

COUNTRY REPORTS

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Colonial Booty and Its Restitution – Current Developments and New Perspectives for French Legislation in This Field

Abstract: Recent developments in French and international laws concerning the return of cultural property from formerly colonized territories are particularly rich. Most States with large collections of non-European objects are now faced with claims from the countries from which these objects were transferred. France, after having long maintained a legal stance based on strict respect of the principle of inalienability of public collections, has recently changed its position statement. In 2017, in Ouagadougou, President Emmanuel Macron said he was in favour of returning African heritage to Africa. Three years later, on 24 December 2020, the Parliament adopted a law that partially fulfilled the President's wish, by identifying 27 objects for return to Benin and Senegal. As this article will explain, the law's passage was fraught, and opinions continue to diverge on a case-by-case (or object-by-object) approach to return versus a generic statute. There are also questions about what drives the idea of return – from legal responsibility, to moral duty in view of French history, to contemporary politics and diplomacy.

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Keywords: colonial looting, restitution of cultural property, French restitution law, inalienability of public collections

Introduction

There have been important recent developments in French and international laws concerning the return of cultural property taken from formerly colonized territories, responding to claims from the countries of origin of these objects. Until 2018, France had insisted upon strict respect for the principle of inalienability of public collections,¹ but its position has since evolved. The change was signalled by the President of the Republic, Emmanuel Macron, in a speech at Ouagadougou University on 28 November 2017. Macron said that he wanted “within five years [...] implementing temporary or permanent restitutions of African cultural heritage to Africa”.² Three years later, on 24 December 2020, the Parliament has adopted an act that partly fulfilled the President’s wish (hereafter “Act No. 2020-1673”).³

This article firstly explains that the Act follows an expert report commissioned from two university professors. Secondly, it also underlines that the adopted piece legislation expresses difficult parliamentary discussions. Next, this article argues that the adopted restitutions agenda goes far beyond the existing legal framework concerning the management of public collections. Indeed, it seems to be part of the government’s concern to compensate the damage suffered by categories of victims as a consequence of French history (colonization, Second World War). As a result, the issue of restitutions is complex from a both legal and political point of view. For this reason, a debate is now engaged on the opportunity to adopt a generic statute on this matter (*loi-cadre*). Finally, this article demonstrates that until now, the French legislator has been pragmatic in ordering restitutions in the form of a case-by-case special statute (*loi de circonstance*).

¹ In 2016 the government of the Republic of Benin made an official request for restitution to France, claiming a certain number of items presented at the Quai Branly Museum. The Minister of Foreign Affairs at the time, Jean-Marc Ayrault, replied in a letter dated 12 December 2016 that “in accordance with the legislation in force, [these items] are subject to the principles of inalienability, imprescriptibility and unseizability. Consequently, their restitution is not possible”.

² Présidence de la République, *Emmanuel Macron’s Speech at the University of Ouagadougou*, 28 November 2017, <https://www.elysee.fr/en/emmanuel-macron/2017/11/28/emmanuel-macrons-speech-at-the-university-of-ouagadougou> [accessed: 06.05.2022].

³ *Loi n° 2020-1673 du 24 décembre 2020 relative à la restitution de biens culturels à la République du Bénin et à la République du Sénégal* [Act No. 2020-1673 of 24 December 2020 on the Restitution of Cultural Property to the Republic of Benin and the Republic of Senegal], *Journal officiel de la République française* 312, 26 December 2020. On this subject cf. C. Bories et al. (eds.), *Les restitutions des collections muséales. Aspects politiques et juridiques*, Mare et Martin, Paris 2021.

An Expert Report with Contested Conclusions

In March 2018, the French government commissioned two academics, Bénédicte Savoy and Felwine Sarr to produce a report on the process of “restituting African heritage”. Their conclusions were submitted to Emmanuel Macron on 23 November 2018.⁴

As is well known by now, the report made far reaching recommendations for the large-scale restitution of colonial artefacts, based on a new relational ethics. These addressed a three-stage restitution process. Firstly, the report recommended the “formal restitution”, i.e. transfer of legal title, of largely symbolic cultural goods, whose return to the countries of origin had long been demanded by several African States. In the second phase, French experts and representatives of claiming States would carry out inventories of French collections and exchange digitized resources. The establishment of joint committees was recommended to consider applications for restitution and counselling in the field of protection, curatorial education and training. At this stage, entities interested in return should be identified. In the third and final phase, African countries and communities who have not yet made restitution claims will be able to do so. This phase is not limited in time, leaving room for future negotiations.

The report’s recommendations generated many and various reactions. Some were positive, from those hoping France would “return” a significant number of cultural goods to African countries formerly colonized by France. Others were more hostile, criticizing the report for its maximalist stance, targeting nearly all objects of African origin in French public collections, and threatening the principle of inalienability of public collections. The report was also criticized for focusing on the issue of restitution of African cultural property taken during the colonial era, and avoiding the issue of trafficking in such objects. This position statement referred primarily to the political stance of the report which put forward the idea of memorial or moral reparation (*réparation mémorielle*), instead of addressing legal obligations to repair past wrongs. Moreover, the report was criticized for calling Western museums into question and describing them as “museums of the other” (*musée de l’autre*)⁵.

After these public reactions, the legislative process started in 2020. A draft bill was submitted to Parliament on 16 July 2020, and enacted, as previously stated, on 24 December 2020. Earlier, on 3 March 2020 the Council of State had delivered a favourable opinion for the submission of a bill on the restitution of cultural prop-

⁴ For an English version of the report, see F. Sarr, B. Savoy, *The Restitution of African Cultural Heritage. Toward a New Relational Ethics*, November 2018, http://restitutionreport2018.com/sarr_savoy_en.pdf [accessed: 06.05.2022].

⁵ This formula could be found before that in the writings of Benoît de L’Estoile, *Le goût des autres. De l’exposition coloniale aux arts premiers*, Flammarion-Champs Essais, Paris 2007.

erty to the Republic of Benin and the Republic of Senegal.⁶ The Council based its opinion on the compatibility of the bill with the domestic legal order, pointing out that “the objective pursued and the historical origin of the property justify a transfer free of charge”.

But the title of the adopted act establishes that the government chose a more restrictive approach than the one recommended by the authors of the report. The act contains only two articles and its scope focuses on the restitution of 26 pieces contained in the treasure of Behanzin to the Republic of Benin, and a sabre known as El Hadj Omar Tall’s sword to the Republic of Senegal.⁷

A question arises: Why was it necessary to enact a special legislation for such limited returns? The answer is that this is due to the specificity of the French legal system: once a property has been incorporated into the public domain it is no longer supposed to leave it – it is inalienable.⁸ In order to do so, it must be declassified. However, in the case of cultural property, declassification by administrative means is only possible when the property has lost all public interest from the point of view of history, art, archaeology, science, or technology.⁹ Obviously, this is not the case for the objects covered by Act No. 2020-1673. It should also be added that in this case the objects comprehended by the Act were brought into French public collections by virtue of donations¹⁰ and were not eligible for administrative declassification for that reason as well. The intervention of the legislator was therefore essential to derogate from the principle of inalienability. But the parliamentary debates were difficult.

Tense Parliamentary Debates

During the parliamentary debates, the deputies and senators did not succeed in agreeing on a common text, but a majority of them agreed on the need to return the objects concerned to the countries in question.

The discussion focused on the specific formulation of the repatriation framework. The majority argued that, having regard to the different process of appropriation, the historical contexts, the evolution of the law over time, and the contemporary increasing of claims, a case-by-case approach to the removal of cultural property from public collections was in order, at least for a period. Removals would

⁶ Conseil d’Etat, *Avis sur un projet de loi relatif à la restitution de biens culturels à la République du Bénin et à la République du Sénégal*, 3 March 2020, http://www.assemblee-nationale.fr/dyn/15/textes/115b3221_avis-conseil-etat.pdf [accessed: 06.05.2022].

⁷ Act No. 2020-1673.

⁸ “Les biens constituant les collections des musées de France appartenant à une personne publique font partie de leur domaine public et sont, à ce titre, inaliénables” (*Code du patrimoine* [Heritage Code], https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006074236 [accessed: 06.05.2022], Art. L.451-5).

⁹ Cf. *ibidem* and *Code général de la propriété des personnes publiques* [General Public Property Code], https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006070299 [accessed: 06.05.2022], Art. L.2112-1.

¹⁰ This was the case with donations of Archinard (sword of El Hadj Omar Tall) and Dodds (26 items from the “treasure of Behanzin”).

be authorized by specific acts until a consensus emerged on a Generic Statute¹¹ (see below on this subject). They argued that the so-called “specific acts” had the advantage of responding to specific demands on an ad hoc basis, introducing an exception to the principle of the inalienability of public collections. However, some members were concerned about the proliferation of such ad hoc laws, which they felt could undermine the principle of inalienability and ultimately more greatly threaten the integrity of public collections. They felt that a future Generic Statute would allow France to display a uniform and clear doctrine in this area. However, they too agreed that the main difficulty concerned the criteria to be adopted for “restitutability”, which needed careful definition. In this context, the parliamentarians agreed on the need to emphasize specific acts of return,¹² apart, of course, from cases covered by international legislation to which France is a State Party¹³ and on the model of the acts that allowed the return of human remains.¹⁴

Another major concern of the parliamentarians was respect for the principle of the inalienability of public collections. Some members of parliament thought it essential to reiterate this principle in the law. In French law, the rule of inalienability is the guarantee of the integrity of national public collections. However, the preliminary draft did not refer to it.¹⁵ Deputies and senators thus approved an amendment aiming to add to Articles 1 and 2 of the law the phrase: “[b]y derogation to the principle of inalienability of the French public collections registered in Article L.451-5 of the French Heritage Code”.

Such an amendment was not neutral for many parliamentarians. It was a way of saying that from a legal point of view nothing obliges France to agree with requests made by Benin and Senegal. It reiterated the point that, following a donation, the items donated became part of the French public collections. And, that no interna-

¹¹ See Y. Kerlogot, *Rapport fait au nom de la commission des affaires culturelles et de l'éducation sur le projet de loi, relatif à la restitution de biens culturels à la République du Bénin et à la République du Sénégal* (n° 3221), 30 September 2020, p. 8, http://www.assemblee-nationale.fr/dyn/15/rapports/cion-cedu/l15b3387_rapport-fond [accessed: 06.05.2022].

¹² C. Morin-Desailly, *Rapport n° 91 (2020-2021), fait au nom de la commission de la culture, de l'éducation et de la communication*, 28 October 2020, p. 9, <http://www.senat.fr/rap/l20-091/l20-0911.pdf> [accessed: 06.05.2022].

¹³ Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 14 November 1970, 823 UNTS 231 (ratified by France on 7 January 1997, Benin on 1 March 2017, and Senegal on 9 December 1984).

¹⁴ *Loi n° 2002-323 du 6 mars 2002 relative à la restitution par la France de la dépouille mortelle de Saartjie Baartman à l'Afrique du Sud* [Act No. 2002-323 of 6 March 2002 Relating to the Restitution of the Remains of Saartjie Baartman by France to South Africa], *Journal officiel de la République française*, 7 March 2002; *Loi n° 2010-501 du 18 mai 2010 visant à autoriser la restitution par la France des têtes maories à la Nouvelle-Zélande et relative à la gestion des collections* [Act No. 2010-501 of 18 May 2010 to Authorise the Return of Maori Heads to New Zealand by France and Relating to the Management of Collections], *Journal officiel de la République française*, 19 May 2010.

¹⁵ *Assemblée nationale, Restitution biens culturels Bénin et Sénégal* (n° 3221). *Amendement*, 25 September 2020, <http://www.assemblee-nationale.fr/dyn/15/amendements/3221/CION-CEDU/AC3.pdf> [accessed: 06.05.2022].

COUNTRY REPORTS

Xavier Perrot

tional text today sets up rules prescribing their return – the 1970 UNESCO Convention¹⁶ is not retroactive; and the takings were not illegal under the laws of the time. That the 19th-century laws of war permitted captures when the “treasure of Behanzin” was seized in 1893 by French colonial troops¹⁷ and the sword of El Hadj Omar Tall in 1890.¹⁸ And that French military regulations also allowed such seizures: in its 1895 version, the decree regulating the service of armies in the field still authorized, in its Article 109, captures made on the enemy.¹⁹ (This article was only abrogated in 1901, after the French intervention in China during the Boxer War.²⁰ This abrogation should also be seen in connection with the context of the Hague Convention which condemned looting in 1899.)²¹

It should be added that the Western powers progressively emancipated themselves from conventional military practices in the context of the colonial conquest, the framework for the exercise of the *Compagnies franches* and detached regiments. These military operations became known as “small wars”.²² Two events took place in this context: the looting of the town of Ségou on 6 April 1890 by the troops of Colonel Louis Archinard²³ and the capture of Abomey in November 1892 by General Amédée Dodds.

As a result of these legal and historical considerations, the French approach is therefore based on the idea of return as a voluntary process and not on an obligation to return, which would have suggested the idea of fault. The restitution

¹⁶ See footnote 13.

¹⁷ For an account of the events, see G. Beaujean, *L'art de cour d'Abomey. Le sens des objets*, Les presses du réel, Dijon 2019, pp. 223 ff.

¹⁸ Senator Catherine Morin-Desailly, rapporteur for the Senate, insists on this point: “From a legal point of view, nothing obliges France today to accede to the requests made by Benin and Senegal. The collections are protected, at the national level, by the principle of inalienability. The artworks have regularly been included in the collections of our museums, following a donation. No international text currently sets out rules for their return. The 1970 UNESCO Convention is not retroactive. Lastly, the captures of war remained ‘authorized’ at the time when the treasure of Behanzin and the sword were seized by the French colonial armies, the first international convention on the subject dating from 1899. The restitution of these objects is therefore more a matter of diplomatic and ethical considerations” (C. Morin-Desailly, *Rapport n° 91...*, p. 23). For the story of the looting of the Ségou treasure, see D. Foliard, *Les vies du «trésor de Ségou»*, “Revue historique” 2018, Vol. 4(688), pp. 869-898.

¹⁹ Ministère de la Guerre, *Décret du 28 mai 1895 portant règlement sur le service des armées en campagne*, Imprimerie Nationale, Paris 1895.

²⁰ X. Perrot, *Ius praedae colonial. Enjeux juridiques autour des objets de la discorde*, in: C. Bories et al. (eds.), op. cit., pp. 185-211.

²¹ Convention (II) with Respect to the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 29 July 1899, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=CD0F6C83F96FB459C12563CD002D66A1&action=openDocument> [accessed: 06.05.2022].

²² J.A. de Moor, H.L. Wesseling, *Imperialism and War. Essays on Colonial Wars in Asia and Africa*, E.J. Brill, Leiden 1989. For the related concept of “savage war”, see K.A. Wagner, *Savage Warfare: Violence and the Rule of Colonial Difference in Early British Counterinsurgency*, “History Workshop Journal” 2018, Vol. 85, pp. 217-237.

²³ It is from Archinard’s military campaigns against the Toucouleur Empire that the sword of El Hadj Omar Tall, which has long been exhibited in the Musée de l’Armée in Paris, comes from.

of these objects therefore responds to considerations of a diplomatic and ethical consideration.

This is probably why the Minister of Culture, Roselyne Bachelot, took care to reassure the senators on 28 October 2020 about the legal regime for property acquired during armed conflict:

[...] the bill is not general in scope: it applies only to the specific set of objects it expressly lists. Thus, even if the objects in question were considered to be taken in war, the passage of this bill will not have the effect of calling into question the legality of our country's ownership of any property acquired in the context of an armed conflict.²⁴

It is in this sense that the discussion on the semantic issues surrounding the terms “restitution” and “return” must be understood.²⁵ The Senate opposition considered that “restitution” was not the right word; as the term “restitution” suggests responsibility and therefore fault. Using this word would mean that France recognized that it is not the legitimate owner of the items concerned by the claim. Implicitly, for some parliamentarians, the concern was that the use of such language would lead to the recognition of French colonization itself as an illicit act giving rise to liability for fault. The Senate thus considered that the act should not have had the effect of calling into question the legality of France's ownership of the cultural objects in question. Several senators also felt that the term “restitution” had an ideological connotation of repentance.²⁶ An amendment was therefore tabled to replace the word “restitution” with “return” in the title of the law. The more neutral term “return” does not legally refer to the idea of fault. The amendment was adopted unanimously upon its first reading in the Senate.²⁷ However, it was rejected by the deputies of the National Assembly, which is why the word “restitution” now appears in the title of the law. For Yannick Kerlogot, rapporteur of the law in the National Assembly, “if the term restitution can mean to return something that one unduly possesses, it also means to put back in its place. It is in this sense that the

²⁴ C. Morin-Desailly, *Rapport n° 91...*, p. 39. Principle recalled by the Council of State: “Unless the legislator provides otherwise, works held by a public law legal entity, including when it has acquired them in the context of or as a result of war operations or in circumstances relating to the exercise of national sovereignty on the occasion of which it has appropriated them, belong to the public domain and are therefore inalienable” (Conseil d'Etat, 30 July 2014, No. 349789; quoted in the impact study of Act No. 3221, see Assemblée nationale, *Étude d'impact. Projet de loi relatif à la restitution de biens culturels à la République du Bénin et à la République du Sénégal*, 16 July 2020, p. 14, http://www.assemblee-nationale.fr/dyn/15/textes/l15b3221_projet-loi.pdf [accessed: 06.05.2022]).

²⁵ Whereas English law uses the word “return”, French law distinguishes between “restitution” and “retour”.

²⁶ Catherine Morin-Desailly confirmed that “the term ‘return’ therefore allows for a favourable response to the requests of Benin and Senegal, without being part of an approach of repentance, which the term ‘restitution’, in its common legal sense, could imply” (Y. Kerlogot, C. Morin-Desailly, *Rapport fait au nom de la commission mixte paritaire chargée de proposer un texte sur les dispositions restant en discussion du projet de loi relatif au retour de biens culturels à la République du Bénin et à la République du Sénégal*, 19 November 2020, p. 7, https://www.assemblee-nationale.fr/dyn/15/rapports/3221/l15b3586_rapport-fond# [accessed: 06.05.2022]).

²⁷ http://www.senat.fr/amendements/2020-2021/92/Amdt_1.html [accessed: 06.05.2022].

COUNTRY REPORTS

Xavier Perrot

rapporteur understands it, and that he wishes it to be stated”, which would have the advantage of “not obscuring dark events that belong to French colonial history”.²⁸ The semantic fluctuation is surprising in its justifications. Indeed, while the Senate stuck mainly to a legal analysis (restitution presupposes the idea of fault and therefore of illegal possession of the objects) and political analysis (rejecting any idea of repentance), the rapporteur for the National Assembly “understands” restitution in a “technical connotation (which) is appropriate to this transfer of property” because this term “is now recognized and used by the media”. This debate shows that media semantics take precedence over legal semantics.

The Senate opposition criticized the government for adopting an arbitrary and essentially voluntary approach to the issue of restitution. Too often the government acts according to the *fait du prince*. The opposition stresses that there is a national heritage that is neither presidential nor governmental property.²⁹

Therefore, the disagreement between the Assembly and the Senate is serious. For the Senate, the French historical conception of the universal museum must be preserved and the answers to the claims from foreign States need to be addressed through a perennial, scientific, transparent, and democratic procedure. Responses must not be subject to diplomatic games, or even let go to the Prince’s will (*fait du prince*). The senators insist on the issue of derogation from the principle of inalienability of public collections, but also highlight the separation of powers, in particular when the executive reduces Parliament to a recording chamber.

Indeed, some parliamentarians expressed their indignation when they learned that the government has handed over the crown of Queen Ranavalona III’s canopy to the Malagasy authorities on 5 November 2020.³⁰ This was precisely while the specific legislation on the returns to Benin and Senegal were under discussion. In the same way, in July 2020 the French government handed over to Algeria the skulls of Algerian resistance fighters, which until then had been kept in the Musée de l’Homme.³¹ From this point of view, the official handover of El Hadj Omar Tall’s sword to the Senegalese authorities on 17 November 2019, under a renewable loan agreement, was also problematic. Handed over before the adoption of the act that would enshrine its restitution, such a measure was interpreted as the free disposal of a public good by the executive. Hence the criticism of *fait du prince*.

Such unilateral decisions, taken in disregard of cultural heritage law and outside of any democratic debate, have contributed to the tense parliamentary de-

²⁸ Y. Kerlogot, *Rapport fait au nom de la commission des affaires culturelles et de l’éducation sur le projet de loi, modifié par le Sénat, relatif au retour de biens culturels à la République du Bénin et à la République du Sénégal* (n° 3631), 2 December 2020, pp. 5 and 12, https://www.assemblee-nationale.fr/dyn/15/rapports/cion-cedu/l15b3631_rapport-fond# [accessed: 06.05.2022].

²⁹ Y. Kerlogot, C. Morin-Desailly, op. cit., p. 13.

³⁰ Ibidem, p. 8.

³¹ These were buried a few days after the handover to the Algerian authorities, in defiance of the deposit agreement.

bates. The Senate then called for the creation of a National Council to reflect on the circulation and return of non-European cultural goods to be included in the law, and to this effect tabled an amendment proposing to add an additional Article 3.³² This Council was intended to prevent political decisions from preceding parliamentary debates. The senators and some deputies considered it is essential that the discussions be informed by scientific expertise. The Council's mission would have been to meet three objectives: to contain the risk of a *fait du prince* in terms of the restitution of non-European cultural property; to provide the public authorities with a scientific perspective in their decision-making; and finally to deepen reflection on these issues. With the creation of this Council, the senators hoped that the French administration would anticipate the claims related to cultural property by carrying out work on the origin of the items. The Council would thus contribute to consolidating the French doctrine on restitution.³³

Subsequently, the debates between the two chambers on this amendment became tense. At the end of November 2020 the parliamentarians (Joint Committee) failed to adopt a common text. Article 3 is particularly problematic. The members of the majority party rejected this amendment. They rejected the creation of a new commission (Council) because the trend is towards administrative simplification, and thus Article 3 was deleted. The disagreement between the Assembly and the Senate is therefore significant.

With the rejection of the creation of a National Council of Reflection (Article 3), the refusal to replace the term “restitution” by the term “return”, and the removal of cultural goods from public collections by the State during the parliamentary discussions, the Senate gave up on continuing the parliamentary discussions.³⁴ A motion opposing the preliminary question to the bill was adopted by the Senate. On the basis of Article 44(3) of the Senate’s Rules of Procedure,³⁵ the Senators therefore rejected the entire text of the bill. In accordance with Article 45(4c) of the Constitution of 4 October 1958, which provides for the procedure in the absence of a consensus of the two chambers on a common text, the Assembly gives a final decision on the bill. On 17 December 2020 the bill relating to the restitution of cultural property to the Republic of Benin and the Republic

³² http://www.senat.fr/amendements/commissions/2020-2021/15/Amdt_COM-3.html [accessed: 06.05.2022].

³³ Following these debates, in response to the Act of 24 December 2020, the Senate adopted on 10 January 2022, a bill on the circulation and return of cultural property belonging to public collections. Assemblée nationale, *Proposition de loi n° 4877, adoptée par le Sénat, relative à la circulation et au retour des biens culturels appartenant aux collections publiques*, 11 January 2022, https://www.assemblee-nationale.fr/dyn/15/textes/l15b4877_proposition-loi# [accessed: 06.05.2022].

³⁴ C. Morin-Desailly, *Rapport n° 204 (2020-2021), fait au nom de la commission de la culture, de l'éducation et de la communication sur le projet de loi relatif à la restitution de biens culturels à la République du Bénin et à la République du Sénégal*, 9 December 2020, p. 9, <https://www.senat.fr/rap/I20-204/I20-204.html> [accessed: 06.05.2022].

³⁵ <https://www.senat.fr/reglement/reglement32.html> [accessed: 06.05.2022].

COUNTRY REPORTS

Xavier Perrot

of Senegal was thus definitively adopted by the National Assembly.³⁶ The law was then promulgated on 24 December 2020.³⁷

The evolution of events is thus notable; from the mission letter of the French President and the report of the two experts (see above) to the adoption of the law. The idea of restituting “African heritage” was replaced by the actual handing over of 27 objects from two regions of West Africa. Moreover, these restitutions took the form of a specific Act rather than a Generic Statute (see below). Such difficulties suggest profound differences in the status of such objects in public collections. This is perhaps the result of a particular political and ideological context, which would mean that the French Republic seeks to rectify historical wrongs before any patrimonial or legal considerations.

Fixing History

Without underestimating the importance of the political stakes and economic interests between France and the former colonized countries insofar as regards the circulation of cultural goods, the adoption of Act No. 2020-1673 is also part of a particular context.

Since the end of the 20th century, there has been an ethical movement in France questioning the responsibility of the State for some of its past actions; this is particularly the case regarding the anti-Semitic laws passed during the Vichy regime, and currently questions about French colonial policy. For several years now, the French Republic has assumed reparation for the damages suffered by certain victims (individuals or States), even if the facts are legally prescribed. France has thus been involved in several public reparation policies. On 18 March 2022, the government adopted a decree instituting an independent national commission for the recognition and reparation of prejudices suffered by the Harkis and other persons repatriated from Algeria after independence, in 1962.³⁸ In addition, at the end of the 1990s the State implemented a public policy of reparations for Jewish families who were victims of anti-Semitic persecution under the Vichy regime.

Although until the end of the 1940s a large number of cultural assets were returned to their looted owners,³⁹ after the first years of the 1950s claims decreased

³⁶ https://www.assemblee-nationale.fr/dyn/15/dossiers/restitution_biens_culturels_Benin_Senegal?etape=15-ANLDEF [accessed: 06.05.2022].

³⁷ Act No. 2020-1673.

³⁸ *Décret n° 2022-394 du 18 mars 2022 relatif à la commission nationale indépendante de reconnaissance et de réparation des préjudices subis par les harkis, les autres personnes rapatriées d'Algérie anciennement de statut civil de droit local et les membres de leurs familles* [Decree No. 2022-394 of 18 March 2022 Instituting an Independent National Commission for the Recognition and Reparation of Prejudices Suffered by the Harkis and Other Persons Repatriated from Algeria after Independence], *Journal officiel de la République française* 67, 20 March 2022.

³⁹ Cf. I. Le Masne de Chermont, D. Schulmann (eds.), *Le pillage de l'art en France pendant l'Occupation et la situation des 2000 oeuvres confiées aux musées nationaux*, La Documentation française, Paris 2000.

and restitutions slowed down.⁴⁰ The resignation of the families, combined with the public desire to rebuild, meant that the issue of restitution took a back seat. Only six restitutions of movable cultural property were recorded between 1953 and 1993.⁴¹ The 1990s marked the beginning of a new period in which restitutions restarted. Some journalistic investigations⁴² and academic researches⁴³ brought to light the presence of a veritable “disappeared museum”⁴⁴ scattered in French public collections, embassies, and ministries, insisting on the existence of an odious debt of reparation that forced the political authorities to react. In a famous speech delivered on 16 July 1995 during the commemoration of the Vél’ d’Hiv’ roundup of 16 July 1942, the French President, Jacques Chirac, declared that the Republic had an “imprescriptible debt” towards the victims. This was the starting point of a public policy of reparation implemented in following the conclusions of the Study Mission on the spoliation of the Jews of France, chaired by Jean Mattéoli, President of the Economic and Social Council and a former deportee under the Vichy regime.⁴⁵ Far from being isolated, the work of the Mattéoli Commission was echoing an intense international diplomatic activity marked by the Washington Conference of 1998,⁴⁶ then the Vilnius (2000)⁴⁷ and Terezin (2009)⁴⁸ declarations.

Following the conclusions of the Mattéoli Commission, a Commission for the Compensation of Victims of Spoliation Resulting from the Anti-Semitic Legislation in Force during the Occupation (CIVS) was created in 1999.⁴⁹ This Administrative Commission for reparation was designed to handle individual claims and is competent to recommend to the Prime Minister compensation plunder of property (companies, bank accounts, movable property, cultural property) and restitution

⁴⁰ Cf. “Yod. Revue hébraïque et juive” 2018, Vol. 21.

⁴¹ D. Zivie, «Des traces subsistent dans des registres...». *Biens culturels spoliés pendant la Seconde Guerre mondiale : une ambition pour rechercher, retrouver, restituer et expliquer, rapport à Madame Françoise Nyssen*, Ministre de la Culture, Ministère de la Culture, February 2018, p. 16.

⁴² See journalistic investigations of Philippe Sprang and Hector Feliciano.

⁴³ See the works of Lynn Nicholas, Isabelle Le Masne de Chermont, and Didier Schulmann.

⁴⁴ From the title of the book by Hector Feliciano, *The Lost Museum: The Nazi Conspiracy to Steal the World's Greatest Works of Art*, Basic Books, New York 1997.

⁴⁵ The research work was initiated following the letter of assignment from Prime Minister Alain Juppé on 5 February 1997.

⁴⁶ Washington Conference Principles on Nazi-Confiscated Art, 3 December 1998.

⁴⁷ Declaration of the Vilnius International Forum on Holocaust Era Looted Cultural Assets, 5 October 2000.

⁴⁸ Terezin Declaration, 30 June 2009.

⁴⁹ *Décret n° 99-778 du 10 septembre 1999 instituant une commission pour l'indemnisation des victimes de spoliations intervenues du fait des législations antisémites en vigueur pendant l'Occupation* [Decree No. 99-778 of 10 September 1999 Establishing a Commission for the Compensation of Victims of Spoliation Resulting from the Anti-Semitic Legislation in Force during the Occupation], Journal officiel de la République française 211, 11 September 1999. For the context of the adoption of the decree, see D. Ruzié, *L'indemnisation des victimes des spoliations intervenues du fait des législations antisémites en vigueur pendant l'Occupation en France*, in: *Libertés, justice, tolérance. Mélanges en l'honneur du Doyen Gérard Cohen-Jonathan*, Bruylant, Bruxelles 2004, pp. 1351-1370. See the website of the CIVS in English: <http://www.civs.gouv.fr/home> [accessed: 06.05.2022].

COUNTRY REPORTS

Xavier Perrot

of movable cultural property looted during the Occupation between 1940 and 1945. The commission is not a court of law; it therefore does not judge, but issues recommendations. The procedure is flexible and adapted to each case. The recommendations of the deliberating panel, based on equity, favour the articulation between respect for the law in force and the moral duty of reparation. This procedure relieves the Commission of the need to comply with the letter and spirit of the French substantive law, which could be a potential barrier to compensation or restitution. In this sense, the creation of this Commission has recognized the imprescriptibility of actions for compensation and restitution, it presumes the good faith of the claimants and also reduces the burden of proof.⁵⁰

The exorbitant nature of such a procedure can only be understood in the light of the policy of reparation undertaken by France at the end of the 1990s. This policy was adopted in a social and political context that recognized, since the 1970s, the genocide of the Jews as the major event of the war and, therefore, the State's responsibility for their persecution during the Occupation was officially recognized in 1995. In contrast, the policy of material restitution implemented after 1945 excluded any idea of State's responsibility. In this time, the authorities have adopted a legal and political approach to spoliations, rather than a moral approach. This approach was based on the loss of property, regardless of the quality of the victim (Jewish or not) and the objective of unitary reconstruction of the country, without discriminating between sufferings (Jews, Resistance fighters, ordinary civilians, etc.).⁵¹

Thus, the legislator recently ordered the restitution of cultural property looted in France from Jewish families during the Second World War.⁵²

It can therefore be argued that the French Republic assumes a true moral duty to make reparation to the victims of the State's policies, including persecution of Jews during the Second World War and the domination and exploitation of colonized peoples. Act No. 2020-1673 must therefore be interpreted in the light of this trend. Indeed, the presence in European museums of works of art, human remains, and ethnological objects related to colonization is no longer self-evident. Today, all visitors question the validity of such "translocations" (Bénédicte Savoy). Although the reality of appropriation in a colonial context is complex,⁵³ such collections tend to

⁵⁰ See F. Dreifuss-Netter, *Justice, droit et équité: la réparation des préjudices résultant des spoliations antisémites sous l'Occupation*, "Recueil Dalloz" 2020, Vol. 196, p. 945. See also X. Perrot, *Actualité juridique d'une criminalité de guerre. La restitution des biens culturels spoliés en France entre 1940 et 1945*, "Tribonien" (to be published in 2023).

⁵¹ C. Andrieu, *En France, deux cycles de politiques publiques : restitutions (1944-1980), réparations (1997...)*, in: C. Goschler, P. Ther, C. Andrieu (eds.), *Spoliations et restitutions des biens juifs en Europe XX^e siècle*, Autrement, Paris 2007, pp. 187-215.

⁵² *Loi n° 2022-218 du 21 février 2022 relative à la restitution ou la remise de certains biens culturels aux ayants droit de leurs propriétaires victimes de persécutions antisémites* [Act No. 2022-218 of 21 February 2022 Relating to the Restitution or Return of Certain Cultural Property to the Heirs of Their Owners Who Were Victims of Anti-Semitic Persecution], *Journal officiel de la République française* 44, 22 February 2022.

⁵³ The legal classification of the facts is necessary in this case. Are the appropriations of extra-European cultural property the result, for example, of military booty? Of simple theft? Of theft by threat, violence, or de-

be presented today as widespread plundering. The historical reading of the facts is generally evaluated in favour of a primarily moral approach. This is why France must increase its resources in the search for provenance of cultural property belonging to public collections. France must also adopt a clear conservation doctrine. Otherwise, these “cultural objects” will increasingly become “objects of discord”. However, a balance must be found within the heritage doctrine that each society has adopted: France has historically chosen the “universal museum”. This doctrine, inherited from the Enlightenment century, postulates that the museum is the refuge of the world’s arts. The integrity and coherence of public collections are thus legally guaranteed by the principles of inalienability, imprescriptibility, and unseizability. Two strong principles supported by France are in conflict here: on the one hand, the preservation of the integrity of public collections (inalienability); and on the other hand the concern to respond justly to legitimate claims, whether they are based on official recognition of the State’s responsibility (persecution of the Jews during the Occupation), or form part of an intercontinental dialogue and collaboration (restitution to the formerly colonized States of sub-Saharan Africa, for example). In view of these difficulties, the Government decided to initiate a consultation on a draft Generic Statute.

Towards a Generic Statute?

On 9 November 2021, the restitution ceremony of the 26 pieces of the royal treasures of Abomey to the Republic of Benin took place in Paris. The President of the Republic then entrusted Jean-Luc Martinez, ambassador for international cooperation in the field of heritage, with the task of carrying out “a reflection on the criteria for restitution with a view to the eventual drafting of a Generic Statute”.⁵⁴ However, the complexity of such a mission is obvious. The risk of blurring the memory between the colonial period and the Second World War is significant. Expectations regarding the restitution of cultural property are not the same in both cases. The contexts are very different, as are the recipients: States for property displaced from the colonies and private individuals for property looted between 1940 and 1945.

It should be added that the debate on the Generic Statute is currently overshadowed by a bill adopted by the Senate on 10 January 2022 on the circulation and restitution of cultural property belonging to public collections.⁵⁵ The proposed law aims to complete the French Heritage Code, especially by introducing the crea-

ception? Of simple purchase? Of forced selling? Of exchange? Of gifts and counter-gifts? It should be borne in mind that “prize law” or “booty” were legal in law of war until the adoption of the Hague Conventions of 1899 and 1907. It was also still included at the end of the 19th century in the French army’s field service regulations. For more on this issue, see X. Perrot, *Ius praedae colonialis...*, pp. 185-211. For the Benin city case, see F. Bodenstein, *Une typologie des prises de butin à Benin City en février 1897*, “Monde(s)” 2020, Vol. 1(17), pp. 57-77.

⁵⁴ *Déclaration de M. Emmanuel Macron, président de la République, sur la restitution de 26 oeuvres des trésors royaux d’Abomey à la République du Bénin, à Paris le 9 novembre 2021*, <https://www.vie-publique.fr/discours/282406-emmanuel-macron-09112021-france-benin> [accessed: 06.05.2022].

⁵⁵ Assemblée nationale, *Proposition de loi n° 4877...*

tion of a “National Council for the circulation and return of extra-European cultural goods”.⁵⁶ This is essentially the same Council that the Senate wanted to include in Act No. 2020-1673 (in repealed Article 3). As can be seen, the doctrines in terms of restitution are very different between the Senate’s proposal and the draft Generic Statute supported by the executive.

Two potential ways of removing ill-gotten goods from public collections thus emerge from the current debates. They illustrate two opposing philosophies: one is resolutely casuistic, based on the creation of a national council of reflection and founded on the search for provenance. This is the vision of the Senate. The second is that of a Generic Statute. The difficulty here is that it is necessary to determine sufficiently precise criteria of “restitutability”.

As we can see, in the middle of 2022, France is at a crossroads in its policy of restitution of cultural property, because this forces it to question its own history and its future relations with the former countries colonized by it.

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⁵⁶ Ibidem.

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