

Restitution of Objects Spoliated in the Nazi-Era: A Consultation Document

THE BRITISH LIBRARY'S RESPONSE TO QUESTIONS FOR CONSULTEES

Introductory Remarks

The British Library welcomes the opportunity to comment on the legislative options proposed by the Department for Culture, Media, and Sport.

The Library notes from the DCMS Consultation Document that it is not possible to say whether or not any legislation would be introduced (1.9), and that 'no consideration has been given to a general power to de-accession items in the national collections, and there are no proposals to legislate more widely' (1.10 and 3.4).

The British Library fully recognises the imperatives that have led the Government to consider the granting of powers to British cultural institutions to deaccession material in their collections to facilitate the restitution of property spoliated in the Nazi-era.

The British Library, itself governed by a statute which effectively debars the deaccessioning of large parts of its collections, is acutely aware of the dilemma faced by institutions where they are unable to meet the claims of heirs to cultural assets dispersed during the Nazi era.

The Spoliation Advisory Panel Report, Report of the Spoliation Advisory Panel in respect of a 12th century manuscript now in the possession of the British Library, laid before Parliament on 23 March 2005, recommended to the Secretary of State that legislation should be introduced to amend the British Museum Act 1963, the British Library Act 1972, and the Museum and Galleries Act 1992 so as to permit restitution of objects spoliated in the Nazi era 1933-45. Such legislation would pave the way for the restitution of the missal to Benevento, which the Panel considered "would be the just and fair solution...". In the meantime the Panel recommended that "the missal should be returned to Benevento as soon as possible on loan and that the parties should forthwith engage in constructive discussions on the terms and conditions of such a loan". A report on progress in effecting the loan is appended as an annex to this response.

For the purposes of the consultation paper it is important to note the significance of the British Library's vesting day, 1st July 1973: for acquisitions made in the last 33 of the 73 years since the Nazis came to power in 1933, the British Library has for most classes of material the power to accede to claims for restitution of Holocaust-era material inadvertently now in the Board's collections. Further details of these powers are provided at the end of this document.

The British Library's response

The British Library has informally shared its response with other institutions.

Q1 Consultees are asked if they agree with our provisional view that museums should have a power to dispose of items in their collections which were lost during the years 1933 to 1945 as a result of the actions of the Nazis, their allies or collaborators

Response: The British Library agrees with this proposition as stated.

The British Library notes that a variety of terms are used in the document to describe the scope of this paper. These include simply those who 'suffered as a result of Nazi actions, or ... their heirs' (1.10 and similarly at 3.13), 'items lost as result of Nazi aggression' (3.12), 'item[s] ... wrongfully taken during the relevant years in circumstances directly related to the actions of the Nazis, *their allies or anyone working in collaboration or co-operation with them, or in other words that there was a causal link between the actions of the Nazis or their allies and the taking of the item concerned*' (3.14 the British Library's italics), and so on.

The British Library's response is predicated on the basis of the wording in Q1.

The British Library notes that, on the basis of the definition in Q1, the case of the Beneventan Missal would – on the facts – have fallen outside the proposed power since no evidence has been uncovered as to how or when the loss took place.

The British Library recognises that powers do need to be granted to institutions to help meet these claims; powers which allow room for alternative means of dispute resolution with the real possibility of restitution or settlement at the end of the process for the claimant and certainty for the institution over the provenance and legitimacy of its collections. At the same time it is necessary to circumscribe carefully the scope and remit of these powers in such a way as to achieve the ends of the proposed legislation.

Q2 Consultees are asked whether:

- a) the power to dispose of objects in a collection which we propose should apply:**
- I. to objects wrongfully taken in circumstances directly related to the actions of the Nazis, their allies or collaborators during the years 1933 to 1945 (and if so whether "wrongful taking" should be defined to include all the circumstances identified in above); or**
 - II. to objects which were involuntarily lost by their owners during the period from 1933 to 1945 in circumstances arising from the actions of the Nazis, their collaborators or allies or;**
 - III. to objects lost during that period as a result of Nazi actions in circumstances which would today be considered to be contrary to the human rights of the original owners.**

Response: The British Library favours an approach which is a selective combination of all three options. 'Wrongful taking' and 'involuntary loss' should be given their ordinary meaning rather than anything more restrictive or legal-specific. Many claimants face difficulties when pursuing property of which they have been dispossessed through lack of proof of a causal connection between the moment of loss and the actions of the Nazis, their collaborators or allies. In this context perhaps the most significant feature of the Washington Conference Principles on Nazi-confiscated Art 1998 was that signatory states should in effect lower the burden of proof asked of Holocaust-era assets claimants. We submit that to give these terms their ordinary meaning would produce a statute in keeping with the spirit of the Washington Conference while not letting the evidence threshold fall below that which would be unacceptable on policy grounds. The Library believes that complete absence of evidence relating to the loss would be unacceptable: this would reduce any claims process to merely a succession of assertion and counter-assertion, with all that would be unsatisfactory for all

parties in recommendations made in an evidential vacuum. Therefore the British Library favours an approach in line with that taken in the Washington Conference. An advantage to this approach is that drafting of any statute may be easier and might avoid problems of second-guessing both circumstances hitherto unconsidered and types of loss not yet contemplated.

The British Library suggests that applying today's human rights assumptions to actions of the past is probably not the right approach. This is a view broadly in line with the decision of the Spoliation Advisory Panel in the Griffier-Tate case¹, where the Panel considered the actions of the Tate at the time of the purchase of the painting to be acceptable by the standards of the time. However, the British Library notes that whatever standards are applied to the past claimants have rightly a range of actions and options open to them under the Human Rights Act 1998 and the European Convention of Human Rights². The issue of whether or not the law at the time was correct or repugnant is not necessarily always the issue in question when considering Holocaust-era claims.

- b) they agree that that separate provision should be made to enable the restitution of the Beneventan Missal in addition to the general power to de-accession items lost as a result of Nazi actions which we propose;**

Response: The British Library agrees with this proposition. Without specific legislation - on the basis of the definition in Q1 and the British Library's answer to Q2 - the Library would be unable to act fully upon the recommendation of the Spoliation Advisory Panel in this case.

- c) the legislation should seek to define the entitlement which should be demonstrated by a claimant before museums are permitted to transfer objects in their collections to that claimant, or whether guidance on a claimant's entitlement should be provided by a Code of Practice. (See paragraph 3.25).**

Response: The British Library believes it is necessary to define such entitlement in general terms only. The Board recently considered this question and accepted that while any person or body corporate might contemplate making a claim, it was reasonable that not all claimants should be given the same status by the British Library. For the purposes of this paper the British Library considers that those with locus standi may include those, or their descendents, who lost property in the Holocaust; Governments, where the property claimed was once the property of that country; and, Corporations – e.g. museums and other institutions that may have lost property during the period in question as a result of pillage and looting, wrongful or involuntary taking. Those without locus standi may include parties who can show no link with the allegedly dispossessed or with the contended property other than interest; this may include pressure groups, lobbyists, and journalists, for instance. Because each claimant must be considered on their own standing and each claim on its own facts, the British Library believes that a Code of Practice would be more practicable than detailed definition within any primary legislation.

Q3 Consultees are asked for their views on the following issues:

¹<http://www.culture.gov.uk/NR/rdonlyres/878CD44D-0395-4B1C-96B0-4D99865E1D11/0/ReportoftheSpoliationAdvisoryPanel.pdf>

² The Library is currently unaware of any case concerning Holocaust-era assets that has been taken as far as the European Court of Human Rights.

a) Should the question whether a particular object is de-accessioned be left wholly to the discretion of the institution concerned?

Response: Yes, in line with the provisions made in respect of the Human Tissue Act 2004 and as discussed in the consultation paper at paragraphs 3.26 to 3.28. Under the British Library Act the Board of the British Library has a duty to exercise its discretion in the absence of any legislation on spoliation and will continue to do so.

b) Should an institution be able to de-accession an object in its collection in response to a claim which has not been considered by the Spoliation Advisory Panel, without reference to other authority?

Response: Yes, there appears to be no case for making the Spoliation Advisory Panel necessary in every circumstance – it may be that the institution accepts the case of the claimant³. In other cases the institution may wish to preserve its independence from a body whose terms of reference require equal weight to be given to morality as to the law. We refer you also to our answer to Q3(a).

c) Should an institution be able to reject a recommendation made by the Spoliation Advisory Panel, and if so in what circumstances?

Response: If the Spoliation Advisory Panel's decisions remain recommendations then by definition they cannot be mandatory. However, the British Library agrees with the statement at 3.28: "if the Panel had recommended that an item should be restored to a claimant, an institution would come under considerable moral pressure to make the transfer". Please see also our answers to Q3a) and Q3b) above.

d) Should recommendations made by the Spoliation Advisory Panel be binding on the parties to a claim?

Response: No useful purpose would be served. The mediatory status of the Panel in its current constitution should be underlined. Parties wishing for binding agreements may either go to arbitration or litigation.

e) Should the consent of the Secretary of State, the Attorney General or the Charity Commission be required before an institution is able to de-accession an object from its collection?

Response: Referring decisions for the consent of the Attorney-General or the Charity Commission would be consistent with the Charities Acts 1992 and 1993. However in respect of paragraph 2.21 it should be additionally noted that powers under the Charities Act section 27 only apply to property a charity owns. Clearly if ownership of the property in question is in dispute then section 27 may not apply. In other respects the consent of the Attorney-General or Charity Commission should not be required.

³ The British Museum accepted the claim of the heirs of Dr Feldman and though the matter had been brought before the Spoliation Advisory Panel, the latter withdrew so that the deaccessioning restraints on the British Museum could be tested at law.

- f) Should the Secretary of State have power, subject to the approval of a draft order by Parliament, to direct an institution to de-accession an item from its collection? (Paragraph 3.39)**

Response: No. The British Library believes that involving the Secretary of State in the decision making process or requiring his or her consent in these circumstances would be in conflict with the traditional 'arm's-length' position of institutions specifically set up as statutory exempt charities. Furthermore the British Library does not believe that an institution should be compelled to deaccession against its will but rather only after due process and consideration within the narrow framework of Nazi spoliation as given in Question 1.

Q4 The views of consultees are sought on the following issues:

- a) Should any provision be made to permit an institution to dispose of an object in its collection in response to a claim where that object is subject to any trust or other condition which expressly or impliedly prohibits disposal?**

Response: Yes, the British Library believes that it is unreasonable that the restitution of looted property within the parameters defined in the consultation paper should be restricted merely on the grounds of type or legal arrangement of a particular collection. Following the recent British Museum case the Library is conscious that neither case law nor statute law currently provides an adequate remedy to this problem where the institution is governed by an act of parliament. Under s3(5) of the British Library Act any property transferred to the British Library from the British Museum and subject to any trust or condition shall be subject to the same trust or condition in the hands of the Board of the British Library. Under s11(5) the Board of the British Library is prohibited from dealing with any property however acquired inconsistent with any trust instrument or condition and that if acquired by any person it shall be subject to the same trust of condition in the hands of any person acquiring it from the Board. Therefore any provision made to allow the British Library to act contrary to any trust of condition would also need to address equivalent restrictions on the recipient of trust property in these circumstances.

- b) If so, should an institution be able to override all non-statutory restrictions on disposal, or should there be any exceptions? What exceptions might be made? (See paragraph 3.48).**

Response: The Library believes there should be no exemptions having accepted in answer to Question 4(a) (see above) that it is unreasonable that the restitution of looted material be restricted on the basis of the status or type of collection.

Q5 Consultees' views are invited on the question whether the Spoliation Advisory Panel should be transformed into a statutory body. (See paragraph 3.54).

Response: The British Library believes the Spoliation Advisory Panel should not be put on a statutory footing. We refer you to our answers to Q3a)-f), see above.

Q6 Consultees' views are invited on the following questions:

- a) **Should the claimant be liable to any capital gains tax payable in respect of gains made on the sale of a work of art or other object restored to the claimant by a museum or gallery?**

Response: Once property has been restituted we do not believe that it should be treated differently from other moveable chattels of its class or type for the purposes of taxation.

- b) **Should the value of a work of art or other object restored to the claimant by a museum or gallery be included in the claimant's estate for the purposes of inheritance tax, or should it be treated as excluded property?**

Response: We refer you to the answer given at Q6a) above.

- c) **Consultees are asked whether they agree that where an item donated to an institution is transferred to a claimant in restitution, the donor of that item should not lose the benefit of any tax advantages accruing to him or her as a result of the donation?**

Response: Please see our answer to Question 6(d) below

- d) **If they agree to the proposal in (c), do they consider that an exception should be made where the donor was aware or had reason to be aware of the previous history of the item)?** (paragraph 3.60)

Response: The British Library agrees with both Questions 6(c) and 6(d) with the proviso that an exception is made whereby any benefit to the donor is lost where the donor's knowledge of the Holocaust-era provenance of the object can be shown. The British Library also recognises that this may be very difficult to prove and may be largely subjective.

Q7: Consultees are asked:

- a) **Should the limited power we propose for museums and galleries to transfer items out of their collections be a permanent one, or should it only be available for a defined number of years after it comes into force?**

Response: The British Library strongly believes that there should be a sunset clause in any legislation granted power to retribute to successful claimants for Holocaust-era assets. We submit that there should be a limitation period of six years in which a claim must be brought once the provenance of an item has been published or its existence has become known to the claimant. This period would be broadly in line with the provisions of the Limitation Act 1980 in respect of actions in tort and for breach of contract.⁴ This would encourage institutions to research and publish provenance of relevant items in their collections as by doing so they would start the clock running on the limitation period. In all cases we would suggest a longstop of fifteen years from the date any proposed legislation comes into force. This would also be in line with other pre-existing limitation periods. The British Library believes that any longstop should ideally be at least Europe-wide in its application and compatible with any relevant or comparable international conventions. The British Library is also aware that any such sunset clause may require derogation from the European Convention on Human Rights.

⁴ We note however that the six year limitation period in the tort of conversion, for instance, runs from the date of the conversion rather than from the date when the owner became aware of the loss of the location of their alleged property.

b) If consultees believe that this power should not be a permanent one, which of the following periods is most appropriate:

- I. Ten years from the date on which legislation implementing it comes into force;**
- II. Twenty years after this date;**
- III. Any other period from this date? (Paragraph 3.64)**

Response: We refer you to our answer to Question 7a) above.

Q8 - Consultees are asked whether they agree that a museum or gallery which has transferred an item from its collection to a claimant should be protected against any further claim in relation to that item by a subsequent claimant. (Paragraph 3.67)

Response: The British Library believes that institutions should be so protected.

OTHER COMMENTS ON THE PAPER: BRITISH LIBRARY'S POWERS TO DISPOSE

With regard to the Consultation Paper's discussion of current restrictions on powers to dispose or deaccession, the British Library notes that paragraphs 2.2, 2.3., and 3.4 oversimplify the situation, at least in respect of the British Library. Property in the Board's collection may, for the purposes of deaccession or disposal, be categorised in five ways:

1. Property that requires primary legislation for deaccession/disposal: i.e. acquired from the British Museum under the British Library Act s3(5).
2. Property that falls within the deaccession powers under British Library Act Schedule s11(4), i.e. property acquired from the British Museum under the British Library Act s3(5) but which does not need primary legislation for deaccession/disposal.
3. Property acquired post 01/07/1973 and therefore subject to various powers of disposal under British Library Act s11(3)-(6). Any decision may be the Board's alone.
4. Property which the British Library holds on trust for another, i.e. subject to British Library Act s11(5). This includes India Office Library Records.
5. Property not owned by the British Library, for example inward loans, property held on bailment, long-terms trusts, or on deposit. There could potentially be three broad categories of such material:
 - a. Legally at the British Library
 - b. Material not capable of being owned
 - c. Stolen property in the British Library's collections

British Library
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ANNEX

BENEVENTAN MISSAL

1. The Spoliation Advisory Panel Report, Report of the Spoliation Advisory Panel in respect of a 12th century manuscript now in the possession of the British Library, laid before Parliament on 23 March 2005, recommended to the Secretary of State that legislation should be introduced to amend the British Museum Act 1963, the British Library Act 1972, and the Museum and Galleries Act 1992 so as to permit restitution of objects spoliated in the Nazi era 1933-45. Such legislation would pave the way for the restitution of the missal to Benevento, which the Panel considered “would be the just and fair solution...”. In the meantime the Panel recommended that “the missal should be returned to Benevento as soon as possible on loan and that the parties should forthwith engage in constructive discussions on the terms and conditions of such a loan”.
2. The British Library accepted the Spoliation Advisory Panel’s conclusions and committed to engage in constructive discussion with the other parties on the terms and conditions of a loan of the Missal to the Chapter Library in Benevento. The Library had, as required by statute, exercised careful stewardship of the manuscript for nearly sixty years and it had been studied in the British Library by distinguished scholars. Thus in accepting the Panel’s recommendation, the Library made clear that it would wish to ensure that the loan would meet rigorous conditions that would guarantee that appropriate levels of stewardship and scholarly access would be maintained going forward.
3. Discussions with Jeremy Scott of Withers, who received instructions to act from both the Archbishop of Benevento and the Italian Inter-Ministerial Commission for the Recovery of Works of Art, have been ongoing since June 2005 and these discussions have been entirely cordial and constructive. The Library has done everything possible to facilitate the loan.
4. At an early stage, the Archbishop of Benevento concluded that Benevento could not provide a suitable environment for the MS on loan. He agreed with the Abbot of Monte Casino that the MS should rest in the library there for the duration of the loan. In January 2006, while due diligence was being undertaken preparatory to a possible loan, it emerged that some urgent works were necessary to be undertaken to the Library at Montecassino, which had caused the Abbot to conclude that it would not be possible to guarantee that the MS could be held in optimal physical and security conditions
5. Subsequently the Biblioteca Nazionale “Vittorio Emanuele III” di Napoli confirmed its initial willingness to accept the Beneventan Missal on long-term loan. However, in September 2006, having consulted the appropriate authorities, the Director of the Biblioteca Nazionale notified the Library that it did not wish to accept the loan. The Library is currently awaiting further guidance from Benevento.

British Library
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