

**RESTITUTION OF OBJECTS SPOILIATED IN THE NAZI-ERA: A CONSULTATION
DOCUMENT
Response of the British Museum**

The Museum is grateful for the opportunity to respond to the above consultation document and provides the following comments:

Q1. The Museum would welcome a time-limited general power for museums and galleries to de-accession objects in the collection which were lost by claimants during the years 1933 to 1945 as a result of the actions of the Nazis, their allies or collaborators.

Q2 (a) (i) As proposed in the consultation document, the new power should be drafted to apply to “wrongful taking” in actions directly attributable to the actions of the Nazis, their allies and collaborators; and that – also as proposed - wrongful taking should be defined to include:

- Theft in any form (including plunder or looting);
- Confiscation (including any form of seizure imposed by way of penalty for a fictitious legal liability, or under form of law without full compensation);
- Appropriation in any way contrary to law (the notion of “law” being taken to exclude any Nazi law whose purpose was the persecution or deprivation of Jews or others);
- Forced sales, or any transaction vitiated by oppression, fraud, duress, or undue influence;
- Sale at significantly less than the value of the object due to the vulnerability of the owner, where that vulnerability is a direct result of the actions of the Nazis, their allies or collaborators (including the establishment of systems of law or practice leading to the vulnerability in question);

Q2 (a)(ii) We suggest that the new power should not be drafted so broadly that all involuntary loss in the course of a war brought about Nazi aggression is caught. In other words, the fact that a loss occurred as the indirect consequence of a war begun by the Nazis should not, on its own, be enough for the power to apply. For the power to apply there should have been action by Nazis or their collaborators bearing directly upon the victim.

Q2(a)(iii) Nor should the definition of loss be drafted by reference to the human rights of the former owner as those rights would be understood if the loss had occurred today. Such a test would be anachronistic; and it would render the determination of claims unnecessarily legalistic, since they would be subject to developing human rights case law. It is preferable that past actions are judged by the standards of their time (such as the Inter-Allied Declaration against Acts of Dispossession committed in Territories under Enemy Occupation or Control - “the London Declaration”, January 5, 1943; and the United Nations Monetary and Financial Conference at Bretton Woods, July 1-22, 1944 @ Chapter VI Enemy Assets and Looted Property).

Q2(b) It is agreed that the argument for the restitution of the Beneventan Missal is different in kind from that for the restitution of objects spoliated by the Nazis; and that therefore the Museum believes that the transfer of the Missal should be the subject of separate statutory provision. The Museum does not believe that a case is established for a general power to address the return of all cultural objects howsoever lost in the Second World War.

Q2(c) Although it should normally be expected that a close family connection between a claimant and a victim is necessary for a claim to be brought, the eligibility of claimants to bring claims ought preferably to be a matter of consideration for museum and galleries, to be decided on individual merit against policy criteria, rather than by statutory definition. An overly prescriptive legal definition of the eligibility to bring a claim may exclude otherwise deserving claims from, for example, co-habitees and other close but unrelated dependents who suffered as a consequence of Nazi aggression. However, the class of such claimants is likely to be small given that it is 60 years since any losses occurred.

Q3(a) The trustees of the national collections are responsible for the collections in their care. It is therefore appropriate and consistent with legal principles that the question whether objects should be de-accessioned should be left to their discretion. Any other arrangement would be inconsistent with the pre-existing law (such as, for example: section 5 British Museum Act 1963; section 6 Museums and Galleries Act 1992; and section 47 Human Tissue Act 2004). It is accepted that, had the Museum won its argument for the application of the rule in *Re Snowden*¹, the Trustees would have required the consent of the Attorney General for an act of de-accession. Nevertheless, the decision whether the Trustees considered themselves bound by a moral claim in the first place, and then whether to seek the consent of the Attorney General, would have remained matters for which they alone would have had to determine.

Q3(b) Unless there is a non statutory trust condition prohibiting de-accession, the trustees of a national collection ought to be able to de-accession an object in their collection in response to a claim from a victim of the Nazis, even where the claim has not been considered by the Spoliation Advisory Panel or any other authority. However, the cases that have been assessed by the Panel (as well as those assessed by the Dutch Advisory Committee on the Assessment of Restitution Applications) illustrate that Nazi spoliation claims may give rise to difficult questions of historical interpretation and valuation upon which the input of an expert may be extremely valuable. It is also true that the Panel is able to provide institutions and claimants with the reassurance that an independent assessment has been made of the merits of a case; and that it is able to recommend action on the part of HM Government, including changes in the law and the settlement of claims by ex gratia payments from Government funds. In these circumstances it seems important that the Panel should continue to exist, as a matter of Government policy, to offer its present facilities to the parties and the DCMS, in an advisory capacity.

Q3(c) - (d) The Museum favours the Spoliation Panel continuing in its advisory capacity. However the Museum suggests that the terms of reference of the Panel should be realigned to conform to the scope of the new power.

The Museum sees a number of advantages to the current status of the Panel: it is able to offer a swift, independent and transparent assessment of a claim, which is cost effective for all parties; it is able to take account of moral arguments; and it provides recommendations that are not subject to further review or appeal. Although its recommendations are only advisory, and may theoretically be disregarded, it is difficult for either party to do so. A referring institution would find it difficult to justify a decision to disregard a Panel recommendation with integrity; and, where a referring institution proposed to implement a Panel recommendation, it would normally be difficult for a claimant not to accept that implementation in full and final settlement of his claim, because any legal claim that may ever have existed would usually be statute-barred, so that any other avenue of claim would be unavailable to him.

On this basis, it does not appear that statutory intervention is necessary to give the Panel's recommendations firmer authority. Further, as the consultation document suggests, the foundation of the Panel as a statutory body able to make binding findings as to title, would give rise to legal rights and a claimant's right to the judicial review of its decision. The process of resolving claims would become slower, more legalistic and undoubtedly more expensive.

Q3(e) It would be consistent with case law, and s.27 Charities Act 1993, if the consent of the Attorney General or the Charity Commission were to be required before an institution is able to de-accession an object in breach of a non statutory trust condition. The consent of the Attorney General or the Secretary of State should not otherwise be required.

Q3(f) It would fundamentally undermine the original reasons for setting up national museums and galleries as statutory exempt charities at arm's length from Government for the Secretary of

¹ HM Attorney General v Trustees of the British Museum [2005] EWHC1089

State to have power, subject to the approval of a draft order by Parliament, to direct an institution to de-accession an item from its collection.

Q4 (a)-(b) The case of *HM Attorney General v Trustees of the British Museum* is authority that s.27 Charities Act 1993/ the rule in *Re Snowden* may be applied with the authority of the Charity Commission or the Attorney General to enable a charity to meet a moral claim to an object held on a non statutory trust in the exceptional circumstance that the object turns out to have been the subject of Nazi spoliation for which the victim was not compensated. The case for the consent of the Charity Commission or the Attorney General is likely to be all the more persuasive if the charity has the recommendation of the Spoliation Advisory Panel that the object should be transferred. To protect the interests of the founders of charitable trusts and bequests, it is the Museum's view that the new power should not give institutions a general power to override non statutory trust conditions, upon which objects were donated to them.

Q5 The Museum does not see the need to transform the Spoliation Advisory Panel into a statutory body. For the reasons given in answer to Q3(c)-(d) the Panel is able to function effectively on the present basis, and to create a new body to determine civil rights would as the consultation documents points out give rise to legal rights and rights of appeal to higher courts. The consequences for a fair and impartial hearing under article 6 of the European convention on Human Rights (such as a right of appeal to the High Court) alluded to in the consultation document are avoidable if the Panel's function remains as it is. A published code of guidance could promote the benefits of reference to the Panel, and encourage the parties to accept its recommendations, if necessary.

Q6(a) On the face of it, the imposition on a successful claimant of a liability to Capital Gains Tax on gains made on the sale of a work of art or other object restored to him by a museum or gallery might appear harsh. However, the object will have been lost to the public at the time of transfer by the museum or gallery, and will have been transferred to a claimant who discounted an ex gratia payment as alternative recompense. It may therefore be appropriate that, in the event of a sale after transfer from a public collection, there should be a tax liability for capital gains, particularly if the sale occurs within a relatively short time after transfer. It may be preferable in the public interest that any ex gratia compensatory payment should be expressly free of tax.

Q6(b) The question whether a work restored to a claimant by a museum or gallery should be included in the claimant's estate for Inheritance Tax purposes is more difficult. It would be a harsh result if a work restored to a claimant shortly before his or her death had to be sold or returned to a public collection in order to pay or minimise the liability of the claimant's estate for Inheritance Tax. On the other hand, many estates contain valuable heirlooms that have been in families for generations, which do not enjoy any exclusion for liability for Inheritance Tax. An exemption from liability for a transfer from a public collection made within a fixed terms of years before the death of the claimant may be compromise.

Q6(c)-(d) It cannot be assumed that donors to museum collections were aware that their gifts contained objects despoiled by Nazi aggression. The Museum agrees that where a donor's object is transferred to a claimant the donor should not lose the benefit of any tax advantage which accrued to him or her as the result of the donation. Even where the donor might have been aware of the tainted history of the object, it does not follow that the donor was actively engaged in the act of despoliation or its concealment, or that he or she could have done anything constructive about the matter. Moreover, since limitation periods will have expired long ago in most spoliation cases, and since these claims will continue to be addressed as a matter of public morality, rather than law, it would be wrong for HM Revenue and Customs to hold donors liable for losses to national collections as the result of the acts of conscience of the boards of those institutions which are now responsible for them. Unless there is an easy way in which the question of any donor's legal culpability for an act of spoliation, or its concealment, can be addressed, the Museum does not suggest that the donor's tax advantage should be put at risk by the return of an object.

Q7 (a)-(b) (i)-(iii) It is 60 years since the end of the Nazi era and the issue of Nazi spoliation has been on the international agenda since the Washington Conference in 1998. At that time the NMDC began to compile and publish lists of objects of bad and doubtful provenance during the years 1933-45. There has been a considerable time for the victims of that era to identify their losses and prepare the ground for making claims. The Dutch Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War, which has faced a considerably higher volume of claims than the UK's Spoliation Advisory Panel has seen², commenced its work in January 2002 and is currently due finish by the end of 2007 (although the Committee is now advising that it may need longer to complete its work on the existing claims). Having regard to these and the factors mentioned in the discussion document the Museum considers that the power to transfer items from collections should be available only for a defined number of years after it comes into force.

A rolling period of time may be more equitable than a mere fixed time of 10 or 20 years, set by reference to the coming into force of the new power. The time frame for bringing claim might be set at, say, six years from the date of publication of an item on a published statutory list as an object with doubtful provenance in the 1933-45 era and, in any event, say, 12 years after the power comes into force. This would provide absolute protection from a claim for any object which has been published on a statutory register for more than six years after the date on which the power comes into force; and for a period of 12 years museums and galleries would have to continue their vigilance in relation to the provenance of objects during the 1933-45 era, either by avoiding acquisition or (where the public interest requires) acquiring the item but placing it on the statutory list. The protection six years after publication would act as an incentive for museums and galleries to complete their provenance research.

Q8. It would be essential that, if having excised proper care in the scrutiny of a claim the Trustees transferred an object from their collection, they should be protected against any further claim in relation to that object from a subsequent claimant.

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² 5 cases were decided in 2002; 7 in 2003; 2 in 2004; and 6 in 2005; there are 19 cases awaiting consideration as at 1st January 2006.