



Open Forum

Katalin Andreides*

A Brief Assessment of the Current State of Restitution Policy at a National Level and in Eastern Europe

<https://doi.org/10.1515/eehs-2024-0031>

Received May 18, 2024; accepted May 21, 2024; published online June 7, 2024

Restitution is a difficult topic for claimants, collectors and collections, policy makers and law makers alike. The process of restitution may uncover uncomfortable truths, it requires the recognition of past wrongs, the acceptance of responsibility and the public disclosure of historical facts.

But restitution does not only mean justice or reconciliation. When integrated into the legal context, it is rightfully expected to reflect proportionality, balance and predictability. To date, however, there is no universally applicable *legal* procedure to make and pursue restitution claims, to advance a common understanding on clearly defined due diligence obligations, or impose fair practices on the art trade.

1 Legal Claims Fraught with Difficulty

In the absence of clear definitions and established special legal procedures, claimants need to rely on existing general laws in the process of restitution. Time bars and limitation periods mean legal claims will not be enforceable forever. Some 80 years after the crime, it is difficult to locate assets: objects have passed through many countries and may be dispersed all over the world. A person who resorts to a foreign court for the purpose of recovering an object faces considerable difficulties. Uncertainties and complexities will surround the choice of the body of law on the basis of which the claimant's rights will be established, as well as the nature and extent of remedies he/she may be granted. Cross-border litigation is expensive.

*Corresponding author: Katalin Andreides, Andreides Law, Budapest, Hungary,
E-mail: katalin@andreideslaw.com

Even if theft or unlawful dispossession can be established successfully, most continental legal systems provide a more favourable legal environment for the subsequent innocent buyer compared to that of the original owners or their heirs – though by no means to a uniform extent.

European courts tend to decide the case before them on the basis of purely legal considerations, but sometimes have residual power to be exercised exceptionally to take into account basic principles of justice and fairness. However, they are sometimes seen to have disregarded or interpreted strict rules in a flexible way when it is the state or a museum seeking the return of a lost object, rather than the dispossessed owner who was subject to persecution.¹

2 The Washington Principles

Due to different legal traditions in a number of jurisdictions and sometimes diametrically opposed national histories, legal and ethical considerations involved in restitution claims have always been politically sensitive and therefore complex. The international community has reached a consensus only in the form of non-legally binding declarations and a set of principles that are not legally enforceable. Nonetheless, that set of principles is widely seen as a watershed moment that has made it possible for claimants to overcome otherwise insurmountable obstacles presented by formal legal rules noted above.

At the Washington Conference on Nazi-confiscated art in 1998, some 44 countries negotiated and, in the end, settled upon 11 voluntary ethical principles intended to help them deal with cultural items in their custody that had been subject to looting by the Nazis and find solutions on a moral basis to restore such deprivation suffered.²

While the initiative behind the Washington Principles was largely driven by the US State Department, the Eastern European nations that endorsed the principles made up more than a third of the nations present at the conference. They included Albania, Belarus, Bosnia-Herzegovina, Bulgaria, Croatia, Czech Republic, Estonia,

¹ In their interpretation of the law, Hungarian courts tend to give more space to original owners' interests in the context of traders, particularly when the state or a museum are seeking the return of a lost object. When a museum claimed a painting that had disappeared in unclear circumstances during the war, the current possessor, who had purchased it at public auction decades earlier, failed to demonstrate that its seller had acted as a trader. Consequently, in the absence of proof of commercial activity, the court found it unnecessary to consider the question of whether the purchase was bona fide altogether. See case: 19.P. 20062/2017/10.

² Washington Conference Principles on Nazi-Confiscated Art [*Released in connection with The Washington Conference on Holocaust Era Assets, Washington, DC, December 3, 1998*] (www.state.gov/washington-conference-principles-on-nazi-confiscated-art/).

Hungary, Latvia, Lithuania, Macedonia, Poland, Romania, Russia, Slovakia, Slovenia and Ukraine.

By way of a summary, the principles call on art that has been confiscated by the Nazis and not yet been restituted to be identified;³ relevant records and archives to be made accessible to researchers;⁴ resources and personnel to be made available to identify such art;⁵ consideration to be given to limitations concerning the provenance information due to passage of time and circumstances of the Holocaust;⁶ art that is found to have been confiscated to be publicised;⁷ a central registry of such information to be established;⁸ heirs of original owners to be encouraged to come forward and make their claims;⁹ steps to be taken expeditiously to achieve a just and fair solution to any such claim;¹⁰ where there is no known claimant, steps to be taken to achieve a just and fair solution in any event;¹¹ bodies to be established to identify such art and to assist in addressing ownership issues should have a balanced membership;¹² and nations are encouraged to develop national processes to implement these principles.¹³

While the Washington Principles were aimed chiefly at museums and public collections, the Terezin Declaration of 30 June 2009 re-affirmed the “*support of the Washington Conference Principles on Nazi-Confiscated Art and [...] encourage[d] all parties including public and private institutions and individuals to apply them as well*”.¹⁴ The Terezin Declaration was endorsed by 46 governments and states and included the above listed countries of Eastern Europe once again.

The implementation of the Washington Principles on a national level may be best described as challenging and as yet incomplete. Of the 44 countries that endorsed the principles, only a handful of countries have drawn up processes as alternative means to facilitate restitution and established national commissions entrusted with developing recommendations which review claims and help in coming to ‘just and fair solutions’ as envisaged in Principles 10 and 11. These are the

3 Principle 1.

4 Principle 2.

5 Principle 3.

6 Principle 4.

7 Principle 5.

8 Principle 6.

9 Principle 7.

10 Principle 8.

11 Principle 9.

12 Principle 10.

13 Principle 11.

14 Terezin Declaration: (https://mzv.gov.cz/public/21/14/49/4826349_2940108_Terezin_Declaration_FullText.pdf).

Beratende Kommission in Germany,¹⁵ the Spoliation Advisory Panel in the UK,¹⁶ the Austrian Kunstrückgabebeirat,¹⁷ the French Commission pour la restitution des biens et l'indemnisation des victimes de spoliations antisémites (CIVS)¹⁸ and the Dutch Restitutiecommissie.¹⁹

In November 2023, the Swiss government decided to establish an “Expertenkommission für belastetes Kulturerbe”,²⁰ which will become the sixth ad-hoc panel to be instituted following the Washington Principles some 25 years after the Principles were agreed upon. None of the countries from Eastern Europe have as yet established such a commission.

It should be noted that even for the handful of Western European countries that have established such commissions, and are seen as being at the forefront of finding workable national pathways to dealing with Nazi-looted artworks, this does not mean that pathway necessarily enables claimants to make successful claims.

While representatives of the restitution committees of the UK, France, Germany, Austria and the Netherlands agreed in 2017 to create a permanent working group to promote closer engagement and improved information sharing between the committees,²¹ their practices and conclusions diverge and are sometimes inconsistent with one another.

Should such panels be allowed to make “advisory” recommendations only, or should their “decisions” be legally binding upon the parties involved? Should one party be able to call upon a panel unilaterally, or should both claimant and current possessor have to agree to call upon the panel to help resolve the dispute? Should panels only hear disputes involving public collections and museums or should they have a say in disputes between claimants and private collectors?

Apart from procedure, there may sometimes be marked differences in substantive approaches between national panels. In 2013, for example, the Netherlands introduced the highly controversial so-called ‘balance of interest’ test for its commission to consider when making a decision on a claim. All of a sudden, the ‘interest’ of the claimant in having an artwork returned was to be weighed up against any given Dutch museum’s interest in keeping such an artwork.²²

¹⁵ See <https://www.beratende-kommission.de/de>.

¹⁶ See <https://www.gov.uk/government/groups/spoliation-advisory-panel>.

¹⁷ See <https://provenienzforschung.gv.at/empfehlungen-des-beirats/>.

¹⁸ See <https://www.civs.gouv.fr/>.

¹⁹ See <https://www.restitutiecommissie.nl/>.

²⁰ See <https://www.admin.ch/gov/de/start/dokumentation/medienmitteilungen.msg-id-98818.html>.

²¹ See <https://www.gov.uk/government/groups/spoliation-advisory-panel#spoliation-conference-action-plan>.

²² See <https://www.lootedart.com/news.php?r=TE2MRV184021>.

After much criticism, including that this approach was akin to a bicycle thief arguing that he should be able to keep stolen property because he was using it,²³ the policy was dropped. In 2023, the German Lost Art Foundation published a memorandum calling on “the federal government to pass a law on restitution so as to explicitly assume responsibility as the legal successor to the National Socialist state.”²⁴ Among other matters, the body called for (i) the establishment of an option to lodge a unilateral request for mediation; (ii) decisions to have a binding effect; and (iii) substantive national legislation on restitution.

In March 2024, Germany announced that it had decided to replace its *Advisory Commission* with what the German government described as a “*Schiedsgerichtsbarkeit*”,²⁵ essentially an arbitration forum for Nazi-confiscated artworks. It is expected that Germany will be able to present the implementation thereof by the end of 2024 and it remains to be seen whether the implementation follows all of the recommendations made in the above-mentioned memorandum.

Also in March 2024, more than 20 countries endorsed a list of “Best Practices for the Washington Conference Principles on Nazi-Confiscated Art” so as to aid more consistent implementation of the principles and provide more clarity as to their interpretation. The list was presented by the World Jewish Restitution Organization, which also produced a “score-card” taking stock of the various national implementations of the countries that have endorsed the Washington Principles.²⁶

The report categorizes countries on whether or not they (i) have engaged in historical research on the subject; (ii) undertake provenance research on their collections; (iii) have a claims process; and (iv) have made a substantial number of restitutions. Overall, seven countries were judged to have made major progress, including Czechia and Austria. Three countries were judged to have made substantial progress (none of which are in Central or Eastern Europe). 13 countries were judged to have made some progress, including Croatia, Hungary, Poland, Serbia, Slovakia and Slovenia. And 24 countries were judged to have made little or no progress at all, including Belarus, Bosnia and Herzegovina, Bulgaria, Estonia, Latvia, Lithuania, Moldova, Montenegro, North Macedonia, Romania, Russian Federation and Ukraine.

23 <https://www.nytimes.com/2020/12/07/arts/netherlands-looted-art-report.html>.

24 <https://kulturgutverluste.de/en/news/memorandum-issued-advisory-commission-nazi-looted-cultural-property>.

25 See <https://www.kmk.org/aktuelles/artikelansicht/beratende-kommission-entscheidende-weichen-fuer-reform-gestellt.html>.

26 See <https://art.claimscon.org/wp-content/uploads/2024/03/4-March-2024-Holocaust-Era-Looted-Cultural-Property-A-Current-Worldwide-Overview.pdf>.

3 UK Panel – Hungarian Collection

Given the dispersal of Nazi-looted artworks noted above, it is of course possible that one of the Western European panels is called upon to consider an artwork looted from Eastern Europe.

In 2014, the UK Spoilation Panel considered a painting in the possession of Tate Britain entitled *Beaching a Boat, Brighton* by the English artist Constable.²⁷

In this case the heirs of a despoiled Hungarian art collector, Baron Hatvany, sought the return of the work alleging that it was subject of looting during the Nazi era following the German invasion of Hungary. There was a considerable gap of provenance in the painting's ownership history from late 1930s and 1962 when the painting was recorded sold in a London based art gallery.

It was not clear whether the painting was taken from Budapest by the Red Army after February 1945 or confiscated by the Germans or collaborators during the previous years of the war. The fact that the painting resurfaced in the West indicated the likelihood that it was not part of Soviet collections containing looted art.

In considering the case the Panel evaluated the validity of the claimant's original title taking into account the difficulties to prove title after the destructions of the war and the Holocaust. Interpreting uncertainties as to the provenance in the claimant's favour, it concluded that the claimant was in possession until the object was looted following the German invasion.

In relation to the research into the painting's ownership history, the Panel concluded that the Tate was under a moral obligation to pursue the possibility that it had been subject to spoilation during the war. The institution could have researched the provenance also on occasions subsequent to the acquisition. The Panel found it surprising that the painting was lent to overseas exhibitions several times, that provenance had not been researched before the loans and that the painting was therefore exposed to a risk of third party claims in other countries.

Taking account all of the circumstances, the panel recommended that the painting should be returned to the claimants as desired. Despite the wide dispersal of artworks after the end of the second world war, not all original owners who were illegally dispossessed due to persecution in Eastern Europe can avail themselves of one of the bodies established in Western Europe to help resolve their claims.

²⁷ See <https://www.gov.uk/government/publications/report-of-the-spoliation-advisory-panel-constable-painting-in-the-tate-gallery>.

4 Eastern European Particularities

Immediately following World War II, substantial restitution efforts were conducted by the Allies. Western restitution policy allowed for the return of vast amounts of artworks back to the country from which they had been removed. It was the task of national recuperation commissions to deal with individual claims.

At the same time, there is little information as to the extent of looting by Soviet war committees and their officers in Eastern Europe. Many works – considered abandoned, confiscated or stolen from unknown collections or simply left on bailment by persecuted families – remained in the hands of the successors of Eastern European government agencies, public institutions and museums. This has added a further layer of complexity to an already complicated picture.

An advanced restitution policy would have been paramount in Eastern European countries (and remains so to this day). Here, the value of lost assets is on an enormous scale. Before the outbreak of World War II, Central and Eastern Europe was home to the largest Jewish populations who were illegally dispossessed of a significant amount of wealth and substantial assets, including artworks and other collectibles. Before the war, Hungarian Jews were among the most affluent Jewish community anywhere in Europe.²⁸

To date, Eastern European countries have performed rather poorly in their commitments as per international accords concerning the restitution of Nazi-confiscated art²⁹ (although some progress has been made in some countries, most notably Czechia³⁰). This state of affairs finds expression in a lack of accessible documentation and rather opaque efforts at undertaking provenance research which makes restitution claims from private individuals against public collections particularly challenging.

Conversely, there tend to be significant funds available for various nation-states to locate and claim works abroad that were dispossessed from public collections.

In Hungary, the courts have generally tended to support legal grounds against private ownership claims to artworks located in Hungarian public institutions. In so doing, the courts have tended to accept arguments on behalf of public collections, such as that objects within museums' custody constitute "heirless art" whose owners are unknown or the argument that the original owner may have left the country 'without permission'.³¹

²⁸ The Herzog, Hatvany, Friedmann collections ought to be mentioned by way of illustrative examples only.

²⁹ See <https://art.claimscon.org/wp-content/uploads/2014/11/Worldwide-Overview.pdf>.

³⁰ See <https://art.claimscon.org/wp-content/uploads/2024/03/4-March-2024-Holocaust-Era-Looted-Cultural-Property-A-Current-Worldwide-Overview.pdf>.

³¹ Section 9 (1) Decree 1954 (Reference made in Herzog-, and Dános-litigation).

In 2013, a legislative initiative sought to revisit the ownership status of works in bailment in public collections. In relation to such works, the government introduced a formal restitution procedure where the lawfulness of state property was in doubt.³² To this end, claims against Hungarian public collections were capable of being submitted to a dedicated state agency. The state agency had the authority to make decisions concerning such artworks' possession. This procedure introduced a more favourable burden of proof for claimants: where the state was not successful in proving beyond reasonable doubt that it had acquired title, the work was to be restituted to the applicant having established the presumption of ownership.³³ However, in 2019 the procedure was repealed.

The picture tends to be similarly difficult across the geopolitical region more broadly. Nonetheless, with the war in Ukraine and a renewed urgency to guard against state-sponsored looting and destruction of artworks and cultural heritage objects, the wider region may yet jump-start restitution efforts in Eastern Europe.

³² Decree 449/2013 (XI. 28).

³³ Amended Section 4/A Act CXL. 1997.