitivity for the need for further reflection on initial intuitions, are widely spread within the practice of restitution on a large number of controversial issues, of which flight-related sales are just one example.[112]

In the last step of this concrete part on challenges and pitfalls of producing just and fair solutions, the second of the two abstract principles considered here[113] is being addressed:

Procedural fairness or due process is recognised as perhaps the most fundamental or most intuitive element of any kind of justice. The claim may well be made that this principle is a truly universal one which transcends all cultural boundaries as it appears in entirely different cultural and historical contexts, from the Old Testament to Niklas Luhmann's system theory as well as in Amartya Sen's »Idea of justice«. In his seminal book on »Legitimacy through procedure«,[114] Luhmann analyses from the perspective of sociology what is needed to create legitimacy for a decision. Legitimacy there is understood as a factual state in society where critique against the decision vanishes below a relevant level. Luhmann identifies three core elements for the production of such legitimacy, and one of them is that the decision-taking body should be of the highest possible reputation. For such reputation builds up an abstract trust of the parties and the public in »fair« proceedings. If members of the deciding body started asking themselves what is expected from them, the first thing they would and should think about would be keeping and demonstrating impartiality. In order to substantiate this further, they could turn, in a cross-cultural tour d'horizon, to Leviticus 19:15: »Do not pervert justice; do not show partiality to the poor or favoritism to the great, but judge your neighbor fairly«. And on this crucial point of impartiality, Amartya Sen, in his »Idea of justice«, joins in forcefully, including references to non-Western wisdoms.[115] Every-

used by that committee (Decree establishing a Restitutions Committee), effective from 22/04/2021 until further notice, Section 1, Definitions (»Restitution«): »the return to the original owner or to their legal heirs under inheritance law of cultural items expropriated involuntarily from the original owner due to circumstances related directly to actions of the Nazi regime«.

111 See above at notes 86 et seq. and accompanying text.

112 For a comprehensive comparative account in the making see once more Matthias Weller et al.: Restatement of Restitution Rules for Nazi-confiscated Art, approx. Bonn 2024, forthcoming.

113 See above at note 87 and accompanying text.

114 Luhmann: Legitimation durch Verfahren.

115 Sen: The Idea of Justice, Part I (»The Demands of Justice«), Chapter V (»Impartiality and Objectivity«), pp. 114 et seqq.

where, an integral part of procedural fairness is the impartiality of the judge and the neutrality of the bench.[116]

Contrary to this universally recognised principle, one member of the German Commission, during the video hearing in the case of Kurt Grawi and directly after the representative for the claimants had finished his pleadings, typed into the chat, open to all of the participants of the hearing:

»A brilliant pleading. Actually, no one should have to discuss anything anymore. The fact that Horten [i. e. the person who donated the painting to the museum in 1962] was close to the Nazis himself makes it even more juicy. And this is still a euphemism.«[117]

Apparently, this member of the commission had already taken her decision, without being willing anymore to hear what the other part would have to say (»audiatur et altera pars«), and tried to push the other members of the commission prematurely and unduly towards her position. Obviously, this is a serious mistake, as it signals strong preconception and bias. At the same time, mistakes happen everyday, and the really relevant question would probably be how a bench of highest reputation would react to such a mistake adequately. One would have expected the member in question to publicly apologise for her mistake and to abstain from further participating in this case. What happened in reality – nothing: Rather, the aggrieved party, the holder, later submitted a complaint for lack of neutrality of this member to the Commission, whereupon the Commission, apparently together with the member against which the complaint was leveled, decided to reject the complaint and continued the proceedings. At the end, the voting of the commission was split in a way that one last vote tipped the balance in favour of recommending restitution, thus the one vote by the biased member became decisive. In its recommendation, the Commission did not report about the incident, neither about the holder's complaint, nor about its rejection, let alone about proceedings and reasons for this rejection. This is certainly the opposite of restitution culture.

116 See also, on another crucial element of neutrality Washington Principle no. 10: »Commissions or other bodies established to identify art that was confiscated by the Nazis and to assist in addressing ownership issues should have a balanced membership.«

117 https://www.duesseldorf.de/fileadmin/Amt41-Zoll/kulturamt/pdf/Provenienzforschung/20210211_LHD_Befangenheitsruege.pdf (8 April 2021): »Ein brillantes Plädoyer. Eigentlich sollte man gar nicht mehr diskutieren müssen. Dass Horten auch noch den Nazis nahestand, macht es zusätzlich pikant. Und das ist noch ein Euphemismus«.

V. Conclusions

Eduardo Rabossi coined the term »human rights culture«.[118] He referred to this culture as a »new and welcome fact of the post-Holocaust world«,[119] and explained it as »an important reality in contemporary culture«.[120] The objective of this term was a pragmatic one: shifting the focus of the discourse on human rights away from (fruitless) attempts to detecting and defending the philosophical presuppositions of human rights in favour of accepting the new and positive reality as a fact. »Restitution culture« aims at quite the opposite: Whereas its philosophical presupposition – corrective justice – is crystal clear and its reality in contemporary culture beyond any doubt, its concrete practice suffers from a striking disconnection from existing philosophical suggestions on how to conceptualise and implement justice. Unconditioned acknowledgement of the gross and partly continuing injustices produced by the Nazi regime, an informed processing of the strong emotions involved (and certainly more fundamentals still to be developed) will add to, and are indispensable for, a truly productive »restitution culture« for Nazi-confiscated art.

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[118] Rabossi: La teoría de los Derechos Humanos Naturalizada, p. 161: »[...] ›cultura de los derechos humanos‹ (la existencia de tal cultura es básica para mis argumentos en contra de los fundamentalistas de los derechos humanos).«

[119] Rorty: Human Rights, Rationality and Sentimentality, pp. 115 et seq.

[120] Rabossi: Naturalizing Human Rights, p. 133.

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