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Putting into place solutions for Nazi Era dispossessions of cultural objects: the UK experience

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Introduction

Alternative Dispute Resolution (ADR) processes have been championed in the context of Nazi Era dispossessions of cultural objects. This paper looks at the practical outcome of claims heard by the Spoliation Advisory Panel (the Panel), a process of ADR that was established by the UK government in 2000.

The procedure before the Panel is an *alternative* to litigation rather than a process of litigation; the Panel's recommendations are not legally enforceable, although the claimant is expected to accept them in full and final settlement of the claim. The respondent museum is under no legal obligation to follow the Panel's recommendations. Therefore, in theory, a claimant could have incurred significant expenditure in commissioning research into his claim, been represented before the Panel and successfully convince the Panel of his strong moral claim, only for the respondent to refuse to put the Panel's recommendation into effect. This paper analyses the effectiveness of the Panel's work in overcoming some of the shortcomings of litigation and analyses the way in which remedies are used to respond to the moral severity of the claim. Often accounts of the Panel's work end with the report and the recommendations made. However, this paper also analyses the way in which the parties have put into effect the Panel's recommendations. This paper will thus analyse whether claimants have, in practice, encountered problems with the implementation of the Panel's recommended remedy given the absence of any legal sanction for non-compliance with the Panel's recommendations. Suggestions will be put forward as to how the implementation of recommendations might be secured in the future.

The first sections give a brief overview of the way in which restitution is favoured as a remedy in narratives about Nazi Era dispossessions of cultural objects and then highlight the reasons as to why litigation may not be suitable for resolving such disputes. The discussion then turns to advantages of the Spoliation Advisory Panel as a means of resolving disputes, particularly in the context of tackling the varied moral circumstances of cases which might not automatically give rise to the remedy of restitution. The paper then analyses the various structural issues that present potential shortcomings of the Panel, particularly in the context of enforcement of recommendations, but then analyses whether these present problems in practice for the parties. The paper ends with suggestions for future development.

The importance of restitution as a remedy

Often the narratives surrounding Nazi Era dispossessions and the claims made in the 21st century start with the remedy itself rather than the cause of action since discussions focus on "restitution" or "return" of objects, rather than on the actual claims in respect of Nazi Era dispossessions or the Holocaust.

It has been said that Holocaust restitution “is about waiting for some recognition, some voucher to validate the misdeeds that have been perpetrated”¹ and where restitution takes place “the restituted object...allows for the veneration of a culture which tyranny sought to make disappear”.² Restitution, O’Donnell suggests, permits the telling of the narrative.³ Restitution does appear, though to be the remedy of choice; Campfens observes that restitution “as a remedy in the case of Nazi-looted art seems to be emphasised as the primary way of achieving justice.”⁴ Restitution can also have a profound effect on the relationship between the claimant and the respondent to such an extent that this can affect the perception towards the state that has facilitated return, such as the UK’s efforts through the establishment of the Spoliation Advisory Panel. For example, it has been argued by the lawyer representing the claimants that the recommendation to return the Benevento Missal⁵ had the effect of changing the perception by the city of Benevento towards the UK “from one of deep hurt, mistrust, even of hate, to one of joyful pleasure and generosity of spirit”.⁶

Restitution strictly means the remedy of returning the object itself to the claimant⁷ and will be used in this way during this paper; it is acknowledged, however, that at times it can be used in a wider sense and “more comprehensively to include the entire spectrum of attempts to rectify historical injustices”.⁸ Despite the starting point of considering the remedy of returning the actual object, it can be seen that the Panel’s Terms of Reference envisage a varied range of remedies that can be recommended.⁹ Furthermore, the Panel has in practice, through its use of remedies, accounted for the varying strength of the moral strength of the claims that it has heard.¹⁰ It therefore, seeks to achieve just and fair solutions in accordance with the overall intention of the Washington Conference Principles.¹¹

Litigation as a flawed medium – independent panels as the way forward

It has been argued that litigation is not always a suitable method for resolving claims in respect of Nazi Era dispossessions.¹² In the UK, most litigation involving Nazi Era possessions would be unsuccessful because of procedural difficulties which may bar an action, specifically the extinction of the original owner’s title by virtue of the statutory limitation period.¹³ However, even in countries where litigation may have a greater chance of success because procedural bars can be overcome, the adversarial nature of litigation can make it a less than perfect avenue for pursuing a claim. This is because of the very emotional and personal stories that often surround the dispossessions and that debating these

¹ Bazyler and Alford 2006, 1.

² O’Donnell 2011, 56.

³ O’Donnell 2011, 55.

⁴ Campfens 2015, 37.

⁵ *Report of the Spoliation Advisory Panel in Respect of a 12th Century Manuscript Now in the Possession of the British Library* (2005 HC 406) [hereinafter British Library/Benevento claim].

⁶ Scott 2005, 306.

⁷ See generally, Legget 2000.

⁸ Barkan, 2000, xix.

⁹ Return, compensation, an *ex gratia* payment or the display of an account of the object’s history: *Spoliation Advisory Panel Terms of Reference*. <https://www.gov.uk/government/groups/spoliation-advisory-panel> [hereinafter SAP ToR] SAP ToR para. 16 (accessed 1 April 2016).

¹⁰ Discussed below.

¹¹ Washington Conference Principles on Nazi Confiscated Art <http://www.state.gov/p/eur/rt/hlcst/122038.htm> (accessed 10 August 2015).

¹² Palmer 2000, 49; Cotler 1998, 603 and Hawkins, Rothman and Goldstein 1995, 88 -95 (who, in the US context, suggest a legislative approach).

¹³ Either the Limitation Act 1939 in respect of claims against English museums or the Conveyancing (Scotland) Act 1924 in Scotland.

in an adversarial context can be particularly stressful for the claimants. Additionally, the lengthy and costly nature of litigation can have a prohibitive effect on bringing a claim, or encourage them to be settled out of court. It is interesting to note that in the USA where some claims relating to Nazi Era dispossessions have been successfully resolved, this tends to result from a settlement of the claim rather than by a final judgment on the merits of the case. This can be seen in two well-known situations. First, in her claim against Austria relating to several paintings by Gustav Klimt, Maria Altmann was successful in the US Supreme Court on jurisdictional issues,¹⁴ but the parties ultimately settled the US litigation of the substantive issue by agreeing to send the matter for determination by binding arbitration in Austria.¹⁵ The second well-known case involved the *Portrait of Wally* by Egon Schiele which had been lent by the Leopold Foundation in Austria to New York's Museum of Modern Art. Again, this was settled out of court and the remedy was agreed by consensus between the parties.¹⁶

In the UK, even where there is a desire by a respondent to return objects to their pre-war owners, the law has prevented a wholly ethical approach being taken where legal barriers exist. This can be seen in the case of *AG v Trustees of the British Museum*.¹⁷ Here, despite the strong moral arguments that could be advanced in favour of transferring the object to the heirs of the pre-War owner, the court was restricted by the legal structure of the museum to allow return.¹⁸ It was therefore not possible to take into account the moral circumstances of the case or at least these could not outweigh the strict legal ones. It is only following the passage of the Holocaust (Return of Cultural Objects) Act 2009 that this statutory bar can be overcome where certain conditions are met.¹⁹ Alternative dispute resolution processes therefore allow the sensitivities of the situation to be taken into account and the varied circumstances that gave rise to the situation; these might otherwise have been excluded in an entirely law-focused forum such as a court. ADR thus provides an opportunity for the narratives to be more fully heard than in litigation. Furthermore, ADR presents a means of overcoming substantive and procedural issues such as limitation statutes which may have extinguished the claimant's legal title to the object as well as the evidential barriers of proving the exact circumstances of loss during the confusion of war.

Advantages of the Spoliation Advisory Panel as a means of alternative dispute resolution

In practical terms, the Panel has provided a concrete means of overcoming several of the barriers that face claimants who seek to litigate disputes with regard to Nazi Era dispossessions in the UK. First, it

¹⁴ Republic of Austria et al v Maria V Altmann 541 U.S. 677 (2004).

¹⁵ The arbitral award which included the famous portrait of Adele Bloch Bauer was successful: Arbitral award Altmann et al v Republic of Austria (15 January 2006). https://www.unodc.org/res/cld/case-law-doc/traffickingculturalpropertycrimetype/aut/maria_almann_vs_republic_of_austria_html/Arbitral_Award_-_5_Klimt_paintings_Maria_V._Altmann_and_others_v._Republic_of_Austria-15_January_2004.pdf (accessed 1 April 2016).

¹⁶ *USA v Portrait of Wally, A Painting by Egon Schiele (in rem)* 99 Civ 9940 (LAP) Stipulation and Order of Settlement and Discontinuance.

http://portraitofwally.com/sites/all/articles/stipulation_and_order_of_settlement.pdf (accessed 1 April 2016).

¹⁷ [2005] Ch 397 (Ch). C.f. the problem encountered by the Wedgwood Museum in *Re Wedgwood Trust Ltd (In Administration)* [2012] *Pension Law Review* 175 where it was not possible to take into account the cultural heritage value of a collection designated under the UNESCO Memory of the World scheme when determining whether the collection was classed as assets which could be sold to fulfil the Wedgwood company's pension deficit.

¹⁸ Specifically the British Museum Act 1963. The governing statutes of the other national museums contain similarly restrictive clauses.

¹⁹ See below.

necessarily overcomes the primary impediment to legal claims relating to Nazi Era dispossessions which are limitation periods. Since the Panel is an *alternative* to litigation, rather than a *process* of litigation,²⁰ no claim is time-barred and although the Panel investigates the original legal title of the claimants and the current legal title of the possessor-museum, it does not determine these.²¹ Therefore, the extinction of the claimant's legal title has no bearing on the moral considerations of the claim on which the Panel focuses its attention. In all successful claims to-date the Panel has concluded that the legal title of all claimants would at the least have been extinguished following the expiration of the relevant domestic limitation periods from the point in time at which the object was first purchased in the UK or acquired by the possessor-museum.²²

Secondly, the Panel's procedures provide a means to overcome one of the primary concerns which statutes of limitation seek to address, which is the problem of evidence. The Panel's Terms of Reference clearly envisage the difficulties that the passage of time may have on a claimant proving original title to the object.²³ However, in its reports the Panel has also adopted an holistic approach to other evidential matters, particularly in the context of the circumstances of the loss of the object.²⁴ The Panel has therefore taken a practical approach which focuses on taking heed of evidence to the contrary, but accepting that there may not always be positive evidence confirming a state of affairs. For example, in some claims there has been documentary evidence that the object in question was in the original owner's possession at a point in time before the date of the alleged loss (whether seizure of all his assets, or an auction of objects). However, there may be no evidence to confirm unequivocally that it was in his possession on the date of the loss. In such circumstances the Panel has accepted what may be considered more contextual evidence about the collecting habits of the original owner which tended to indicate that he would not have sold the object in the interim. This can be seen in the claim by the Rothberger heirs against the British Museum. Here, evidence from an expert at the British Museum suggested that wealthy European families were unlikely to have sold off their collections, even on the occasion of deaths in the family.²⁵ In the claim involving the *Feldmann heirs* and the British Museum, Dr Feldmann had consigned some of the objects to auction on a previous occasion to defray his financial obligations, but they were returned unsold. The Panel took the view that, whilst it was possible that he had sold the objects subsequently and before the date of the Gestapo seizure of his property, it was nevertheless unlikely that he had actually sold them as the proceeds of such a sale "would have had no material impact on his financial problems."²⁶ In the *Benevento Missal* claim the Panel found that the claimants' circumstantial evidence was "sufficiently robust to vindicate their submission"²⁷ that the manuscript had been spoliated at some point between the bombing of Benevento in 1943 and the recorded purchase from a dealer in 1944 despite the absence of any direct evidence of the manuscript's presence in the collection immediately before the war. Here the claimant relied on the absence of any evidence that indicated a sale during the period between a publication

²⁰ SAP ToR, para. 9.

²¹ SAP ToR, para. 8.

²² Either the Limitation Act 1939 in respect of claims against English museums or the Conveyancing (Scotland) Act 1924 in Scotland.

²³ SAP ToR, para. 15(d).

²⁴ Woodhead 2003, 181.

²⁵ Report of the Spoliation Advisory Panel in respect of three pieces of porcelain now in the possession of the British Museum London and the Fitzwilliam Museum, Cambridge (2008 HC 602) [hereinafter *British Museum/Rothberger* claim and *Fitzwilliam/Rothberger* claim], para. 7.

²⁶ Report of the Spoliation Advisory Panel in respect of four drawings now in the possession of the British Museum (2006 HC 1052) [hereinafter *British Museum/Feldmann* claim], para. 28.

²⁷ *British Library/Benevento* claim, para. 52

which included the manuscript in 1914 and 1943 when the town was attacked.²⁸ These cases demonstrate the Panel taking cognisance of the difficulties encountered with evidence, and the specific support to giving consideration to any “unavoidable gaps or ambiguities in the provenance in light of the passage of time and the circumstances of the Holocaust era” which is found in the Washington Conference Principles.²⁹

Tackling varied moral circumstances

Claims in respect of Nazi Era dispossessions of cultural objects need to be dealt with on a case-by-case basis not only because they involve “specific and identifiable object[s]”³⁰ but also because the circumstances of the loss may be quite varied and raise different moral issues that need to be addressed individually. The Panel has therefore necessarily grappled with difficult moral issues arising from the circumstances of the individual claims brought in respect of Nazi Era dispossessions of cultural objects. Whilst there may be instances of direct seizure where there is a strong moral claim on the part of the claimant based on the circumstances of loss, in other cases the circumstances giving rise to the necessary moral strength of the claim have required more consideration since they were not so clear cut. So in all cases where there was evidence of direct seizure by the Nazis the Panel concluded that there was a strong moral claim.³¹ There is nothing to suggest that some acts of seizure have been considered any less morally severe than other acts of seizure. In all cases where return by the possessor-museum was possible, this was the remedy recommended by the Panel.³² This falls in line with the principle found in the Council of Europe Resolution 1205 that institutions that are in receipt of public funding, which all the possessor-museums featuring in Panel reports have been, should return such “looted Jewish cultural property”.³³

Whilst the Washington Conference Principles and the Council of Europe Resolution were phrased in terms of “Nazi Confiscated Art” and “Looted Jewish cultural property” respectively and could thus be interpreted as applying only to direct seizure, it is widely accepted that not only were the Nazi Era dispossessions of cultural objects much more varied than confiscations and lootings, properly so-called, but extended further. It is clear from the Inter-Allied Declaration of 1943 that the transfers that were to be regarded as invalid included “transfers or dealings [which] have taken the form of open looting or plunder, or of transactions apparently legal in form, even when they purport to be voluntarily effected.”³⁴

One particular category of losses that have been seen in a variety of forms in the Panel’s work has been forced sales. These claims have given rise to a variety of different recommended remedies to

²⁸ *ibid* para. 50.2.

²⁹ *Principles with respect to Nazi-Confiscated Art*, Washington Conference on Holocaust-Era Assets, 1998 <http://www.state.gov/p/eur/rt/hlcst/122038.htm> (accessed 1 April 2016).

³⁰ Dugot 2006, 273.

³¹ Specifically in the *British Museum & Fitzwilliam/Rothberger* claims and the *British Museum/Feldmann* and *Report of the Spoliation Advisory Panel in respect of the three drawings in the Courtauld Institute of Art* (2007 HC 200) [hereinafter *Courtauld/Feldmann* claim].

³² *Fitzwilliam/Rothberger* claim, *British Library/Benevento* claim, *Report of the Spoliation Advisory Panel in respect of three Meissen figures in the Victoria and Albert Museum* (2014 HC 208) [hereinafter *V&A/Budge* claim], *Report of the Spoliation Advisory Panel in Respect of a silver-gilt Renaissance Salt in the possession of the Ashmolean Museum* (2014 HC 687) [hereinafter *Ashmolean/Budge* claim]; *Report of the Spoliation Advisory Panel in Respect of Four Nymphenburg porcelain figures in the possession of the Cecil Higgins Art Gallery, Bedford* (2014 HC 775) [hereinafter *Cecil Higgins/Budge* claim] and *Courtauld/Feldmann* claim

³³ Council of Europe Resolution 1205 On Looted Jewish Cultural Property (November 1999).

³⁴ Inter-Allied Declaration against acts of dispossession committed in territories under enemy occupation or control, London, 5 January 1943.

reflect what the Panel has accepted as being differing levels of moral severity dependent on both the circumstances of the loss as well as any subsequent compensation and the like.

The first type of forced sale is where extortionate tax demands were made to Jewish individuals which had to be paid before they were free to emigrate. In these claims, any money that was received by the claimants tended not to be available to them to spend afterwards. In effect, the claims were made on the basis that the claimants were denied the free right of disposal of the cultural objects. Two claims, both involving the same group of claimants, show that the Panel treated this as a sufficiently strong moral claim to justify return of the objects.³⁵ The second type of forced sale can be seen in the claims involving the estate of Emma Budge, an American Jew who had a property in Hamburg. On her death, as a result of anti-Semitism, the works of art which formed part of her estate were sold in a manner contrary to the stipulations of her will and the estate was deprived of the works of art “without receiving fair or any value for them”.³⁶ In the *Courtauld/Glaser* claim the sale at auction of Curt Glaser’s art collection was said to be in part because of Nazi persecution, which had meant that he had lost his job and his flat, but was also in part due to his desire to start a new life following the death of wife; it was because of these mixed motives as well as the fact that he had received a reasonable market price and his second wife received post-war compensation from Germany that a lesser remedy than return was recommended.³⁷ Unlike the Budge claim it did seem that Glaser was free to use the proceeds of sale. The final type of forced sales consists of those that took place, not during persecution, but whilst the owners were fleeing across Europe. This category was clearly envisaged by the Inter-Allied Declaration of 1943 which committed its signatories to setting aside transactions even seemingly legal in effect.³⁸ The *Tate Gallery/Griffier* claim involved a sale that took place in Belgium whilst the claimant’s mother was fleeing from the Nazis through Belgium. The sale was concluded at a significant undervalue since the evidence presented to the Panel was that she had received next to nothing.³⁹ Even though she was able to spend the money that she received from the sale, this was for the necessities of life during her escape.⁴⁰ The second claim which took place in circumstances following escape from persecution was the *British Museum/Koch* claim where the claimant’s mother sold various clocks and watches at auction in London. Here, the sales were considered to be forced, since they were undertaken to alleviate the financial difficulties of the family which had resulted from fleeing persecution. However, the sales were not at an undervalue. The Panel therefore concluded that the moral strength of the claim was at the lower end of the spectrum and again recommended a commemorative remedy rather than that of return.⁴¹

The final category of dispossessions that the Panel has dealt with is that of general loss, probably theft during the war. The only claim heard to-date is the *British Library/Benevento* claim where it was found that on the balance of probabilities the missal was lost during the confusion of war rather than spoliation at the hands of the Nazis.⁴² This claim fell within the Panel’s jurisdiction because it was probable that it was lost during the requisite timeframe of the Nazi Era.

³⁵ Report of the Spoliation Advisory Panel in respect of a painting now in the possession of Glasgow City Council (2004 HC 10) [hereinafter *Glasgow City Council/attrib. Chardin* claim] and *British Library/Biccherna* claim).

³⁶ This was the case for the claim against the Cecil Higgins Art Gallery, Bedford, para.32. See also *Ashmolean/Budge* claim, para. 23.

³⁷ *Courtauld/Glaser* claim paras. 42 and 43.

³⁸ Inter-Allied Declaration. See also *Glasgow City Council/attrib. Chardin*, para. 19.

³⁹ *Tate Gallery/Griffier* claim, para. 11.

⁴⁰ *Tate Gallery/Griffier* claim, para. 11.

⁴¹ *British Museum/Koch* claim, para. 27.

⁴² *British Library/Benevento* claim, para. 52. For some of the background to this claim see generally Scovazzi 2011.

What has been clear from the Panel's reports so far is that the Panel needs to be satisfied that there is a moral strength to the circumstances surrounding the object itself. The Panel has expressly stated that it will not make a recommendation of return on basis of the general suffering encountered by a claimant's family at the hands of the Nazis, but will do so only based on the actual circumstances of the loss.⁴³

Structural procedural shortcomings

Where Nazi Era dispossessed objects are in the possession of private collections, rather than those established for the public benefit, the Panel has no automatic jurisdiction if a claimant were to attempt to bring a claim. Instead, there needs to be consensus between the parties before the claim can be brought.⁴⁴ So far no such private claim has been brought before the Panel.

A further shortcoming that exists in the Panel's Terms of Reference (albeit one which may arise only in limited circumstances) is that once an object ceases to be in the possession of a national museum or other museum established for the public benefit it falls outside the jurisdiction of the Panel. This would apply equally whether the object were owned by the museum or on loan to it. This happened in the context of a medieval casket that was on loan to the Victoria and Albert Museum. It was reported that it was seized by police and so ceased to be in the possession of the museum. Consequently the Panel no longer had jurisdiction to hear the claim (that had already been commenced).⁴⁵

The structural difficulties with enforcing recommendations

It is clear that the ability of the Panel to take into account the various moral nuances of the circumstances and to overcome the legal procedural impediments has a positive effect on the ability of claimants to have claims heard and receive recommendations. However, from a structural point of view there is a clear disadvantage to a more informal, non-litigious approach, namely that there is no means of enforcing the Panel's recommendations where the possessor-museum refuses to put in place the Panel's recommended remedy. Use of the Panel is unlike other forms of ADR where the parties undertake to accept the determination as the full and final settlement.⁴⁶ Instead, it is clear from the Panel's Terms of Reference that its recommendations are not legally binding on either of the parties or on the Secretary of State.⁴⁷ The only concession here is that where a respondent does put in place the Panel's recommendation then it is seemingly protected by virtue of the fact that the claimant is expected to accept that in full and final settlement of the claim.⁴⁸ Norman Palmer has suggested that where a claimant accepts the Panel's recommendation that this would act as an estoppel against any subsequent claim being brought.⁴⁹ In only one claim to-date has the claimant expressed publicly any dissatisfaction with the Panel's recommendation. This was in the claim made by the heirs of Curt Glaser.⁵⁰ Here, the Panel acknowledged that there was a strength to the moral

⁴³ *Tate Gallery/Constable* claim, para. 43.

⁴⁴ SAP ToR, para. 6.

⁴⁵ Louise Jury, "Art treasures and the Gestapo: The casket, the Nazis and why the police came calling at the V&A." <http://www.independent.co.uk/news/uk/this-britain/art-treasures-and-the-gestapo-the-casket-the-nazis-and-why-the-police-came-calling-at-the-vampa-6104459.html> (accessed 1 April 2016). See also Palmer 2015, 170.

⁴⁶ This would likely be a contractual obligation in the case of mediation. The binding nature of arbitral awards is found in the Arbitration Act 1996, s 58(1) and these can be enforced by a court of law: Arbitration Act 1996, s 66(1).

⁴⁷ SAP ToR, para. 10.

⁴⁸ SAP ToR, para. 11.

⁴⁹ Palmer 2015, 179.

⁵⁰ Bailey 2009.

claim, but recommended that the remedy should be the display of an account of the object's history, rather than return or the payment of an *ex gratia* sum.⁵¹ The Panel's work does not fall neatly into the existing categories of ADR. It has been described as an example of parties making use of a "neutral third-party facilitator", something that can best be termed an "innominate category".⁵² Nevertheless, similar models have also been used in other European countries, including Austria, France, the Netherlands and Germany, These Panels hear claims relating to Nazi Era dispossessions in a similar manner to the UK Panel. The differences in procedure and substantive considerations were compared by Marck and Muller following the completion of questionnaires by the various panels.⁵³ Notable differences include the fact that the Austrian panel can only recommend restitution rather than what Marck and Muller describe as "'compromising' solutions"⁵⁴ such as compensation and presumably also the account of an object's history.⁵⁵ Interestingly, different conclusions were reached in the UK and the Netherlands in claims that involved the same claimants and losses that took place in the same circumstances.⁵⁶ Even where the Panel has recommended the transfer of a cultural object under section 2 of the Holocaust (Return of Cultural Objects) Act 2009 and the Secretary of State has approved this recommendation under that same section, the governing body of the national museum merely has a power to transfer the object and is not obligated to do so. Of the national museums that were given such a power of transfer, only the Trustees of the British Museum have expressly stated their approach to how they would exercise this power.⁵⁷ The *British Museum Policy on De-Accession* states that even if the Panel recommends return and the Secretary of State approves this, the Trustees will make their own independent decision.⁵⁸ The policy then goes on to state several factors on which they would normally base their decision. First, the Trustees will need to satisfy themselves that the claimants have a strong moral claim, but also that they have the authority to represent all of the heirs of the original owner.⁵⁹ The second factor is particularly interesting because it effectively restricts the scope of the types of claim that would be given effect to through transfer; return would only normally be granted where the object was lost "as the consequence of wrongful action of the National Socialist Government of Germany or its collaborators in Nazi occupied Europe."⁶⁰ Consequently, had the Benevento Missal remained in the British Museum rather than transferred to the British Library in 1972⁶¹ it is unlikely that it would have been returned to Benevento under the power granted by section 2 of the 2009 Act. This declaration by the British Museum Trustees of their own restriction of the way

⁵¹ *Courtauld/Glaser* claim, para. 47.

⁵² Palmer 2015, 183.

⁵³ Marck and Muller 2015.

⁵⁴ Marck and Muller 2015, 52.

⁵⁵ Which is available in the UK (SAP ToR, para. 16(d)), the Netherlands (Regulations for opinion procedure under Article 2, paragraph 2, and Article 4, paragraph 2 of the Decree establishing the Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War. (amended 27 February 2014), para. 11(f)) and Germany (Germany - Guidelines for implementing the Statement by the Federal Government, the Länder and the national associations of local authorities on the tracing and return of Nazi-confiscated art, especially Jewish property, of December 1999 of February 2001 as revised in November 2007.

⁵⁶ *Courtauld/Glaser claim* and Advisory Committee on the Assessment of Restitution Applications for items of cultural value and the Second World War Report 2010, Recommendation regarding Glaser: Case number RC 1.99, 4 October 2010, para. 9. See Woodhead 2014, 126.

⁵⁷ *British Museum Policy on De-Accession of Registered Objects from the Collection*. Approved by the Trustees on 4 March 2010. To-date no such recommendation has been made which would have engaged the power for the Trustees of the British Museum.

⁵⁸ *British Museum Policy on De-Accession*, para. 3.7.

⁵⁹ *British Museum Policy on De-Accession*, para. 3.7.1.

⁶⁰ *British Museum Policy on De-Accession*, para. 3.7.2.

⁶¹ Under the British Library Act 1972, s 3(1).

in which they will exercise the discretion under section 2 of the 2009 Act seems at odds with one of the conclusions of a recent independent review of the Panel which stated that it did not recommend any change to the Panel's Terms of Reference to "require the loss to be more closely linked to the actions of the Nazis or their allies."⁶² Previous compensation received by the claimant is the third factor that the British Museum Trustees consider, such that return would be unlikely to be put into effect if the claimants were deemed to have received just and fair compensation.⁶³ Finally, the Trustees bring into consideration a more controversial factor which is the importance of the object to the Museum. Therefore, when exercising this power the Trustees must be satisfied that:

"the transfer of the object represented the best solution to the claim after giving due weight to the importance of the object to the Museum's collection and circumstances in which the object was acquired by the Museum".⁶⁴

In this way the Trustees will take into account the public benefit derived from the cultural object, something that the Panel has not been prepared to take into account as an operative factor in its decision-making process.⁶⁵ Arguably there are three aspects to this, which can be seen in two claims heard by the Panel. First, the issue of the care and stewardship taken of the object whilst in the national museum's care; secondly, the wide audience that an object within such a national collection can reach and thirdly, the importance of the object to the museum in terms of its place within the collection as a whole. The first two of these are clear from the Panel's response to arguments put forward in the claim regarding the Beneventan Missal by the British Library.⁶⁶ There the British Library suggested that the careful stewardship of the Missal by the British Library staff, together with the easier public access to the Missal in a major collection such as the British Library was relevant to the issue of where the public interest should lie in the Panel making its decision.⁶⁷ However, the Panel was not prepared to treat such an issue as a decisive factor since it took the view that were it to take such an approach then this would "almost certainly defeat any claim for restitution against any of the national collections within our remit, and thus frustrate the Panel's primary role as laid down in our terms of reference."⁶⁸ Arguments relating to the importance of the object to the collection were advanced by the Tate Gallery in a claim involving *Beaching a Boat, Brighton* by Constable.⁶⁹ Here the Tate juxtaposed the lack of emotional significance of the painting to the claimants (based on the supposed anomaly of this English painting within a primarily Continental European collection and the fact that the claimants had sold some other restituted works) and the importance of the painting to the Tate.⁷⁰ Specifically, the Tate referred to the importance of the work to the gallery "as the major national repository of Constable's work" and the fact that the painting was a preparatory sketch for another work in the Tate's collection (*Chain Pier, Brighton*).⁷¹ However, again the Panel was unwilling to accept the importance of the object as a "paramount consideration" when making its

⁶² Jenkins KCB QC, Sir Paul. 2015. *Independent Review of the Spoliation Advisory Panel*, <https://www.gov.uk/government/groups/spoliation-advisory-panel#review-of-the-spoliation-advisory-panel> (accessed 1 April 2016).

⁶³ *British Museum Policy on De-Accession*, para. 3.7.3.

⁶⁴ *British Museum Policy on De-Accession*, para. 3.7.4.

⁶⁵ *British Library/Benevento* claim, para 7 and *Tate/Constable* claim, para. 46

⁶⁶ *British Library/Benevento* claim, para 71 and *Tate/Constable* claim, para. 46.

⁶⁷ *British Library/Benevento* claim, para 70.

⁶⁸ *British Library/Benevento* claim, para 71.

⁶⁹ *Report of the Spoliation Advisory Panel in respect of an oil painting by John Constable, 'Beaching A Boat, Brighton', now in the possession of the Tate Gallery* (2014 HC 1016) para. 35 [hereinafter *Tate Gallery/Constable* claim].

⁷⁰ *Tate Gallery/Constable* claim, paras. 31 and 34

⁷¹ *Tate Gallery/Constable* claim, para. 35.

recommendation, because otherwise “the very principle of restitution of important works would be called into question.”⁷² The Panel therefore assumes that all objects within a national collection are of equal cultural value and does not account for particular art historical value that may be achieved by seeing associated objects together.⁷³ This author has argued elsewhere that the importance of an object to a collection might be relevant as a factor in the context of claims in three narrow circumstances, namely: “(1) where the object is a superlative example of a particular style or period; (2) where it is a unique object; or (3) where the object has a particular connection with other objects within the collection, with thus more context that adds to the value of the object.”⁷⁴

The way in which the Panel has been established as an alternative dispute resolution procedure without any sanction for non-compliance with its recommendations has the potential to dilute its effectiveness as a solution to the problem of Nazi Era dispossessions. Furthermore, there is a certain fragility of giving the governing bodies of national museums merely a power to transfer objects, rather than making it mandatory. The governing bodies of national museums were only given a power to transfer because there is strong support for the independence of the governing bodies, free of political control.⁷⁵ This fragility is particularly evident in the context of the British Museum,⁷⁶ although this appears to be the only national museum to have adopted such a restrictive policy in this regard. Nevertheless, successful claimants do not appear in practice to have encountered problems with the enforceability of the Panel’s recommendations, although on some occasions the exact terms of the Panel’s recommended remedies have not been followed. These situations will be analysed below.

There may be a number of different reasons for the general atmosphere of compliance with the Panel’s recommendations. First, some claims are made in an environment of consensus where the respondent is content to return an object if the Panel is content to recommend that course of action. In this way in certain cases the strength of the claimant’s moral claim is conceded or factual evidence submitted by the claimants is not disputed by the respondents.⁷⁷ On occasions the respondent and claimant come to the Panel with a preferred solution which they are asking the Panel to rubber stamp. This may be to request that an *ex gratia* payment be made by the government.⁷⁸ Even a wholly consensual claim would need to be brought before the Panel where the favoured remedy was that a national museum return the object because the museum governing body’s power is only engaged following a recommendation of the Panel.⁷⁹

Even if a claim is robustly defended by a respondent but return is ultimately recommended, there appears to be a respect for the recommendations of the Panel such that the content of its Reports are followed in practice. This may be in part due to the professional commitment demonstrated by many museums to the principles relating to Nazi Era dispossessions published by the National Museum

⁷² *Tate Gallery/Constable* claim, para. 46. This point was confirmed in *Report of the Spoliation Advisory Panel in respect of a painted wooden table, The Biccherna Panel, now in the possession of the British Library* (2014 HC 209) para. 32 [hereinafter *British Library/Biccherna Panel* claim].

⁷³ Woodhead 2015(b) 205-251.

⁷⁴ *ibid* 250.

⁷⁵ Barbara Follet, the Parliamentary Under-Secretary of State for Culture, Media and Sport Hansard HC vol 492 col 1172 (15 May 2009).

⁷⁶ In its *British Museum Policy on De-Accession* discussed above.

⁷⁷ E.g. *Courtauld/Feldmann* claim.

⁷⁸ *ibid*

⁷⁹ Holocaust (Return of Cultural Objects) Act 2009, s 2.

Directors' Conference⁸⁰ and the now disbanded Museums and Galleries Commission⁸¹ which is evident in the Acquisitions and Disposals policies of many museums.⁸²

There is an argument for saying that were a respondent museum to fail to put into effect the Panel's recommended remedy that it would experience professional embarrassment caused by a failure to uphold the commitments stated in the NMDC or MGC principles. There is strong public support for the resolution of Nazi Era claims which is evident in the media which, when discussing return of Nazi Era cultural objects, uses the terminology of return to the "rightful owners".⁸³ Furthermore, there is a clear cross-party agreement on the importance of giving effect to the perceived moral obligation to address these historical wrongs which was clearly articulated not only in the Select Committee Report of 2000⁸⁴ and its follow-up report of 2003,⁸⁵ but also in the Parliamentary debates on the passing of the Bill that ultimately became the Holocaust (Return of Cultural Objects) Act 2009. In this context, it was described as a "friendly consensus on an important issue."⁸⁶

In practice

The discussion now focuses on the extent to which, in practice, the Panel's recommendations have been followed by the parties. The analysis therefore is a functional one, to assess the effectiveness of the Panel's recommendations in giving effect to a resolution of disputes involving Nazi Era dispossessed objects.

It was noted above how the narratives surrounding the resolution of Nazi Era dispossessions of cultural objects tend to centre around the notion of restitution. The Panel has a range of remedies that it can recommend, but where there is a strong moral claim it takes the starting point that return would normally be recommended. This is clear from the very first claim brought before the Panel which was in respect of the Griffier painting in the possession of the Tate Gallery where it stated that "Having upheld the claim in principle, our first option would be to recommend the return of the picture."⁸⁷ This presumption in favour of return appears to be based on the "powerful, and to our minds morally preponderant, consideration that those who lost possession of their property as a result of Nazi

⁸⁰ NMDC *Statement of Principles and Proposed Actions on Spoliation of Works during the Holocaust and World War II Period* 1998 http://www.nationalmuseums.org.uk/what-we-do/contributing-sector/spoliation/spoliation_statement/ (accessed 1 April 2016).

⁸¹ Reproduced as Appendix 000 in Palmer 2000. Note that much of the work of the MGC is now undertaken by Arts Council England.

⁸² By way of illustration this can be seen in non-national museums such as the Falmouth Art Gallery, *Acquisition and Disposal Policy* http://www.falmouthartgallery.com/assets/documents/policies/Acquisition_and_Disposal_Policy_2011.pdf (accessed 1 April 2016). Bolton Library and Museum Service, *Acquisition & Disposal Policy* <http://www.boltonmuseums.org.uk/museum/museum-and-archive-policies/acquisition-and-disposal-policy> (accessed 1 April 2016) and in national museums such as the *Tate Acquisition and Disposal Policy* available at <http://www.tate.org.uk/download/file/fid/50197> (accessed 1 April 2016) and the *Imperial War Museum Acquisition and Disposal Policy* https://www.iwm.org.uk/sites/default/files/public-document/A%26D_Policy_March_2011.pdf (accessed 1 April 2016).

⁸³ E.g. Percival 2009 and Huggler 2014.

⁸⁴ Seventh Report of the Select Committee on Culture, Media and Sport, 'Cultural Property: Return and Illicit Trade' HC (1999-2000) 371-I.

⁸⁵ First Report from the Culture, Media and Sport Select Committee, 'Cultural Objects: Developments since 2000' (2003-04 HC 59).

⁸⁶ Public Bill Committee, Wednesday 10 June 2009.

⁸⁷ *Tate/Griffier* claim, para. 51.

oppression should be entitled to its return where, as here, any alternative remedy is inappropriate, and so long as there is no legal impediment.”⁸⁸

The Panel appears reluctant to impose conditions on the claimants when recommending return of a cultural object. For example, in the renewed claim in respect of the Benevento Missal⁸⁹ the Panel was unwilling to stipulate as conditions for transfer that the British Library’s stewardship of the Missal should be recognised and that its loss should be acknowledged even though the Panel considered that “such recognition and acknowledgement are due.”⁹⁰ However, more recently where the Panel recommended return in the *Tate Gallery/Constable* claim, this was subject to the claimants returning to the German state the compensation that had been paid earlier to them to reflect the loss of the painting.⁹¹ This was presumably to avoid the problems of the claimant being doubly compensated for his loss.⁹² In a claim made against the Victoria & Albert Museum by the executors of Emma Budge the Panel, when recommending return of three Meissen figures, invited the executors to use their discretion under terms of the will to donate one of the figures to the V&A.⁹³ However, this invitation was not acceded to as the figures were returned to the claimants and all three figures were sold at Bonhams auction house.⁹⁴

Where the Panel has recommended return of objects, these recommendations have been acceded to, except in the case of a few selected cases, where there were specific reasons for not returning the cultural object despite the Panel’s recommendation. The first of these cases was the *Glasgow City Council/attrib. Chardin* claim. Here, the terms of the bequest under which the object, as part of Burrell Collection, had been transferred to Glasgow City Council could not, in the opinion of the legal counsel to the city council, be altered to permit return. Instead, the council made an *ex gratia* payment to the claimants.⁹⁵ In a subsequent decision involving the Burrell Collection the Panel made alternative recommendations, were the council once again to receive legal advice that transfer from the collection was not permissible.⁹⁶

In the recent *British Library/Biccherna Panel* claim the claimants sought return of the object, but the respondents were of the view that the claimants were prepared to accept an *ex gratia* payment in lieu of return. In its report the Panel stated that it had no objection if the claimant agreed to compensation

⁸⁸ *Glasgow City Council/attrib. Chardin* claim, para. 32.

⁸⁹ *Report of the Spoliation Advisory Panel in respect of a renewed claim by the Metropolitan Chapter of Benevento for the return of the Beneventan Missal now in the possession of the British Library* (2010 HC 448) para. 7 [hereinafter *British Museum/Benevento (renewed)* claim].

⁹⁰ *British Museum/Benevento (renewed)* claim, para. 7.

⁹¹ *Tate Gallery/Constable* claim, paras. 54 and 55.

⁹² This was a relevant consideration in the *Courtauld/Glaser* claim, although there not only had the claimants received compensation, but the price received at the forced sale was the reasonable market price: *Courtauld/Glaser* claim, para. 43. Although the point was not specifically mentioned by the Panel, nothing contradicted the assumption that the original owner had been free to use the proceeds of sale (rather than them having been handed over to the Nazis to secure exit visas or in satisfaction of extortionate tax demands).

⁹³ *V&A/Budge* claim, para. 28.

⁹⁴ *Meissen figure of a butcher, mid18th Century*. <http://www.bonhams.com/auctions/21958/lot/210/> (accessed 1 April 2016); *A rare Meissen figure of Harlequin with a monkey, circa 1740*. <http://www.bonhams.com/auctions/21958/lot/195/> (accessed 1 April 2016) and *A Meissen crinoline group of a seated lady with servant, circa 1737-40*. <http://www.bonhams.com/auctions/22782/lot/69/> (accessed 1 April 2016)

⁹⁵ Sixth Report from the Culture, Media and Sport Select Committee, ‘Caring for our Collections’ HC176-I (2006-07), para. 39.

⁹⁶ *Report of the Spoliation Advisory Panel in respect of Tapestry Fragment in the Burrell Collection* (2014 HC 776), para. 33 [hereinafter *Glasgow City Council/Tapestry fragment* claim].

instead of return.⁹⁷ After the report the British Library board agreed to deaccession the panel,⁹⁸ but the parties agreed for compensation to be paid; the online collection states that:

“The British Library did not contest the claim of the heirs but a mutually agreed sum was arranged between the heirs and the Library to ensure the official ownership was passed to the Library in January 2015.”⁹⁹

In some situations return has been effected but then the claimants donate works back to the respondent institution. This can be seen in the claim brought by the Feldmann heirs against the Courtauld.¹⁰⁰ Here the parties had, prior to the submission of the claim to the Panel agreed that the drawings should remain in the Courtauld but wished for the claimants to be paid an *ex gratia* payment. Since the payment of this sum was sought from the government, the parties brought the claim before the Panel. Despite the parties’ preferred solution, the Panel nevertheless recommended return rather than an *ex gratia* payment because the Panel did not consider itself justified in recommending such a payment from the public purse where there would be insufficient public benefit derived from making such a payment because of the relative poor quality of the objects.¹⁰¹ The Courtauld deaccessioned the three drawings pursuant to a Charity Commission order of 3rd May 2007.¹⁰² The heirs then donated one of the three drawings (*A dog lying down*, attributed to Frans Van Mieris the elder) to the Courtauld as a “symbol of friendship”.¹⁰³

In one claim the initial recommendation of the Panel was questioned by the respondent where new evidence came to light. In the *Tate Gallery/Constable* claim the Board of Trustees of the Tate confirmed at its meeting of 21 May 2014 that it intended to exercise its power to deaccession the painting under section 2 of the Holocaust (Return of Cultural Objects) Act 2009.¹⁰⁴ However, new evidence came to light which led to the Tate referring the matter to the Secretary of State who in turn asked the Panel to reconsider the claim in light of the new evidence.¹⁰⁵ Following a supplementary report by the Panel which recommended return,¹⁰⁶ the Tate’s Board of Trustees unanimously agreed to follow the recommendation.¹⁰⁷

The Panel has recommended the payment by the government of an *ex gratia* payment in only two claims. In both instances the moral circumstances of the claim would have been sufficiently strong to justify return but at the time the national museums in question were prevented from transferring

⁹⁷ *British Library/Biccherna Panel*, para. 34.

⁹⁸ The British Library Board, *Matters Arising from the Minutes of the previous meeting held on 20 May 2014*, BLB 14/42, para. 2.2. <http://www.bl.uk/aboutus/foi/pubsch/pubscheme4/BLB1442.pdf> (accessed 1 April 2016).

⁹⁹ *British Library Catalogue entry for Painted Panel, Davis 768*. Available at: <http://www.bl.uk/catalogues/bookbindings/Results.aspx?SearchType=AlphabeticSearch&ListType=CoverMaterial&Value=126> (accessed 1 April 2016).

¹⁰⁰ *Courtauld/Feldmann claim*

¹⁰¹ *ibid*, para. 28

¹⁰² *Architectural capriccio – design for a stage?* <http://www.artandarchitecture.org.uk/images/gallery/3166e2a5.html> (accessed 1 April 2016).

¹⁰³ *ibid*

¹⁰⁴ *Minutes of the Meeting of the Board of Trustees of the Tate Gallery held on Wednesday 21 May 2014*, para. 16. <http://www.tate.org.uk/download/file/40393> (accessed 1 April 2016).

¹⁰⁵ *Minutes of the Meeting of the Board of Trustees of the Tate Gallery held on Wednesday 18 March 2015*, para. 11.1. <http://www.tate.org.uk/download/file/50121> (accessed 1 April 2016).

¹⁰⁶ *Supplementary Report of the Spoliation Advisory Panel in respect of an oil painting by John Constable ‘Beaching a Boat, Brighton’ now in the possession of the Tate Gallery* (2015 HC 439)

¹⁰⁷ *Minutes of the Meeting of the Board of Trustees of the Tate Gallery held on Wednesday 23 September 2015*, para. 17 <http://www.tate.org.uk/file/minutes-meeting-board-trustees-september-2015> (accessed 1 April 2016).

objects out of their collections even on moral grounds.¹⁰⁸ In both cases it appears that the payments were made, as this information has been recorded on the online catalogue entries for both objects.¹⁰⁹ The Feldmann heirs, whose claim against the British Museum was resolved by the payment of an *ex gratia* payment, have since resolved two further disputes with the British Museum on an informal basis, rather than making a claim to the Panel. The claimants were content for the objects to remain in the museum and the museum then made *ex gratia* payments to the heirs.¹¹⁰

In two cases where the Panel recommended that the British Museum display an account of an object's history, this information is also available to view as part of the 'Acquisitions notes' on its online collection.¹¹¹ The Tate Gallery also includes the information relating to the object's history with the Jan Griffier, *View of Hampton Court Palace* on its online collection.¹¹² Even though it was reported that the Glaser heirs were not prepared to accept the Panel's recommendation,¹¹³ the Courtauld does display an account of the disputed objects' history on the online catalogue entries.¹¹⁴ In two recent claims the Panel has concluded that sales were not forced sales carried out in the context of Nazi persecution, but has nevertheless suggested that it would be appropriate to include an account of the object's history when display the objects. In the case of a claim by the Oppenheimer heirs against Bristol City Council the Panel suggested that "without any obligation on the Council" that it would be "fitting to incorporate into the Painting's narrative history when display the [claimants'] connection with the Painting".¹¹⁵ In the case of a claim by the Silberberg heirs against the Ashmolean museum the Panel recommended "the display alongside the Work, wherever it is, and in whatever medium, of an account of the history of the Work in the collection of its former owner during the Nazi era, and his tragic fate and that of his wife."¹¹⁶

Concretising the recommendations.

Whilst the immediate implementation of the Panel's recommendations might be important for the respondent museum to fulfil its obligations and to avoid the wrath of public opinion, arguably there are situations where, over time, the Panel's recommendations may fail to be implemented in their entirety. For example, where the recommendation is that the museum displays an account of the

¹⁰⁸ *AG v Trustees of the British Museum*.

¹⁰⁹ *Jan Griffier, View of Hampton Court Palace: Summary*. <http://www.tate.org.uk/art/artworks/griffier-view-of-hampton-court-palace-t00408/text-summary> (accessed 1 April 2016) and British Museum Collection Online: drawing; museum number 1946,116.1 (accessed 1 April 2016). http://www.britishmuseum.org/research/collection_online/collection_object_details.aspx?objectId=716622&partId=1&searchText=feldmann&page=1 (accessed 1 April 2016).

¹¹⁰ British Museum Press Releases: Spoliation case settled, October 2013. https://www.britishmuseum.org/about_us/news_and_press/press_releases/2013/spoliation_case_settled.aspx (accessed 1 April 2016).

¹¹¹ *British Museum, Collection online: plate object 1939,0302.1* http://www.britishmuseum.org/research/collection_online/collection_object_details.aspx?objectId=72816&partId=1&searchText=rothberger&page=1 (accessed 1 April 2016) and *British Museum, Collection online: table clock object 1958,1006.2150*. (accessed 1 April 2016) http://www.britishmuseum.org/research/collection_online/collection_object_details.aspx?objectId=55421&partId=1&searchText=koch&page=1 (accessed 1 April 2016).

¹¹² Tate Gallery, *View of Hampton Court Palace*.

¹¹³ Bailey 2009

¹¹⁴ *Courtauld Institute of Art Gallery Collections: Kitchen still-life*. Available at <http://www.artandarchitecture.org.uk/images/gallery/6b7821aa.html> (accessed 1 April 2016).

¹¹⁵ Report of the Spoliation Advisory Panel in respect of an oil painting by Pierre-Auguste Renoir, 'The Coast at Cagnes', now in the possession of Bristol City Council (2015 HC 440), para. 87.

¹¹⁶ Report of the Spoliation Advisory Panel in Respect of a Gothic Relief in Ivory, now in the possession of the Ashmolean Museum, Oxford (2016 HC 777), para. 35.

object's history next to it when the object is publically displayed, there may come a point in the future where the object is hung in a new location, but the curator fails to display the account of the object's history. In such circumstances it would arguably be difficult to enforce this element of the recommendation in the absence of any legal sanction (although in many situations it would probably be resolved by friendly consensus). Elsewhere it has been argued that a means of addressing this is to recognise some form of moral title which would give the claimant a continuing entitlement to object to the treatment of the object which has been retained by the museum.¹¹⁷ However, this notion of moral title would not have any legal force by itself.¹¹⁸

A mechanism for encouraging museums to put in place the recommendations of the Panel might be to make it a requirement of professional codes of ethics, such as the Museums Association Code of Ethics (MACoE) or as part of the Accreditation Scheme run by the Arts Council. Whilst there is no legal sanction for non-compliance with the code or contravention of the Accreditation Scheme, there are potential implications which can encourage compliance. The first relates to membership, the second to funding and the third to professional pressure. Each of these will be considered in turn.

Where the MA Disciplinary Committee finds a member guilty of misconduct¹¹⁹ (or there is an admission of guilt) such as a breach of the code and it considers the member to be unfit or unsuitable to continue as a member it can expel them¹²⁰ or suspend their membership for up to one year.¹²¹ Where there is no termination or suspension of membership the MA Disciplinary Committee can either 'reprimand' or 'severely reprimand' a member who is guilty of misconduct;¹²² this can provide a significant deterrent for others who might otherwise have engaged in similar conduct in the future.

The MA has rarely used the sanction of expulsion, since its establishment in 1889 and has only done so in the case Derbyshire County Council.¹²³ More recently Northampton Museums Service was barred from MA membership for 5 years following the sale of an Egyptian statue of Sekhemka for financially motivated reasons that were in breach of the MACoE.¹²⁴ Two further local authority museums withdrew their membership before having it removed,¹²⁵ when the MA's Disciplinary Committee found that Bury Council's decision to sell a painting by Lowry to reduce its financial deficit contravened the code.¹²⁶ As Bury Council had already resigned, the Disciplinary Committee severely reprimanded it, stating that any future application made by Bury to rejoin the association would be referred to the

¹¹⁷ Woodhead 2015(a), 241.

¹¹⁸ Woodhead 2015(a), 230.

¹¹⁹ Under the MA, *The disciplinary regulations of the Museums Association* a failure to comply with the code of ethics can constitute misconduct: <http://www.museumsassociation.org/about/12194>, paras 7.1-7.2.

¹²⁰ Which can justify termination of membership under para. 14.1.1.1. Termination is also mandated by the Articles of Association of the Museums Association, art 8.2 where in accordance with disciplinary regulations drafted by the Association (see *ibid*).

¹²¹ MA Disciplinary Regulations, para. 14.1.1.2.

¹²² MA Disciplinary Regulations, para. 14.1.2.1.

¹²³ Derbyshire County Council (Buxton museum): see Nick Merriman, *Museum Collections and Sustainability*. Available at <http://www.museumsassociation.org/download?id=16720>, 8-9 and Heal 2006.

¹²⁴ *Statement on barring Northampton Museums Service from Museums Association membership*. Available at <http://www.museumsassociation.org/news/01102014-ma-bars-northampton>

¹²⁵ BBC, 'Lowry sale council loses status' BBC News 15 December 2006. Available at <http://news.bbc.co.uk/1/hi/england/manchester/6183547.stm>

¹²⁶ Principally principle 6.13 of the code in force at the time. See Museums Association, 'Statement from the Museums Association Council' (regarding Bury Council). Available at <http://www.museumsassociation.org/publications/13286>

MA Council to ensure compliance with the code of ethics.¹²⁷ In September 2013 the MA Ethics Committee recommended that Croydon Council should face disciplinary action over the proposed sale of items from the Riesco collection of Chinese objects.¹²⁸ Croydon Council resigned from the Museums Association before any disciplinary hearing took place.¹²⁹

The potential negative effects of sanctions can encourage compliance; in addition to the loss of MA membership in the context of breaches of the code museums may also lose accredited status from the Arts Council.¹³⁰ This happened in the case of Northampton Museums Service who, following the sale of the Egyptian statue of Sekhemka, were excluded from the scheme and prevented from participation in it for a further 5 years.¹³¹ This can also mean loss of access to funding since compliance with the MACoE and/or accreditation will often be a prerequisite of funding.¹³² Given the importance of external sources of funding for museums this potential effect of failure to uphold the principles of the code can provide an important incentive for compliance with the code's provisions.

What has become apparent, particularly in recent times, is the strong museum-sector support for discouraging museums from making financially motivated sales of their accessioned collection. This is particularly evident from the recent statement agreed by among others, the Arts Council and the Museums Association which has reconfirmed the position set out in the MA Code of Ethics and the requirements of the Accreditation Scheme.¹³³ Sales motivated by financial reasons which do not follow the relevant procedures in guidelines provided by the Museums Association are considered to unethical and a breach of the public trust.¹³⁴ Consequently, where museums have been found to engage in such behaviour it has led to the disciplinary procedures mentioned above. In the context of Nazi Era dispossessions similar strongly-worded support can be seen not only from the museum sector,¹³⁵ but also from states through their commitment to international statements of principle such as the Washington Conference Principles and the subsequent declarations.¹³⁶ It is therefore arguable that such support might justify the MA and the MLA adopting an approach which approached a failure to follow the recommendation of the Panel as a breach of trust, justifying disciplinary procedures and implications for funding in the future.

¹²⁷ Museums Association, 'Statement from the Museums Association Council'

¹²⁸ Geraldine Kendall, *Croydon Council to face disciplinary action over Riesco sale*. Available at <http://www.museumsassociation.org/news/18092013-croydon-disciplinary-action>

¹²⁹ Patrick Steel, *Croydon Council resigns from MA*. Available at <http://www.museumsassociation.org/news/01102013-croydon-council-resigns-from-museums-association>

¹³⁰ BBC, 'Lowry sale council loses status'. See Museums Association, 'Statement from the Museums Association Council'.

¹³¹ Geraldine Kendall, *ACE Strips Northampton Museums Service of Accreditation*. <http://www.museumsassociation.org/museums-journal/news/01082014-ace-strips-northampton-accreditation> (accessed 1 April 2016).

¹³² The MA's Disciplinary Committee called on heritage funding bodies 'to consider carefully any decision to award funding to Bury Council' following its breach of principle 6.13: Museums Association, 'Statement from the Museums Association Council'.

¹³³ 'Joint Statement – Unethical Sale from Museum Collections' <http://www.museumsassociation.org/download?id=1141616> (accessed 1 April 2016)

¹³⁴ Ibid. This is reflected in the recently revised MA Code of Ethics in principle 2.9.

¹³⁵ e.g. the NMDC and MGC statements of principles discussed above.

¹³⁶ *Vilnius Forum Declaration* (October 2000) <http://www.lootedartcommission.com/vilnius-forum> (accessed 1 April 2016) and *Terezin Declaration on Holocaust Era Assets and Related Issues* (June 2009) <http://www.holocausteraassets.eu/program/conference-proceedings/declarations/> (accessed 1 April 2016)

Conclusion

Whilst in structural terms there appears to be a potential for respondents not to follow the recommendations of the Spoliation Advisory Panel because of the absence of any legal sanction for non-compliance, there nevertheless appears to be a respect for the Panel's recommendations in practical terms. The only situations in which the Panel's recommendations have not been followed have been where there has been a legal impediment to returning the object, or where the parties have reached a consensus on a financial remedy instead of return. The only claim where transfer to the claimants was delayed is where new evidence came to light which meant that the Panel revisited its earlier recommendation (although ultimately leaving it unchanged). The Panel, as an alternative to litigation rather than a process of litigation, has several notable advantages to litigation in that evidential barriers can be surmounted and that it can respond to moral claims that might otherwise not attract a remedy in a variety of different remedial ways. If the Panel were to be given legal effect then this could alter the way in which it handles such claims. One way to give further impetus to museums to follow the Panel's recommendations would be to make compliance with the Panel's recommendations an ethical requirement of the museum professions' codes of ethics and as a requirement of the Accreditation Scheme. In this way, non-compliance could be met with disciplinary action under the MA's disciplinary procedure and the loss of Accredited Status from the Arts Council would result in loss of funding opportunities.

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