

Restitution Policies on Nazi-Looted Art in the Netherlands and the United Kingdom: A Change from a Legal to a Moral Paradigm?

Tabitha I. Oost*

Abstract: This article considers the constant tension facing several national panels in their consideration of Nazi spoliation claims concerning cultural objects. It will argue that this tension results from a shift in paradigms in dealing with Nazi-related injustices—from a strictly legal paradigm to a new victim groups-oriented paradigm, where addressing and recognizing the suffering caused by the nature of past crimes is central. While these national panels originate from this new paradigm and embody the new venues found for dealing with Nazi-looted art claims, this paradigm change at the same time presents these panels with a predicament. It seems impossible to abandon the legalist paradigm completely when remedying historical injustices in the specific category of cultural objects. Through a comparison between the Dutch and United Kingdom (UK) systems, this article will illustrate from both an institutional and substantive perspective that these panels seem to oscillate between policy-based, morality-driven proceedings (new paradigm) and a legal emphasis on individual ownership issues and restitution in kind (old paradigm). This article addresses this tension in order to provide insights on how we could conceptually approach and understand current restitution cases concerning Nazi-looted art in the Netherlands and the UK.

Keywords: looted art, restitution, WW II, reparations, restitution committees, ADR

*Department of Constitutional and Administrative Law, University of Amsterdam, The Netherlands;
Email: t.i.oost@uva.nl.

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INTRODUCTION

Recently in the Netherlands, the issue of Nazi-looted art again raised attention.¹ From 12 May until 27 August 2017, a special exhibition entitled *Looted Art before, during and after World War II* was on display at the Bergkerk, which is situated in Deventer, the Netherlands. The exhibition was an attempt to tell “the story of Jewish art dealers and private individuals whose artworks fell into German hands during the Second World War.”² The works on display are on loan from the Dutch national art collection, Dutch museums, and also from families that have successfully reclaimed artwork. Although the Dutch efforts in restituting Nazi-looted art since the turn of this century have been internationally recognized and praised, some critical remarks were made in the wake of this exhibition. The *New York Times* covered the exhibition on 12 May 2017 in an article entitled “Are the Dutch Lagging in Efforts to Return Art Looted by the Nazis?”³ Although the Dutch attitude towards restitution is described as “enlightened,”⁴ the article conveys the existence of international concerns about recent developments in Dutch restitution policy since it has become stricter than it was before.⁵ The criticism focuses on the fact that this policy allows weight to be given to the interests of a museum—that is, the significance of a work to public art collections—against the emotional attachment of a claimant. This balance of interests is questioned on the grounds that it discards past injustices and could mean that a “good claim” does not lead to restitution “nor any other remedy.”⁶

It is this criticism that relates to the core argument of this article. I will argue that there has been a paradigm shift in dealing with Nazi-related injustices. Generally, the legalist paradigm has been exchanged for a victim group-oriented paradigm infused by moral considerations.⁷ As a consequence, individual court-based adjudication has gradually been replaced by a morally induced approach where mere membership in a category of victims may lead to lump sum compensation.

¹It must be noted that the discussion in this article is intended to extend beyond looting *stricto sensu* and concerns all wrongfully taken cultural objects during the years of the Nazi reign in Europe. Due to the absence of clear definitions in this particular field, the author has chosen to maintain the most common reference for the greater public.

²Text derived from exposition banner. For more information on the exhibition and its background, see T Borch, <http://roofkunst.com/en/home/> (accessed 26 March 2018).

³Nina Siegal, “Are the Dutch Lagging in Efforts to Return Art Looted by the Nazis?” *New York Times*, 12 May 2017.

⁴Siegal, “Are the Dutch Lagging.”

⁵Siegal, “Are the Dutch Lagging.”

⁶Siegal, “Are the Dutch Lagging,” quoting Anne Webber. See also “New Rules for Returning Nazi Looted Art Are Not Always Fair,” *DutchNews.nl*, 5 March 2015, <http://www.dutchnews.nl/features/2015/03/new-rules-for-returning-art-stolen-by-nazis-are-not-always-fair/> (accessed 26 March 2018), based upon an earlier critical opinion by Dutch lawyer Gert-Jan van den Berg published in a Dutch newspaper entitled “Geef alle roofkunst terug aan de nazaten,” *Volkskrant*, 25 February 2015.

⁷Neumann and Thompson 2015, 10.

This has been the case with regard to, for example, the financial loss suffered by Jewish victims or their heirs as a consequence of the Holocaust or their treatment in the postwar period.⁸ The same development can be seen in regard to the special category of Nazi-looted art. Dealing with Nazi-looted art cases on the basis of a strictly legal paradigm (with its statutes of limitation, burdens of proof, and so on) is also increasingly considered to be morally unacceptable.⁹ New venues have been found to handle the upsurge of Nazi-looted art claims since the 1990s.¹⁰ However, for reasons that will be explained later in this article, it seems impossible to abandon the legalist paradigm completely when remedying historical injustices in the specific category of Nazi-looted cultural objects. This results in a state of constant tension with respect to how the new venue proceeds in the Netherlands. This article, by making a comparison with the situation in the United Kingdom (UK) will furthermore show that this is a problem that goes beyond borders. In this new victim group-oriented paradigm, recognizing and addressing the suffering caused by the traumatic nature of past crimes is the principal aim.¹¹

To begin, the two paradigms as introduced above will be touched upon in relation to the specific category of looted art. Second, the main characteristics of the newly founded restitution venues—that is, advisory panels or bodies—of the Netherlands and the UK will be discussed briefly. The main focus of this article is to illustrate this predicament through examples derived from these restitution venues from both a substantive as well as an institutional perspective. Whereas issues relating to a substantive perspective have received some scholarly attention in recent years,¹² an institutional perspective has remained underexposed up until now. In the context of this article, the institutional perspective relates to the manner in which the advisory panels or bodies are established and operated.

⁸On the Dutch compensatory settlements in 2000, see Ruppert 2015, 50–71; for the French “lump-sum” approach in the restoration of rights, see Andrieu 2007, 138–42; 2011, 19. For a more general perspective, comparing several compensatory schemes in European countries, see Unfried 2014. In addition, with a specific focus on the Dutch situation, see Ruppert 2017, ch. 6.

⁹Testament by international declarations such as the Washington Principles on Nazi-Confiscated Art, December 1998, <https://www.state.gov/p/eur/rt/hlcst/270431.htm>, as confirmed later in similar declarations; Vilnius Forum Declaration, October 2000, <http://www.lootedartcommission.com/vilnius-forum>; Terezin Declaration on Holocaust Era Assets and Related Issues, June 2009, <http://www.holocausteraassets.eu/program/conference-proceedings/declarations/>. The Parliamentary Assembly of the Council of Europe adopted a resolution with similar content, Resolution 1205 on Looted Jewish Property, November 1999, <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=16726&lang=en> (last accessed 26 March 2018). See generally Oost 2012, 1–2. From a practical point of view, this moral conviction is of course flanked by legal considerations, as recourse to litigation on the European continent would be fruitless, because of procedural defenses, such as statutes of limitation.

¹⁰Bazyler 2003; Eizenstat 2003, 187–204; Bazyler and Alford 2006, 1–13.

¹¹Neumann and Thompson 2015, 10.

¹²E.g., Campfens 2015a; Woodhead 2014, 2016; Palmer 2000.

Both in the Netherlands as well as in the UK, this institutional perspective has recently become a subject of public discussion; therefore, it is time to also address it with respect to the predicament highlighted in this article.¹³ It seems that this predicament could infringe on the public perception of the activities of these panels or bodies, which, in turn, could detrimentally affect their legitimate aim, which is to provide just and fair solutions.

IN BETWEEN TWO PARADIGMS: THE LEGALIST AND THE VICTIM GROUP-ORIENTED PARADIGM

The primary remedy concerning Nazi-looted art still seems to be restitution in kind.¹⁴ This remedy of physical and actual restitution, especially when a substantial amount of time has passed, has been ascribed with a broader potential: one of recognition of past injustice while also serving as a means of historical narrative through a tangible way of dealing with past atrocities.¹⁵ This basically means that the legal result in terms of property, which results in restoring the situation *ex ante*, is also topped with this extra layer.¹⁶ Such restitution seems in line with the new victim group-oriented paradigm in remedying other Nazi-related injustices where recognizing and addressing the suffering caused by the traumatic nature of past crimes is the principal aim.¹⁷ It is a departure from the strict legalist paradigm that adheres to a corrective justice mechanism and leads only to mere correction and the re-establishment of the *ex ante* situation.¹⁸

A New Paradigm in Dealing with Nazi-Related Injustices, in General, and Looted Art, in Particular

Thérèse O'Donnell has specified this argument in the field of Nazi-looted art and argued that the road to restitution of cultural objects, especially due to the passage

¹³Recently *Zvandaag*, a Dutch current affairs program presented a critical item on the Dutch Restitution Committee (RC) based upon a documentary on the Dutch RC. This will be extensively discussed later in this article.

¹⁴O'Donnell 2010, 55; Woodhead 2014, 128; 2016, 386; Campfens 2015b, 37. In this article, I understand by the term "restitution in kind," restitution of the looted artwork itself, in contradistinction to other forms of restitution, such as restitution of a comparable artwork or replica or financial compensation.

¹⁵On the wider potential of restitution in redressing (historical) wrongs, see generally Barkan 2000.

¹⁶On the symbolic value of restitution as remedy, in terms of "remembrance" and education of the public of a past in the context of grave injustices, see Warren 1999, 1, 19; in relation to Nazi-looted art and appropriate fora, see Roodt 2013, 421.

¹⁷Neumann and Thompson 2015, 10.

¹⁸For the specific context of Nazi-related injustices and the characterization of immediate post-World War II efforts in this regard in France, see Andrieu 2007, 138–42 and, as of the late 1990s, Andrieu 2011, 19.

of time, seems to embody a symbolic value for claimants.¹⁹ This argument relates of course to that of scholars arguing that the notion of “restitution of property” in the context of the Holocaust has obtained a completely different connotation. The Holocaust has been qualified in the Nuremberg trials as genocide, war crimes, and crimes against humanity. In this context, restitution is “dramatically” different in precedent and principle.²⁰ It is about the “inherent dignity and worth of every human,” and although restitution cannot restore lives, it “can seek to restore dignity.”²¹ Similar observations have been made with an emphasis on the special and added value of cultural objects as opposed to other assets.²² Contrary to financial compensation for insurance policies or dormant accounts, for example, restitution of cultural objects could add to the remembrance of the victim since these often embody a certain emotional or intangible value and represent some kind of reparation.

In this regard, Beat Schöneberger points towards the importance of the uniqueness of these assets and the invocation of what he describes as “emotive interests” for individuals and groups of people.²³ He goes as far as to claim that this emotive element separates Nazi-looted art cases from the issue of dormant accounts, which lack this symbolic significance.²⁴ Of further interest in this context is Berthold Unfried’s recent description of the Dutch restitution policy, especially in light of his analysis on the compensatory schemes in several European countries from the 1990s concerning Nazi-related injustices. Unfried introduced the term “rough justice” in his analysis of the French, Austrian, and Swiss commissions on financial compensation and the Dutch compensatory settlements at the turn of this century. He describes the development of “*Entschädigungsforderungen, die nicht belegt, sondern nur ‘glaubhaft gemacht’ werden müssen.*”²⁵ This development broadened the circle of eligible claimants compared to postwar restitution schemes. Furthermore, it resulted in standard amounts of financial compensation “*unabhängig von der konkreten persönlichen Geschichte und von Konkreten Beweisen.*”²⁶ With the term “rough justice,” Unfried refers to compensatory policies that abstract from concrete individual particularities and are based on a collective approach that addresses groups of victims. According to him, this “rough justice” approach has also affected restitution efforts in the specific category of Nazi-looted art. In taking

¹⁹On the reconciliatory potential of restitution in Nazi-Looted art cases, see O’Donnell 2011, 55.

²⁰Cotler 1998.

²¹Cotler 1998, 623.

²²Chechi (2014a, 2) recently referred to this added value—i.e., special feelings of symbolical, religious, historical, and emotional as qualities of the objects in question—as their “human dimension.”

²³Schöneberger 2009, 51.

²⁴In the context of discussing the different interests that generally feature claims on cultural assets, Schöneberger (2009, 51–52) perceives this as a possible common denominator of Nazi Looted art as well as the return of human remains.

²⁵Unfried 2014, 462.

²⁶Unfried 2014, 462.

the Netherlands as an example, he considers the policy to be “*bahnbrechend im Sinne der Eröffnung einer neuen Restitutionsrunde nach neuer Logik.*”²⁷

Tension between the Legalist and Moralist Paradigm in the Field of Nazi-Looted Art

Unfried’s qualifications are perhaps a bit too blunt, but they do indicate that the paradigm in addressing Nazi-related injustices concerning cultural objects has changed.²⁸ Whereas, in a strict legal sense, restitution simply means restoring the *ex ante* situation, it has also gained a different connotation that seems to result from the emphasis on a victim group-oriented paradigm. As Klaus Neumann and Janna Thompson have rightfully noted, in the context of grave injustices where a substantial amount of time has passed, the legalist paradigm is “challenged.”²⁹ This may best be illustrated by the various non-binding declarations regarding the issue of Nazi-looted art that rose to the surface in the late 1990s and onwards, the most important one being the Washington Conference Principles on Nazi-Confiscated Art, which were adopted in 1998.³⁰ These declarations clearly showed that the traditional legalist paradigm where the limitation process serves as a system was falling short in this context. The legalist paradigm, characterized by individual legal court-based assessments with the parameters set by statutes of limitations and rules concerning prescription inspired by principles of legal certainty and foreseeability, effectively barred a “just and fair solution.”³¹

However, given that the primary remedy of restitution in the specific category of looted cultural assets, as opposed to other categories of looted assets, has not changed, tensions rise to the surface immediately when this issue is addressed. On the one hand, in regard to cultural objects with an often significant monetary, emotional, and historical value,³² it seems impossible to completely discard the legalist paradigm, especially in countries such as the Netherlands and Austria where this paradigm has been followed in early attempts to address these dispossessions following

²⁷Unfried, 503–04. For now, I will refrain from addressing his assumption that the Dutch government ultimately confirmed these general considerations. A strong indication against his assumption is the refusal of the Dutch government to adopt the RC’s positive advice in the Goudstikker case. Instead, the government restituted on moral grounds and in consideration of the course of events in the Goudstikker negotiations right after the war. See http://www.restitutiecommissie.nl/en/summary_rc_115.html (accessed 26 March 2018).

²⁸Palmer (2007, 8) referring to the “march away from law and litigation.” Several authors have furthermore pointed towards the costly and time-consuming nature of litigation. Murphy 2010, 19; Roodt 2013, 423–24.

²⁹Neumann and Thompson 2015, 10–11.

³⁰See note 9 for these declarations.

³¹See Washington Principles, Principles VIII, IX.

³²Cechi 2014a, 2.

World War II.³³ On the other hand, when the aim is to do justice to past suffering and look for solutions that are morally just and fair, as proclaimed by international documents such as the Washington Principles,³⁴ the need is felt for a generous approach, which necessitates disregarding legal obstacles so far as possible since these legal rules do not seem appropriate.³⁵ This tension between the legalist approach and the moral approach has caused, at least in some cases, an ambiguous public perception of the way in which these claims are dealt with. Moreover, this is especially complicated when claimants, inspired by the new paradigm, feel that justice has not been done.³⁶

NEW VENUES FOR CONSIDERING NAZI-LOOTED ART CLAIMS IN THE NETHERLANDS AND THE UK: THE RESTITUTION COMMITTEE AND THE SPOILIATION ADVISORY PANEL

In the introduction to this article, reference was made to the existence of several European committees that deal with Nazi-looted art, which are also frequently referred to as government advisory panels³⁷ or (national) panels.³⁸ In the Netherlands as well as in the UK,³⁹ such bodies were established in what O'Donnell refers to as the "perfect storm."⁴⁰ The issue of Nazi-looted art gained momentum after the fall of the Iron Curtain, with the opening of archives resulting from the renewed attention for World War II atrocities at various events and commemorative ceremonies.⁴¹ Awareness was raised and became fueled by a substantial rise in restitution claims concerning Nazi-looted art⁴² and publications by historians⁴³ on what is known as "heirless art collections,"⁴⁴ namely publicly owned art collections

³³In the late 1990s and early 2000s, the Dutch government, with an appeal to the post-World War II system of the restoration of rights, was at first reluctant to take a more lenient approach concerning legal notions such as "settled" cases. With the establishment of the Dutch RC in 2001, this strict legal approach, induced by the legalist paradigm, was ultimately abandoned. Based upon the analysis on the course of events leading toward a new restitution venue in the Netherlands, see T.I. Oost, "Institutional Challenges in a Moral Paradigm," 2018, (unpublished).

³⁴See Washington Principles, Principles VIII, IX.

³⁵Veraart (2015, 211–21) indicated that the ability of the law to provide the perfect solution should not be over-estimated. The role of the law is modest and can be of use primarily in providing procedural rather than substantive justice.

³⁶Paragraph based on the analysis in T.I. Oost, "A Challenging Endeavor: Addressing a 'Tainted' Heritage in a New Paradigm," 2016 (unpublished).

³⁷Campfens 2014, 81.

³⁸Referring to panels, see Woodhead 2016, 392; Marck and Muller 2015, 41–89.

³⁹Other panels have been established in Austria, France, and Germany. For an overview, see Oost 2012; Marck and Muller 2015.

⁴⁰Bazyler and Alford 2006, 3; O'Donnell 2011, 50–51.

⁴¹O'Donnell 2011, 49, n. 10, referring to Bodemann (1996) on Germany's "epidemic of commemorating."

⁴²Frequently referred to as the "Holocaust art movement" or the "Holocaust art restitution movement." Kreder 2008, 1; O'Donnell 2011, 51.

⁴³Nicolas 1994; Petropoulos 1996; Feliciano 1995.

⁴⁴Campfens (2014, 81) referring to "heirless" art collection.

with a Nazi-looting background.⁴⁵ It also became clear that due to the simple passage of time, the legalist paradigm, by way of its statutes of limitations and rules concerning prescribed periods, would be an obstacle to the successful pursuit of such claims.⁴⁶ Both in the Netherlands⁴⁷ and in the UK,⁴⁸ the decision was taken to address the matter and provide for an alternative venue.

The Dutch Restitution Committee

General Features

In November 2001, the Dutch government decided to establish the Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War (RC).⁴⁹ Before discussing the mandate of the RC, I will first give a short description of the national context as it is necessary to properly understand the rationale of the RC's establishment. The Dutch situation is marked by an heirless art collection that resulted from the first "round" of restitution conducted in the Netherlands in the immediate years following World War II.⁵⁰ The Netherlands, contrary to the UK, was occupied by Nazi Germany during the war, and after the war it was responsible for undoing the consequences of the occupation that had had a detrimental impact on the Dutch economy and its citizens.⁵¹

⁴⁵Oost 2012, 61–81; Campfens 2014, 81.

⁴⁶The legal proceedings in the renowned Dutch Goudstikker case in 1999, prior to the establishment of the Dutch Restitutions Committee, may serve as an illustration in this regard. After failed negotiations with the Dutch government, recourse was sought in court by the Goudstikker heirs. Among other things they filed a direct request under the post-WWII legislation on the restoration of rights. The Court dismissed this appeal under referral to the cut-off date of 1 July 1951. *The Netherlands v. Goudstikker*, ECLI:NL:GHSGR:1999:AV1399 (Court of Appeal of The Hague, 16 December 1999); Van Velten 2006, 259–61.

⁴⁷Provenance research by the government-installed research commission *Herkomst Gezocht* or *Ekkart Commission* (after its chairman) was important as it pointed toward a substantial number of works in public hands that had, or possibly could well have had, a "tainted" past. *Herkomst Gezocht/Origins Unknown* 2006.

⁴⁸Noting the increasing demands for the return of Holocaust-related cultural property and based on recommendations on how to proceed in the field of Nazi-looted art (as well as human remains). Select Committee on Culture Media and Sport, *Seventh Report Cultural Property: Return and Illicit Trade*, HC 371-I, 1999–2000, para. 179. Apart from such official reports from the government's side, important initiatives were also taken by art officials. See the United Kingdom's National Museum Directors' Conference in terms of provenance research as well as the Statement of Principles and Proposed Actions for its members. See extensively Oost 2012, 197–206; Marck and Muller 2015, 63–65.

⁴⁹Besluit Adviescommissie Restitutieverzoeken cultuurogoderen en Tweede Wereldoorlog, Ministerial Order WJZ/2001/45374(8123), *Dutch Government Gazette (Staatscourant)*, no. 248, 21 December 2001 (Establishing Decree 2001) (for an unauthorized English version, see http://www.restitutiecommissie.nl/en/files/consolidated_text_decree_establishing_the_committee_2012.html (accessed 26 March 2018)).

⁵⁰Veraart (2016, 967–68), using "rounds" to designate post war and present-day efforts in restoring legal rights in the Netherlands and France.

⁵¹On the Dutch situation, see generally Veraart 2005, 546–47; 2016, 9.

With regard to the specific category of cultural objects, the Netherlands was not spared from the vast and systematic plunder and looting of artworks by Nazi Germany.⁵² Large numbers of valuable cultural objects were shipped to Germany. This resulted not only from the systematic dispossession of the Jewish population in the Netherlands—thus, plain looting—but also from sales (whether voluntary or involuntary)⁵³ on an initially flourishing Dutch art market.⁵⁴ Although, initially, there were plans to embark on an international restitution process,⁵⁵ restitution (that is, the legal restoration of ownership rights) became an internal affair for the countries of origin.⁵⁶ Of course, although the 1943 Inter-Allied Declaration that promulgated a reversal of the looting, with specific reference to the “stealing and forced purchase of works of art,”⁵⁷ served as the guiding principle,⁵⁸ the exact design of the restitution process was at the discretion of the individual countries where the looting took place.⁵⁹ In the Netherlands, as well as in other European countries such as France and Austria, national restitution legislation was indeed enacted, aimed at the restoration of rights.⁶⁰ However, despite this legislation, a substantial number of objects could not, or were not, returned.⁶¹ These objects

⁵²Petropoulos 1996, 139–44; Muller and Schretlen 2002, 25–29.

⁵³For the systematic dispossession of the Jews in the Netherlands, see Aalders 1999; Petropoulos 1996, 139–44.

⁵⁴Following the crisis on the art market during the years of economic depression in the 1930s. Venema 1986.

⁵⁵The tracing of dispersed cultural objects as well as interstate restitution was a conjoined international effort. See generally Edsel and Witter 2009.

⁵⁶Kurtz 1997, 114; Palmer 2000, 118; Campfens 2015b, 18–19.

⁵⁷See Inter-Allied Declaration against Acts of Dispossession Committed in Territories under Enemy Occupation and Control, 5 January 1943 “Note on Meaning, Scope and Application,” for the specific reference to “the stealing or forced purchase of works of art.” Looting in the Declaration also comprised transactions “apparently legal in form,” of course pertaining to forced sales, <https://www.lootedartcommission.com/inter-allied-declaration> (accessed 26 March 2018). See also Palmer 2000, 60–62, 303–05; Campfens 2015b, 16–26.

⁵⁸Whereas the status of the 1943 Inter-Allied Declaration as international customary law is questioned, it is a generally agreed upon convention to announce a mere general norm of restitution in inter-state terms. See O’Donnell 2011, 60; Peters 2012, 145–46; Woodhead 2014, 115.

⁵⁹For an analysis of the Inter-Allied Declaration and the different post-World War II restitution laws, see Campfens 2015b, 16–26.

⁶⁰Palmer 2000, 119. Discussing various differences between the post-war restitution laws, see Campfens 2015b, 20–26.

⁶¹This legislation was for the most part drafted during the war and from a constitutional law point of view was rather exceptional. Due to the extraordinary situation of the Nazi German occupation from 10 May 1940, the Dutch legislative procedure as prescribed by the Constitution could not be followed. The legislature in the Netherlands is a compound organ, consisting of Parliament and government. The procedure of law-making thus involves both organs and requires that Acts be made in “joint consultation,” according to Article 81 of the Grondwet (Dutch Constitution). However, as of May 1940, the Dutch government had fled to London, which rendered the “joint consultation” requirement impossible. The Dutch government in exile resorted to emergency powers, and, until 20 November 1945, all Dutch legislation was issued by way of royal decrees or so-called statutory orders. These decrees were presumed to have the same status as Acts. These royal decrees amounted to a complex system that governed the restoration of rights. In short, it provided for special executive institutions as well as a special judiciary exclusively competent to rule on disputes concerning the restoration of rights. For the purposes of this article, it would go too far to discuss this extensively. See critically on this system in general, Veraart 2005.

were designated as Nederlands Kunstbezit Collectie (NK collection), consisting of some 4,000 items that ended up in the Dutch state's care.⁶²

In the late 1990s, in the wake of a broader and more critical discussion focused on the process of restoration within the Dutch borders in the immediate post-war years, this NK collection became a subject of public discussion.⁶³ As in several other European countries,⁶⁴ the existence of such a collection of objects with a possibly tainted provenance residing in public hands was questioned.⁶⁵ As a reaction, the Dutch government decided to initiate government-funded research into the fate of Jewish assets during and after the war by instituting several research committees. In regard to the specific category of Nazi-looted cultural objects, the Committee Herkomst Gezocht/Origins Unknown was established in the fall of 1997.⁶⁶ This committee, also frequently referred to as the Ekkart Committee (named after its chairman), investigated the Dutch post-World War II efforts concerning looted art with a primary focus on the provenance of the NK collection. An important conclusion of the committee in April 2001 was that the Dutch postwar system of restoration of rights concerning the specific category of looted cultural objects, in line with the overall conclusion of the other government-installed committees, was executed in a “formalistic, bureaucratic cold, callous and often even heartless” manner.⁶⁷ Inspired by this general conclusion, the Ekkart Committee called for a more generous approach toward restitution claims.⁶⁸

Due to the simple passage of time, possibilities for restitution applications had lapsed decades before as the cut-off date for restitutions in the Netherlands

⁶²See Muller and Schretlen 2002, 223–36; Oost 2012, 179–90; Marck and Muller 2015, 73.

⁶³See generally Gerstenfeld 2008; Ruppert 2017.

⁶⁴See, e.g., the Musées Nationaux Récupération (MNR) collection in France and a critical and important contribution in this regard from Hector Feliciano, *The Lost Museum*, 1997, which was a revised version of Feliciano 1995.

⁶⁵Campfens 2014, 81.

⁶⁶A total of five committees were installed. Four of them focused on the looting by Nazi Germany and the Dutch system on the restoration of rights. In chronological order, these were the Van Kemenade Committee (Contact Group for Second World War Funds—Nazi-Gold), the Scholten Committee (Financial funds—securities, bank accounts, and insurance policies), and, lastly, the Kordes Committee (Liro archives/Jewish privately owned tangible goods such as jewelry, diamonds, and household effects). A fifth committee, the Van Galen Committee, focused on another aspect of World War II; it researched the financial consequences of the Japanese occupation of the former Dutch colonies in Asia, mainly Indonesia, and the fate of Indian funds.

⁶⁷Herkomst Gezocht/Origins Unknown 2006, 28, Appendix 7, which contains the first of three sets of findings and recommendations by the Ekkart Committee; on the execution of the post-World War II system of restoration of rights in the Netherlands concerning cultural objects, see extensively Muller and Schretlen 2002, ch. 3; on the Dutch system of restoring legal rights during the post-World War II years, see Veraart 2011, 21–34.

⁶⁸Herkomst Gezocht/Origins Unknown 2006, 15–18, 28–32; Establishing Decree 2001, explanatory notes; Oost 2012, 180–81; Marck and Muller 2015, 75.

was set at 1 July 1951.⁶⁹ Furthermore, the relatively short prescribed periods for making claims, as well as a Dutch civil law system that was generally favorable to good faith owners,⁷⁰ further complicated the traditional legal approach.⁷¹ This led the Dutch government to decide to establish an advisory committee to issue advice on Nazi-looted art claims, by which it stated explicitly that it would embark on a policy-induced and generous approach rather than on one set by the traditional legalist paradigm.⁷² The RC, which was established merely by a ministerial order,⁷³ was guided by policy rules that were largely based on the Ekkart Committee's recommendations in this regard.⁷⁴ With this knowledge in mind, the actual task of the RC will now be discussed briefly. Based on Article 2 of the RC's Establishing Decree,⁷⁵ the RC has a two-pronged purpose. It can issue both recommendations as well as opinions:

- A recommendation is issued to the minister and concerns claims on objects residing in the hands of the Dutch state. These objects not only comprise the NK collection, but they can also belong to "other possessions of the State

⁶⁹Royal Decree E100, "Besluit Herstel Rechtsverkeer," *Staatsblad (Dutch Bulletin of Acts and Decrees)*, 17 September 1944, Art 21 (1) and *Staatscourant (Dutch Government Gazette)*, 27 December 1950, no. 251, p. 5. Many other postwar restitution laws were limited in time; see Palmer 2000, 119. On the fading of the initial determination to restore (cultural) property rights due to the preoccupation of European states to restore society, see Prott 2004, 113–18; Chechi 2014a, 263.

⁷⁰In this regard, see Royal Decree E100, Art. 113 (2); see note 69, on the basis of which objects whose owners did not successfully file a timely claim for these objects. These revenues went to the Dutch State treasury. See critically Lubina 2009, 299.

⁷¹Campfens (2015b, 21, n. 32) recently suggested that the postwar restitution legislation might still be successfully invoked. Reference was made to legislation that declared all Nazi measures null and void, and, thus, the title of ownership never passed.

⁷²See Establishing Decree 2001, explanatory notes.

⁷³"Merely" from a legislative constitutional law perspective; this legislative instrument is the lowest in rank in regard to national legislation. For a legislative act resulting in a law or statute, this requires the involvement of both Parliament as well as the government. The Dutch legislature is a compound organ; see Art. 81 of the Grondwet (Dutch Constitution). On the hierarchy of Dutch law, see generally Munneke 2012.

⁷⁴The policy framework concerning the national art collection is the result of a dialogue between government and the Ekkart Committee. See also Lubina 2009, 299–312. For a recent overview of the relevant documents, see Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War 2016, Appendix 4.

⁷⁵The Establishing Decree was amended in 2012. Besluit van de Staatssecretaris van Onderwijs, Cultuur en Wetenschap van 4 juli 2012, no. WJZ/420483 (10207), houdende wijziging van het Besluit adviescommissie restitutieverzoeken cultuurgoederen en Tweede Wereldoorlog in verband met evaluatie van het restitutiebeleid, *Staatscourant*, no. 14780, 18 July 2012 (Establishing Decree 2001 as amended in 2012) (for an unauthorized translation, see <https://www.restitutiecommissie.nl/en/system/files/Consolidated%20text%20Decree%20establishing%20the%20Dutch%20Restitutions%20Committee%20ENG%202012.pdf> (accessed 26 March 2018)).

of the Netherlands” or, rather, the Dutch national art collection as such.⁷⁶ A recommendation is merely given as advice to the minister and is not legally binding.⁷⁷

- Opinions are issued on “disputes concerning the restitution of items of cultural value between the original owner who, owing to circumstances directly related to the Nazi regime, involuntary lost possession of such an item and the current possessor which is *not* the State of the Netherlands.”⁷⁸ They mainly concern objects that are part of a collection of a provincial or municipal authority;⁷⁹ however, they can also include those belonging to a private (legal) person. These opinions are given in a special procedure called the binding-expert opinion procedure. To this end, regulations have been drawn up by the Committee, which will be addressed in depth later in this article.⁸⁰ The procedure basically aims to give the involved parties a final settlement of their dispute after a joint decision by both parties to call upon the RC.

A Stricter Policy as of 2012?

Until 19 July 2012, these two tasks of the RC had their own distinct policy frameworks. The RC’s task regarding the entire Dutch national art collection (the NK collection as well as other possessions of the state) was governed by a renewed and liberalized restitution policy, whose parameters were set by the Ekkart Committee’s recommendations in this regard.⁸¹ Important features that marked the generous nature of the policy were the reversal of the burden of proof concerning the involuntariness of loss, which was

⁷⁶Establishing Decree 2001 as amended in 2012, Art. 2, sub 1.

⁷⁷It must be noted that the minister has accepted all recommendations by the RC, albeit in the Goudstikker recommendation he followed a different line of reasoning. See http://www.restitutiecommissie.nl/en/summary_rc_115.html (accessed 26 March 2018). For the Goudstikker recommendation, see Recommendation Regarding the Application by Amsterdamse Negotiatie Compagnie NV in Liquidation for the Restitution of 267 Works of Art from the Dutch National Art Collection, RC 1.15, 19 December 2005.

⁷⁸Establishing Decree 2001 as amended in 2012, Art. 2, sub 2 (emphasis added).

⁷⁹An important facilitating factor concerning this task has been provenance research conducted under the auspices of the Netherlands Museums Association that led to a special website devoted to the manner of execution as well as to the results of the provenance research. See Museale Verwervingen, “About the Investigation,” <http://www.musealeverwervingen.nl/en/36/about-the-investigation/> (accessed 26 March 2018).

⁸⁰Based on the Establishing Decree 2001 as amended in 2012, Art. 4, sub 2, the “Committee may draw up regulations concerning further working methods.” In 2007, the Regulations for Opinion Procedure under Article 2, 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 were created. A revised version of the regulations was published on 3 March 2014. See Regulations Binding Expert Opinion Procedure, 3 March 2014, http://www.restitutiecommissie.nl/en/regulations_binding_expert_opinion_procedure.html (accessed 26 March 2018) (Regulations).

⁸¹The policy framework concerning the national art collection is the result of a dialogue between government and the Ekkart Committee. See also Lubina 2009, 299–312. For a recent overview of the relevant documents, see Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War 2016, Appendix 4.

presumed for individuals during the years of the Nazi regime, and relaxed standards of proof of ownership. The RC's task concerning objects that did not reside in the hands of the Dutch state proceeded on the basis of a different framework governed by "principles of reasonableness and fairness," as worked out in its regulations in this regard.⁸² On the basis of this open policy, the RC "could" balance the interests of former and current owners and, for example, take into account the acquisition of a work in good faith by the current owner and also the importance of a work to the current and former owner as well as the interest of the general public.⁸³

As of 19 July 2012, this distinction was no longer applicable; the state secretary announced a policy change whereby the two tranches would become one uniform applicable policy for all objects.⁸⁴ The rationale for these changes was motivated in the following way. In 2001, at the time of the RC's establishment, it was decided (out of the motivation for a more generous approach) to extend the liberalized policy to comprise not only the NK collection but also the entire Dutch national art collection.⁸⁵ However, due to the fact that this latter category of works of art was from a different background, often acquired "many years after the second World War through normal channels, such as purchase in good faith at an auction," the need was felt in 2012 to give the RC more leeway to assess all relevant factors.⁸⁶ The liberalized restitution policy did not leave any room to take into account a possible good faith purchase by the state. When ownership was established to a reasonable degree of certainty and the involuntariness of the loss given, the RC had no option but to recommend restitution. Therefore, as of 19 July 2012, claims concerning objects from the Dutch national art collection (not the NK collection) were dealt with according to the principles of reasonableness and fairness.⁸⁷

⁸²Establishing Decree 2001 as amended in 2012, Art. 2, sub 5.

⁸³Regulations, Art. 3(e), (f), (g).

⁸⁴This policy change was again based upon advice sought by the government. An ad hoc advisory committee of the Council of Culture was specifically designated with this task and consisted of the same members as the Ekkart Committee that advised the Dutch government between 1997 and 2005. For the advice (only in Dutch), see Raad voor Cultuur, Appendix (bgl-174352) to Kamerstukken (Parliamentary Papers) II, 2011–2012, 25839, no. 41, 25 January 2012, <https://zoek.officielebekendmakingen.nl/bgl-174352> (accessed 26 March 2018). For a summary in English, see Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War 2012, 12–16.

⁸⁵General Consultation with the Standing Committee of Education Culture and Science, Kamerstukken (Parliamentary Papers) II, 2001–2002, 25839, no. 28, <https://zoek.officielebekendmakingen.nl/kst-25839-28.html> (accessed 26 March 2018). Letter from the State Secretary of OCW to the Lower House with His Response to the Advice of the Council for Culture about the Restitution Policy in Regard to Items of Cultural Value, 22 June 2012, Kamerstukken (Parliamentary Papers) II, 2011–2012, 25839, no. 41, 2–3, <https://zoek.officielebekendmakingen.nl/kst-25839-41.html> (accessed 26 March 2018) (Letter from the State Secretary 2012).

⁸⁶Letter from the State Secretary 2012, 2–3.

⁸⁷In 2017, the RC dealt with two restitution requests concerning objects of the Dutch national collection under this new policy. In both cases—Recommendation regarding Berolzheimer, RC 1.166, 4 September 2017 and Recommendation Regarding a Pastel Drawing by Philippus Endlich, RC 1.167, 13 November 2017—the RC issued a positive advice.

The second tranche towards unification was set on 30 June 2015 as it was deemed that the liberal restitution policy “does not need to be drawn out indefinitely.”⁸⁸ From that date onwards, all claims, and, thus, also the NK collection, would be assessed on the basis of the principles of reasonableness and fairness. It must be noted, however, that the state secretary, when announcing the policy changes, specifically stated that the RC could still “take the specific provenance of works of art into account during the substantive assessment of a claim. This means that considerable weight will be given to the fact that a particular item comes from the NK collection.”⁸⁹

More or less parallel to this change was the entering into force on 1 July 2016 of the new Dutch Heritage Act.⁹⁰ This Act was not specifically written to deal with claims regarding Nazi-looted art, but it nevertheless affected the RC’s decisions.⁹¹ The Act requires a recommendation from the so-called Protection Worthiness Assessment Committee (Toetsingscommissie Beschermdwaardigheid or TCB) in the case of the disposal of a cultural object or collection when, in brief, it can be considered irreplaceable and indispensable to Dutch cultural heritage.⁹² Depending on where in the public domain the object resides, Article 4.18 of the Heritage Act requires either the minister, the responsible provincial or municipal authority, or any other public body (for example, universities) to seek such advice.⁹³

⁸⁸Quotation from the Council of Culture’s advice on the basis of which the State Secretary decided to act accordingly. Letter from the State Secretary of OCW to the Lower House with His Response to the Advice of the Council for Culture about the Restitution Policy in Regard to Items of Cultural Value, 22 June 2012, Kamerstukken (Parliamentary Papers) II, 2011–2012, 25839, no. 41, 5, <https://zoek.officielebekendmakingen.nl/kst-25839-41.html> (accessed 26 March 2018).

⁸⁹Letter from the State Secretary 2012, 5–6. See also Establishing Decree 2001 as amended in 2012, Art. 2, sub 6, in which it is explicitly expressed as of 2012 that “committee attaches great importance to the circumstances of the acquisition by the possessor and the possibility of knowledge of the suspicious origin at the time of the acquisition of the cultural object in question.”

⁹⁰Act Relating to the Combining and Amendment of Rules Regarding Cultural Heritage, 9 December 2015, available in English at <https://cultureelerfgoed.nl/sites/default/files/publications/heritage-act-2016.pdf> (accessed 26 March 2018) (Heritage Act).

⁹¹The aim of the Heritage Act is “conservation and management of Dutch cultural heritage” and to harmonize the various acts and different sets of regulations regarding the protection and preservation of Dutch cultural heritage. See Cultural Heritage Agency, <https://cultureelerfgoed.nl/sites/default/files/publications/heritage-act-2016.pdf> (accessed 26 March 2018) at 41, “1.2 Reasons for a single Heritage Act.”

⁹²See Heritage Act, Arts. 4.19 and 4.20, on the scope of the Toetsingscommissie Beschermdwaardigheid’s advice and rules on the composition as well as safeguards for its independence.

⁹³The unofficial translation of Art. 4.18 of the Heritage Act refers to these public bodies as “another legal entity under public law.” Originally, the Heritage Act was limited to cultural objects owned by the state, provinces, and municipalities and was criticized by the Council of State for not including all publicly owned works. The Heritage Act was successfully amended after MPs A. Pechtold and J. Monasch’s proposal in Second Chamber of Parliament, *Handelingen TK* (Parliamentary Proceedings Second Chamber), 2014–2015, no. 96, item 9, <https://zoek.officielebekendmakingen.nl/h-tk-20142015-96-9.html> and <https://zoek.officielebekendmakingen.nl/kst-34109-15.html> (accessed 26 March 2018).

The minister sought such advice for the first time in 2017 since the restitution request concerned an object residing in the Dutch national art collection; the recommendation was consequently addressed by the RC in weighing the interests involved.⁹⁴ The TCB did not consider the object irreplaceable and indispensable; however, it stressed its singularity and the visual attractiveness of the drawing, which rendered the disposal of the object a “great loss” to the public domain. The RC nevertheless concluded that the drawing’s importance for the cultural heritage of the Netherlands was limited. Still, it remains to be seen what would have happened if the TCB had answered this question in the affirmative. In answering questions in Parliament about the connection between the RC’s mandate and the Heritage Act in 2015, the minister emphasized that, in her opinion, restitution should remain the guiding principle when cultural objects “ended up in the wrong hands.”⁹⁵ Furthermore, the RC’s chair stated in 2015 that the 2012 policy change did not mean that the Ekkart Committee’s recommendations are “stored in the archives on 30 June 2015.”⁹⁶

However, in light of the changed rationale set forth in 2012, the public interest seems to have gotten the upper hand over remedying past injustices. This assumption could well be put into perspective in light of other (potential) consequences of this change in course in 2012 in terms of the solutions the RC has at its discretion. Until 19 July 2012, the distinction was as follows: recommendations can only amount to restitution, whereas opinions can entail all possible solutions the RC deems fit.⁹⁷ It seems that this distinction has been abandoned since the policy changes announced in 2012. Concerning objects belonging to the Dutch national art collection, the state secretary commented in 2012 that under “this new policy the Committee will also always be able to recommend restitution (unreservedly) of a tainted work of art, but it will also be able to *recommend another satisfactory solution*.”⁹⁸

The RC reiterated this idea in its 2015 annual report when addressing the policy changes in regard to the Dutch national art collection cases (non-NK collection works) and referred to the new “scope for recommending solutions

⁹⁴Recommendation regarding Berolzheimer.

⁹⁵Answer of Minister Jet Bussemaker on MP Van Veen’s Question on the Relation between the RC’s Mandate and the Heritage Act, Handelingen TK (Parliamentary Proceedings Second Chamber), 2014–2015, no. 90, 21 at 90–20–37: “Ik hecht eraan dat in voorkomende gevallen kunst nog steeds teruggegeven wordt waar die in verkeerde handen is gekomen,” <https://zoek.officielebekendmakingen.nl/h-tk-20142015-90-21.html> (accessed 26 March 2018).

⁹⁶Foreword by the Chairman Willbrord Davids, Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War 2015, 5–6. It remains a bit unclear what the chairman meant by this. It seems, however, that as far as a restitution request concerned an object from the NK collection, the RC intended to follow the loosened standards as set out by the Ekkart Committee.

⁹⁷Restitution could be made subject to certain conditions—i.e., the payment of received sales proceeds where a former owner had freely disposed of the object. Palmer 2007, 9; Lubina 2009, 313.

⁹⁸Letter from the State Secretary 2012, 4 (emphasis added).

other than the restitution of an item.”⁹⁹ How this will play out in practice is not yet clear as no cases have come before the RC in which this matter could be assessed.¹⁰⁰

The UK's Spoliation Advisory Panel

In May 2000, the UK government established the Spoliation Advisory Panel (SAP).¹⁰¹ Whereas the Dutch situation is marked by an heirless public collection, in the UK, the issue of Nazi-looted art centers around objects with a doubtful provenance, mostly acquired in good faith by museums.¹⁰² The SAP was established as an independent alternative forum for claimants seeking restitution who most likely would be left empty-handed if they embarked on the traditional legal road.¹⁰³ It considers claims against UK public museums by people who lost possession of artwork during the Nazi era (1933–45).¹⁰⁴ The SAP's “paramount purpose” is to achieve a just and fair solution for both the claimant and the institution; however, its subsequent recommendations are not legally enforceable.¹⁰⁵ Although the SAP does consider legal issues relating to the title of the object, it does not determine legal rights;¹⁰⁶ it proceeds on the basis of moral considerations and assesses the moral strength of a claim.¹⁰⁷ A subsequent recommendation is not legally enforceable on the claimant, the institution (respondent museum), or the state secretary;

⁹⁹Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War 2015, 11.

¹⁰⁰Either because ownership could not be established to a reasonable degree (e.g., see Recommendation concerning Hamburger (III), RC 1.160, 28 June 2016) or because it concerned requests dated earlier than 30 June 2015.

¹⁰¹For relevant documents, see Terms of Reference, <https://www.gov.uk/government/groups/spoliation-advisory-panel#terms-of-reference> (accessed 26 March 2018).

¹⁰²Woodhead 2014, 114; Select Committee on Culture Media and Sport, *Seventh Report Cultural Property: Return and Illicit Trade*, HC 371-I, 1999–2000, para. 182, mentioning some 350 artworks with doubtful provenance. For a recent overview of spoliation research, see Collections Trust, “Spoliation Research by UK Museums for 1933–45,” <http://collectionstrust.org.uk/cultural-property-advice/spoliation-research-by-uk-museums-for-1933-45/> (accessed 26 March 2018).

¹⁰³Original owners are likely to have lost legal title based on the Limitation Act 1939, s. 3(2) as it extinguishes title of the original owner six years after the original conversion, also when conversion was a theft. See generally Palmer 2000, ch. 10; Oost 2012; Woodhead 2013, 168; 2014, 115–16; Marck and Muller 2015, 64.

¹⁰⁴Spoliation Advisory Panel Constitution and Terms of Reference, para. 1 (SAP ToR), <https://www.gov.uk/government/groups/spoliation-advisory-panel#terms-of-reference> (accessed 26 March 2016). A claimant (not the institution) is expected to accept the recommendation as a full and final settlement of the claim. SAP ToR, para. 11. Woodhead (2013, 172) referred in this regard to the expected professional embarrassment for museums in case it would not uphold a recommendation by the Spoliation Advisory Panel (SAP). On enforcement issues concerning the SAP's recommendations, see also Woodhead 2016, 391–95.

¹⁰⁵SAP ToR, para. 14.

¹⁰⁶SAP ToR, paras. 8, 15(d), (f).

¹⁰⁷SAP ToR, paras. 9, 15(e).

however, if a claimant accepts the recommendation, he or she is expected to accept the implementation of the full and final settlement of his claim.¹⁰⁸

Apart from restitution, the SAP has other remedies at its discretion in making recommendations. It can decide to award financial compensation, an *ex gratia* payment (by the state), or display alongside the object an account of its history and a reference to the claimant's special interest in it.¹⁰⁹ It can furthermore advise the secretary of state, first, on action to be taken in "relation to general issues raised by claims" and, second, on actions to be taken in relation to a specific claim (for example, *ex gratia* payments).¹¹⁰ Until 2009, there was no statutory recognition of the SAP, which changed with the establishment of the Holocaust (Return of Cultural Objects) Act 2009.¹¹¹ The main reason for these statutory changes was that in two cases restitution could not be effected after a recommendation thereto by the SAP, due to statutory impediments.¹¹² The Holocaust (Return of Cultural Objects) Act handed the Board of Trustees of the 17 institutions mentioned in Article 1 the discretionary power of deaccessioning objects after a recommendation of the SAP (referenced as the Advisory Panel in the Act) and the subsequent approval of the secretary of state.¹¹³

Although the SAP was established in the context of the above-mentioned perfect storm and felt a "duty to do what the [UK] Government can to play their part in righting these historic wrongs," it must be stated that the mandate of the SAP was rather broad.¹¹⁴ It could consider claims concerning all acts of dispossession of cultural objects, not only those connected to Nazi persecution, provided that they occurred "during the Nazi era (1933–1945)."¹¹⁵ In the case of the Beneventan Missal, the SAP indeed considered, although "not without hesitation,"¹¹⁶ a loss of

¹⁰⁸SAP ToR, paras. 10, 11.

¹⁰⁹SAP ToR, para. 17.

¹¹⁰SAP ToR, para. 7. See, e.g., Report of the Spoliation Panel in Respect of Four Drawings Now in the Possession of the British Museum, 2006 HC 1052 (British Museum/Feldmann claim) where restitution was legally barred and instead an *ex gratia* payment was recommended. See also note 113 below.

¹¹¹Holocaust (Return of Cultural Objects) Act 2009. It was deliberately established without statute; see also Palmer 2001, 515.

¹¹²In the case of the Beneventan Missal, see Report of the Spoliation Advisory Panel in Respect of a 12th Century Manuscript Now in the Possession of the British Library, 2005 HC 406 (British Museum/Benevento claim) and in the British Museum/Feldmann claim, restitution could not be awarded due to statutory impediments. A public consultation followed in July 2006. Department for Culture, Media and Sport 2006. In 2008, there was again a case in which restitution could only be partially awarded. Report of the Spoliation Advisory Panel in Respect of Pieces of Porcelain Now in the Possession of the British Museum, London and the Fitzwilliam Museum, Cambridge, 2008 HC 602. This ultimately led to the Holocaust (Return of Cultural Property) Act 2009 on the basis of which deaccessioning of objects belonging to public collections on the basis of a recommendation of the SAP is possible. Oost 2012, 198, 199; Woodhead 2014, 119–24; Marck and Muller 2015, 65–66.

¹¹³Holocaust (Return of Cultural Property) Act 2009, Art. 2, sub 4 provides for an extra requirement concerning Scottish bodies, being the consent of the Scottish ministers.

¹¹⁴Alan Howarth, Member of Parliament, *Hansard*, House of Commons Debates, vol. 361, c340W.

¹¹⁵SAP ToR, para. 1; Oost 2012, 204; Woodhead 2013, 179–78; Woodhead 2014, 119–20.

¹¹⁶British Library/Benevento claim, para. 2.

possession resulting from circumstances related to the chaotic state of war rather than Nazi persecution.¹¹⁷ As others have pointed out, there is a certain ambiguity on the SAP's use of its jurisdiction, especially in light of the context in which the SAP was established.¹¹⁸ Thus far, however, the Beneventan Missal case has been the only abnormality, which suggests that the SAP's mandate must first and foremost be seen in the context of remedying past Nazi-related injustices.¹¹⁹

Comparing the Dutch RC and the UK's SAP

This section will provide a few comparative remarks on the Dutch RC's and the SAP's mandates that one must bear in mind when the actual substantive and institutional predicament is discussed.¹²⁰ There are some important differences between both panels, which are mainly due to a rather different national context.¹²¹ The rationale behind the SAP is a result of the need felt by the UK government to provide a venue to remedy historic wrongs in a situation where, from a legal perspective, the remedy of restitution is ultimately a decision to be made by the Board of Trustees of a respondent museum. Furthermore, there are no general (substantive) policy guidelines published apart from the SAP's constituent documents¹²² since the SAP's basic principle is to assess claims on a case-by-case basis.¹²³

In the Netherlands, the situation is different as the political impetus to act on the matter of Nazi-looted art is primarily related to a tainted public collection (the NK collection with a distinct "war record").¹²⁴ In the Netherlands, at least until 2012, this was the main justification for the existence of two separate restitution policies (recommendations concern objects in the hands of the Dutch state and opinions

¹¹⁷British Library/Benevento claim; 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 (British Library/Benevento (renewed) claim).

¹¹⁸Department for Culture, Media and Sport 2006, 23. Woodhead 2013, 179–80; 2014, 119–20.

¹¹⁹To date, the panel has issued 22 reports of which two consider the same case: British Library/Benevento claim and British Library/Benevento (renewed) claim; and the claim concerning the John Constable painting held at the Tate, 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 (Tate Gallery/Constable claim) and 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 (Tate Gallery/Constable (renewed) claim).

¹²⁰It would go beyond the scope of this article to discuss the various differences between the RC and the SAP in greater detail. For a comparison, see Oost 2012, ch. 2 and, recently, Marck and Muller 2015, 41–90.

¹²¹Oost 2012, 73–76.

¹²²Over the years, the Rules of Procedure have been revised and a so-called "Guidance for Parties" has been added, apparently to facilitate claimants. See "Review of the Spoliation Advisory Panel," <https://www.gov.uk/government/groups/spoliation-advisory-panel#panel-reports> (accessed 26 March 2018).

¹²³Woodhead (2013, 170, n. 17, 18) noted in this regard that whereas in earlier claims the SAP sought to avoid setting precedent, in recent years the panel has made reference to earlier claims.

¹²⁴For reference to a "war record," see Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War 2012, 12.

concern objects owned by entities other than the Dutch state) on the basis of which the RC had to proceed. This has resulted, on the one hand, in different assessments. Under the liberalized Dutch restitution policy concerning recommendations, when the ownership of private individual owners is established with a reasonable degree of certainty and the involuntariness of loss is given (based on the loosened burden of proof), restitution follows, disregarding, for example, the interest of the public benefit in the continuous display of the object or the possible financial compensation for lost objects in the past by former owners or heirs.¹²⁵ Again, it must be stated that the liberalized policy not only concerned the NK collection, but, until 19 July 2012, was also extended to the entire Dutch national art collection. This arm of the policy differed in terms of rationale with that of the UK's SAP since it was primarily designed to tie up existing loose ends inherited from the first round of restitution conducted during the immediate postwar years;¹²⁶ it was meant to be lenient towards individual claimants and heirs.¹²⁷

The second arm of the Dutch restitution policy seems more in line with its UK counterpart; the aim of the RC was to settle disputes as “a neutral third party.”¹²⁸ Coming to terms with its own past mistakes in relation to Nazi injustices seems not to be the main rationale; in the UK, it is to aid in assisting by providing a venue in which to address historical injustices. As for the future, it seems that the RC is headed in a direction that is even more in line with the UK's SAP. The expectation is that the claims concerning the NK collection will “gradually dry up”¹²⁹ and that the coming years will see a rise in claims where parties other than the Dutch state will be asking for advice.¹³⁰ Therefore, it seems that there will be a shift in emphasis in the RC's task from advising government on the national art collection (mainly the NK collection) to acting as an independent neutral party in the settlement of

¹²⁵The restitution policy differentiates between objects formerly owned by private individuals and art dealerships. The main difference concerns the applicability of the reversal of the burden of proof regarding the involuntariness of loss. There is no reversal of the burden of proof in case of art dealerships since the essence of art dealing is trading and research showed that even Jewish art dealers in the first years of the war could engage in normal transactions. *Herkomst Gezocht/Origins Unknown* 2006, Appendix 10.

¹²⁶Translation of “losse eindjes.” Letter of the State Secretary of Education Culture and Science, 14 July 2000, *Kamerstukken (Parliamentary Papers) II, 1999–2000*, 25839, no. 16, <https://zoek.officielebekendmakingen.nl/kst-25839-16.html> (accessed 26 March 2018).

¹²⁷Apart from the aforementioned features concerning the relaxation of the burden of proof and the loosened requirements on the establishment of ownership, former owners and/or their heirs were actively traced by an organization set up to this end, the Bureau *Herkomst Gezocht/Origins Unknown*. See *Herkomst Gezocht/Origins Unknown* 2006, 27; *Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War* 2002, 10.

¹²⁸Bussemaker 2015, x.

¹²⁹Letter from the State Secretary 2012, recommendation 3.

¹³⁰This is mainly due to the provenance research conducted in provincial and municipal museums; see note 79. See also Campfens 2014, 87–88. After publication of these results, from 2014 to 2016, the RC received nine requests to issue an opinion. *Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War* 2016, 22.

disputes involving works of art owned by parties other than the government.¹³¹ This is even more underlined by the policy changes set forth on 19 July 2012; the assessment of all claims before the RC will take place on the basis of the principles of reasonableness and fairness in which several interests, including those of the respondent institution as well as the public interest, can be taken into account. How this will transpire exactly in assessments concerning state-owned objects and, more particularly, in those belonging to the NK collection remains to be seen.¹³²

SUBSTANTIVE QUANDARY: *FLUCHTGUT*, DOUBLE COMPENSATION, AND BALANCING THE INTERESTS

It seems that both from a substantive as well as from an institutional perspective, the committees dealing with restitution claims have been confronted with a predicament. This predicament is, to a large extent, caused by the primary remedy sought. Actual restitution in kind still entails an individualized, semi-legal assessment of the possible restoration of the ownership of a formerly owned specific subject. Thus, actual physical restitution of a claimed object is not something that can occur without answering vital questions that have a legal connotation, especially not when it involves cultural objects of significant and mostly monetary value. These questions touch upon what I refer to in this article as the substantive part of the new restitution venue: the recommendations issued by the restitution committees and, if available, their mission/policy statements. One cannot return a work without verifying whether the object that has been claimed is the one lost 60 years ago. This involves questions about evidentiary standards and what evidence should be insisted upon when the loss occurred over 60 years ago. The simple passage of time alone makes such an assessment very difficult. The mere notion of a just and fair solution induced by morality does not tell us how one should deal with criteria such as the involuntary loss of possession “due to circumstances directly related to the Nazi regime” in practice.¹³³ A broad explanation of that criterion on account of the strength or weakness of the causal link between persecution and loss, including, for example, sales made after a successful flight from the Nazi regime in order to support the livelihood of one’s family or even an accustomed standard of living, fits the new paradigm. However, this new paradigm brings about difficulties and a lack of clarity on how to classify or assess past events. Two points must be made in this regard.

The first point refers to my reference to an accustomed standard of living, which relates to the recent debate on the eligibility for restitution of cases most commonly

¹³¹Bussemaker 2015, x.

¹³²E.g., concerning the remedies available. Regarding objects in the Dutch national art collection, not the NK collection, the minister explicitly stated in 2012 that solutions other than restitution can be considered. Such an explicit statement has not been made in relation to objects belonging to the NK collection. It could by analogy be argued that such other solutions would also be applicable to claims regarding the NK collection. That would, however, be a breach of the initial policy framework as set in 2001.

¹³³Phrased as such from 2001 onward; see Establishing Decree 2001 as amended in 2012, article 2.

referred to as *Fluchtgut*.¹³⁴ The debate on *Fluchtgut* or flight goods recently regained momentum when Cornelius Gurlitt bequeathed his collection, some of which was looted from Jews by the Nazis, to the Kunstmuseum Bern in Switzerland in 2014.¹³⁵ In Switzerland, *Fluchtgut*, as opposed to *Raubgut*,¹³⁶ is not eligible for restitution, and the Swiss have been criticized for this “artificial” distinction.¹³⁷ This distinction relates to the weak(er) quality—if it arguably exists at all—of the causal link between loss and persecution: *Fluchtgut* or flight goods concern sales made outside the direct control of the Nazi regime. Therefore, it revolves around the question of how broadly the notion of a forced sale should be interpreted when assessing the eligibility of a claim for restitution.¹³⁸ On the basis of examples derived from both the Netherlands and the UK, this sliding scale on the quality of the causal link will be illustrated.

In the Netherlands, claims concerning *Fluchtgut* can be considered on the basis of an assessment of the substantive criterion of involuntariness of loss. Based on the applicable policy, in the case of sales by private individuals, the involuntary nature of the loss is presumed when a sale occurred in Germany as of 1933, in Austria as of 1938, and in the Netherlands as of 10 May 1940, and, thus, this effectively results in a relaxation of the burden of proof in favor of individual claimants. The assessment of the Dutch RC in 2009 concerning the first case of the Semmel heirs (see discussion later in this article) in the context of a claim for an object belonging to the NK collection serves as an illustration on how this assessment

¹³⁴The term *Fluchtgut* originates from an historical analysis of the Nazi-looted art in the Swiss context. See Francini, Heuss, and Kreis 2001.

¹³⁵For an overview of the course of events in the Gurlitt case, see Chechi 2014b, 199–217. For an analysis of the eligibility of claims in Germany, see Hellwege 2016, 105–62. For an analysis on legal aspects of possible claims under German and US law, see Rebholz 2015, 307–09. On 28 August 2014, the Conference *Fluchtgut: Geschichte, Recht und Moral* was held at the Oskar Reinhart Museum in Winterthur, entirely devoted to the issue of *Fluchtgut*. Mosimann and Schöneberger 2015. See also Florian Weiland, “Ist Fluchtgut dasselbe wie Raubkunst?” *Südkurier*, 3 September 2014, <http://www.suedkurier.de/nachrichten/kultur/Ist-Fluchtgut-dasselbe-wie-Raubkunst;art10399,7218364> (accessed 26 March 2018).

¹³⁶The term *Raubgut* originates from a historical analysis of the Nazi-looted art in the Swiss context. Francini, Heuss, and Kreis 2001.

¹³⁷See C. Hickley, “Swiss under Pressure over Art That Jews Were Forced to Sell,” *The Art Newspaper*, 3 March 2016, drawing upon Ronald S. Lauder, “A Crime Committed 80 Years Ago Continues to Stain the World of Art Today,” Lecture at the Kunsthau Zürich, 2 February 2016, <http://www.worldjewishcongress.org/en/news/remarks-by-ronald-s-lauder-in-zurich-a-crime-committed-80-years-ago-continues-to-stain-the-world-of-art-today-2-2-2016> (accessed 26 March 2018). See also Stefan Koldehoff, “Raubkunst Oder Fluchtgut? Viele Juden verkauften ihre Kunstsammlungen auf der Flucht aus dem NS-Staat. In der Schweiz gilt das bis heute nicht als “verfolgungsbedingter Verlust.” Die Nachlassregelung im Fall Gurlitt erfordert eine neue Debatte,” *Frankfurter Allgemeine*, 3 August 2015.

¹³⁸Ronald Lauder recently argued that no distinction should be made between looted art and “*Fluchtgut*.” See “Remarks by Ronald S. Lauder in Zurich: ‘A Crime Committed 80 Years Ago Continues to Stain the World of Art Today,’” <http://www.worldjewishcongress.org/en/news/remarks-by-ronald-s-lauder-in-zurich-a-crime-committed-80-years-ago-continues-to-stain-the-world-of-art-today-2-2-2016> (accessed 26 March 2018).

transpires in practice. In this case, the Dutch RC held that Richard Semmel, a Jewish businessman, involuntarily lost possession of the artwork in order to finance his flight from the Nazi regime.¹³⁹ Despite some gaps in the provenance of the painting as well as uncertainty about the proceeds of the received sales, the RC deemed it most plausible that the painting was sold at an Amsterdam auction on 21 November 1933 in order to finance Semmel's escape from Germany in April 1933:

It is unclear whether the painting was actually sold at this auction. The Committee assumes that if this was not the case, the painting was re-auctioned at a later date or sold privately, since the Committee's investigation has shown that the painting was no longer in Semmel's possession in March 1934. The Committee, therefore, considers the painting to have been sold in connection with Semmel's flight, and deems, therefore, the loss of possession involuntary as a result of circumstances directly related to the Nazi regime.¹⁴⁰

Research into this case showed that Semmel left Germany in April 1933 and was included in the Amsterdam population register on 27 November 1933. The RC therefore found that it had been proven with a high degree of probability that the Semmel heirs lost possession involuntarily as it considered that the painting had to be sold "in connection with Semmel's flight."¹⁴¹ Clearly, some questions still remain unclear, such as the exact date of the sale and the specific reason for the sale. However, infused by the new paradigm, these gaps can remain as such based on moral considerations rendering the RC's conclusion of a sale "in connection to a flight" to be fair and just. It is a plausible line of reasoning, but the question remains how far this causal link can be stretched, and this will be illustrated with a recent case brought before the UK's SAP.

In 2012, the SAP considered the British Museum/Koch claim in which the former owner sold a large collection of clocks at Christie's auction house in 1939 after a successful flight from the Nazi regime to the UK. Ida Netter, widow of the late Otto Koch (she remarried in 1930 to Emile Netter), auctioned off part of the collection she had inherited "in order to have means to live."¹⁴² The clocks were thus sold not in order to finance a flight but, rather, to support the livelihood of the remaining family. The SAP found that this sale did amount to a forced sale. The founding document of the SAP, the Constitution, and the Terms of Reference, does not define this term. Therefore, since the SAP assesses claims on the basis of probabilities, it reasoned

¹³⁹According to the RC, Semmel was not only targeted due to his Jewish background but also because of his active involvement in the Deutsch Demokratische Partei (German Democratic Party). Recommendation regarding Semmel, RC 1.75, 1 July 2009, paras. 3 (quotation of Semmel's postwar statement), 9.

¹⁴⁰Recommendation regarding Semmel, para. 9.

¹⁴¹Recommendation regarding Semmel, para. 9.

¹⁴²Report of the Spoliation Advisory Panel in Respect of 14 Clocks and Watches now in the Possession of the British Museum, 2012 HC 1839 para. 10 (British Museum/Koch claim) (quotation from claimants).

that Mrs Netter would not have sold this collection when she did, had she remained in Germany and had the Nazis not come to power. In so finding, we do not rule out the possibility that she might, in any event, have sold the collection to fund the education of her children or her own way of life but we consider this to be a more remote prospect.¹⁴³

Restitution, however, was not awarded due to the fact that the SAP, in balancing the interests at hand, deemed that this sale was at the lower end of the scale of gravity.¹⁴⁴ The SAP deemed it to be a sale that was in nature highly different from those that were made either to pay for freedom or to sustain the “necessities of life.”¹⁴⁵ This opinion of the SAP can serve as an illustration of the core difficulties that occur when it comes to the matter of *Fluchtgut*, which are not resolved when one turns to morality for solutions since morality lacks clear and undisputed standards. How should one actually assess these cases since the causal link between loss and persecution is not there or, at the very least, is extremely weak?

A second thorny point in the substantive assessments made concerning restitution is the matter of German financial compensation received after World War II, which is primarily based upon the Brüg accords.¹⁴⁶ In this regard, it must be noted that different assessments have been made ranging from a broad explanation that disregards earlier compensations and explanations where the concept of unjust enrichment is a barrier standing in the way of restitution.¹⁴⁷ The claim for restitution by the Kurt Glaser heirs before the Dutch RC and the UK’s SAP is maybe one of the most pressing examples. Although both committees had the same set of facts to decide on, being that it was the same claimant as well as the same circumstances of loss of possession, the outcomes ended up being different. In the Glaser case before the UK SAP, the compensation was taken into account in the assessment of what amounted to a just and fair solution.¹⁴⁸ Although the SAP did conclude that Nazi persecution was the “predominant motive” for the sale, in light of the fact that the received proceeds from the sale reflected the market price at the time

¹⁴³British Museum/Koch claim, para. 20.

¹⁴⁴British Museum/Koch claim, para. 21.

¹⁴⁵British Museum/Koch claim, para. 21, referring to two other *Fluchtgut* cases dealt with by the SAP: Report of the Spoliation Advisory Panel in respect of a painting now in the possession of the Tate Gallery, 2001 HC 111, where it concerned sales to pay for food in occupied Belgium, and Report of the Spoliation Advisory Panel in respect of a painting now in the possession of Glasgow City Council, 2004 HC 10, where all assets were sold in Germany in the 1930s for extortionate taxes. Although restitution was not awarded, the SAP did recommend placing a commemorative plaque next to a collection of clocks in the British Museum to explain its history and provenance with special reference to the heirs’ relationship with the objects in question.

¹⁴⁶Leading to financial compensation for individual victims by Germany in the 1950s, frequently referred to as the politics of Wiedergutmachung. See, e.g., Goschler and Ther 2003; Goschler 2005.

¹⁴⁷Weller 2015, 203–04.

¹⁴⁸Report of the Spoliation Advisory Panel in respect of eight drawings now in the possession of the Samuel Courtauld Trust, HC 757 2009, para. 43 (Samuel Courthauld Trust/Glaser claim). Again, here the SAP recommended a commemorative plaque explaining their provenance and a special reference to the heir’s relationship and historical interest in the drawings.

and that German compensatory payments were received after the war, restitution could not be afforded.¹⁴⁹ The SAP considered the moral strength of the case on the basis of all of the relevant circumstances and not merely the “causation.”¹⁵⁰ In the Dutch counterpart of this claim, double compensation was disregarded as a relevant factor by the Dutch RC.¹⁵¹ Restitution was awarded in the case of the Glaser heirs before the Dutch RC, and in its opinion, the RC held:

that this settlement does not constitute an impediment in terms of the admissibility of the applicants regarding a claim to a work of art in the Dutch national art collection, given that the settlement did not entail a waiver of the rights to the lost work of art and the State of the Netherlands was not a party to it.¹⁵²

These different outcomes are the result of different approaches concerning the matter of double compensation. The lenient approach in the Dutch case seems to be inspired by the new paradigm, although the relevant national context must be borne in mind. The case of the Glaser heirs concerned an object that belonged to the NK collection. Due to the specific background of this collection, this factor only adds to a generous approach in which victims of historical injustices are treated in a favorable manner. The UK approach, on the other hand, indicates adherence to a legalist paradigm since its rather meticulous approach on received compensatory awards seemingly aims to prevent unjust enrichment of a claimant.¹⁵³ In any case, the different solutions show that on a substantial level one can definitely differ on what constitutes a just and fair solution, and they serve as an illustration of the predicament on a substantive level.¹⁵⁴ Furthermore, at the very least, these differences can cause feelings of uncertainty among claimants, especially in the case of the Glaser heirs dissatisfaction, which is not wholly incomprehensible in their case given the different rulings on the same set of facts.¹⁵⁵

¹⁴⁹Samuel Courthauld Trust/Glaser claim, para. 37.

¹⁵⁰Samuel Courthauld Trust/Glaser claim, para. 42.

¹⁵¹Recommendation Regarding Glaser, RC 1.99, 4 October 2010, para. 8.

¹⁵²Recommendation Regarding Glaser, para. 8.

¹⁵³It seems that the lenient approach in the Netherlands is derived from the new paradigm and related to the too legalist approach of the matter by the Dutch government in the direct post-World War II period. Woodhead 2014, 126; T.I. Oost, “A Challenging Endeavour: Addressing a ‘Tainted’ Heritage in a New Paradigm,” 2016 (unpublished).

¹⁵⁴It must be noted that the Dutch RC’s advice of 4 October 2010 does not mention the letter from Kurt Glaser to Edvard Munch dated 19 May 1933, which is considered in the SAP’s advice in the Samuel Courthauld Trust/Glaser claim, at paras. 35–36, as part of the evidence brought forward by the Courthauld. This letter could potentially shed light on the nature of the sale, as not being forced. However, the SAP states that it is satisfied with the conclusion that Nazi persecution was the predominant motive for the sale, which is in line with the conclusion of the Dutch RC (at para. 37). Furthermore, as the research reports of the Dutch RC are not publicly accessible, it remains unclear whether this specific fact was, or was not, considered by the Dutch RC and would have led the Dutch RC to decide otherwise.

¹⁵⁵Martin Bailey, “Glaser Heirs Reject UK Spoliation Rulings,” *The Art Newspaper*, 26 August 2009, <https://www.lootedart.com/news.php?r=NSXYNP109171> (accessed 26 March 2018).

The same difficulty can be perceived in the example used in the introduction to this article, which revealed the Dutch policy of balancing the interests of a museum against those of an individual claimant. Although the policy has changed into a uniform policy from 30 June 2015 onwards, with the consequence that all cases are now assessed on the principles of reasonableness and fairness, up-to-date examples of such an assessment are only to be found in binding expert opinions.¹⁵⁶ These binding expert opinions by the Dutch RC do reveal an effort to balance such interests. The claims of the Semmel heirs brought before the RC under this task can serve as an example in this regard. In two of these binding opinions, two of the Semmel heirs' requests for restitution were rejected on the grounds that the works in question were too vital to a collection to be returned therewith, thus superseding the interests of the heirs in question or, rather, their emotional link to the claimed objects.¹⁵⁷

Unlike the Dutch RC, the UK's SAP has not considered the emotional link of a claimant to a claimed object when considering restitution as a remedy.¹⁵⁸ In light of the criticism on the Dutch policy that was mentioned in the introduction, it is interesting that Charlotte Woodhead, in the context of the SAP, has argued in favor of such a consideration under referral to the Dutch Semmel case.¹⁵⁹ According to Woodhead, in circumstances where a claimant has no particular link to an object and is likely to sell after actual restitution, "there is an argument for saying that the Panel should balance this information with the public benefit that might be derived from the object."¹⁶⁰ It has been argued that such different solutions or inconsistencies found in seemingly comparable individual cases could also be cause for a sense of injustice.¹⁶¹ In this regard, Woodhead's call for procedural and

¹⁵⁶For the most recent overview on cases dealt with by the RC, see Restitutiecommissie, "Recommendations," <http://www.restitutiecommissie.nl/en/adviezen.html> (accessed 26 March 2018).

¹⁵⁷This concerned *Christ and the Samaritan Woman at the Well* by B. Strozzi, RC 3.128, 25 April 2015 (Semmel/De Fundatie) and *Madonna and Child with Wild Roses* by Jan van Scorel, RC 3.131, 25 April 2015 (Semmel/Centraal Museum). The Semmel heirs requested a total of four works under this task of the RC, which issued all four of these binding expert opinions on 25 April 2013. In the request concerning the painting *The Landing Stage* by M.F. van der Hulst, RC 3.126, 25 April 2015, the museum's title was deemed not to carry sufficient weight. Important considerations to this end were that the work of art had been in the museum's repository for years and had not been exhibited or loaned out. Furthermore, the museum acquired the painting at no cost, and there were no indications that it had incurred any expenses in regard to it—for example, in having the painting restored. In *Stag Hunt in the Dunes* by Gerrit Claesz Bleker, RC 3.127, 25 April 2015, it did not come to such a balance of interests: the claim of the Semmel heirs was rejected because ownership could not be established.

¹⁵⁸Woodhead 2013, 182; 2014, 130–31.

¹⁵⁹Woodhead (2014, 131) uses the Dutch RC's reasoning in *Semmel/De Fundatie* and *Semmel/Centraal Museum* as an example in which the public benefit can outweigh the interests of individual claimants, especially when the emotional link is weak or weakened.

¹⁶⁰Woodhead 2014, 130.

¹⁶¹Weller 2015, 205; in the specific context of the United Kingdom, see Woodhead 2013, 167–92.

substantive principles in the UK is illustrative of the substantial quandary between the legalist and victim approaches. According to her, the point of departure of the UK's SAP—that is, to advise on a case-by-case basis—can stain the perception of the legitimacy of the outcome. She therefore proposes a set of principles that are basically an elaboration of the principle of legal certainty, which is an argument that seems to be inspired by the traditional legalist paradigm.¹⁶² Furthermore, she argues that the SAP should explicitly refer to the legal context in which the advice is made; according to her, it should be reiterated in one of those principles that the recommendations are made in the context of British legal principles and procedures.¹⁶³

The goal of her argument is thus clear: to prevent a sense of injustice, it seems that elements of the legalist paradigm are still needed. Current practice concerning Nazi-looted art claims is and remains a balancing act in which different assessments can be made based on the same set of facts. Although inspired by sincere motives, this balancing act might result in a slippery slope that could infringe on the perception of a just and fair outcome. Leaving the legalist paradigm completely behind seems impossible; however, how and to what extent it should be considered is clearly approached by both committees in a different manner.

A CLOSER LOOK: INSTITUTIONAL QUANDARY IN THE NETHERLANDS AND THE UK

This article's final section concerns the institutional predicament that can be detected when one takes a closer look at the establishment of these committees and the changes that have been made over the years. Interesting in this regard are the recent semi-public reviews on the functioning of these committees that coincidentally took place both in the Netherlands¹⁶⁴ and the UK¹⁶⁵ in 2015. The cause for these reviews seems to have been partly related to the protection of public interest in the individual cases that the committees were addressing. In the Netherlands, this again concerned the claims of the Semmel heirs, which were now under the binding expert opinion procedure, as well as the Tokkie case,¹⁶⁶ which shows to

¹⁶²After analogy to the *Bennion on Statutory Interpretation* (Baily and Norbury 2017), for reasons of consistency Woodhead proposes a set of principles derived from past practices, Woodhead 2013, 174–75.

¹⁶³Woodhead 2013, 176.

¹⁶⁴Bureau Berenschot 2015.

¹⁶⁵Jenkins 2015.

¹⁶⁶The review of the RC conducted by Bureau Berenschot, a Dutch management consulting firm, was conducted at the request of the minister. The report identifies the significant substantial changes of policy as of 19 July 2012 as the official cause of the review. Bureau Berenschot 2015, 5. See for the RC's recommendation in the Tokkie case, Recommendation Regarding the Painting Children on the Beach by Isaac Israels, RC 1.149, 20 July 2016.

some extent important similarities with the UK's Tate Gallery/Constable case.¹⁶⁷ Some of the questions raised in the Netherlands as well as in the UK seem to indicate that these committees were especially vulnerable from an institutional perspective and that this vulnerability resulted from their positioning in between these two paradigms. It also seems that in this institutional perspective these committees tend to oscillate between, on the one hand, policy-based, morality-driven loose proceedings (victim groups paradigm) and, on the other hand, a legal emphasis on notions such as independence and impartiality (traditional legalist paradigm). For reasons of clarity, I will provide a few remarks on the meaning of institutional perspective in the context of this article and then will discuss the position of the UK's SAP and the Dutch RC.

In Brief: The Institutional Perspective

The institutional perspective concerns the (legal) instruments used to establish these commissions, their mandate, their composition, and the manner in which their members are appointed as well as procedure. There are certain similarities in the general characteristics of the institutional frameworks of the Dutch RC and the UK's SAP that seem to be the main cause of their vulnerability, and this will be discussed later in this article. A common feature of both the Dutch RC and UK's SAP is that they are government instituted¹⁶⁸ and financially dependent on public funding.¹⁶⁹ Furthermore, in both countries, the composition of these committees remains at the discretion of the executive; thus, members of the committee are appointed and re-appointed by the relevant government minister.¹⁷⁰ In addition, in the actual restitution procedure

¹⁶⁷The review of the SAP denominates two official reasons for the inquiry as it states that the immediate cause for review was the "significant increase" in claims brought to the SAP in 2014, combined with the ongoing appeal in the Tate Gallery/Constable claim. In light of these circumstances, it was deemed "an opportune moment" to review at that particular point in time (para. 3). On enquiry with the SAP on the context of this review, it appeared that this review was conducted as part of a regular and ongoing government program to review public bodies and ensure they continue to operate effectively. Jenkins (2015, para. 5.3), however, mentions that some believe that criticisms on the functioning of the SAP may have played a part in triggering this review. The review was carried out for the first time since the SAP's establishment in 2000, from December 2014 to February 2015.

¹⁶⁸In the Dutch case, by way of a legal instrument (a ministerial order) and in the UK until the Holocaust (Return of Cultural Objects) Act of 2009, the SAP was entirely governed by policy documents.

¹⁶⁹For the RC, see Establishing Decree (2001 as amended in 2012), Arts. 5, 8. The latter article on the fee of the RC's members is explicated in Royal Decree WJZ/2006/18046 (8196), "Besluit vaste beloning Restitutiecommissie," *Staatscourant (Dutch Government Gazette)*, 30 August 2006, no. 168. For the SAP, see SAP ToR para. 5.

¹⁷⁰Recently in the Netherlands, apparently for reasons of transparency and to avoid a system of co-optation that marked the manner of appointments until 2016, new appointments of members transpired via a public selection procedure. Prior to this, an advisory committee was established by the minister in order to draft a profile for future members. See Besluit van de Minister van Onderwijs, Cultuur en Wetenschap van 1 juli 2016, no. 915229, houdende de instelling van de Adviescommissie tot benoeming van leden van de Adviescommissie restitutieverzoeken cultuurgooden en Tweede Wereldoorlog, *Staatscourant (Dutch Government Gazette)*, no. 36823, 15 July 2016.

followed by the respective committees, the executive is involved to some extent. In the Netherlands, the founding decree stipulates that the RC's formal involvement can only be activated after an assent or request of the responsible minister.¹⁷¹ Additionally, when it concerns objects in the possession of the Dutch state (NK collection or non-NK collection), any positive recommendation by the RC has to be endorsed by the Dutch minister in order for the physical restitution to take place.¹⁷² In the UK, a positive SAP recommendation to return an object from the national collection¹⁷³ also requires the approval of the relevant government minister.¹⁷⁴

In the next section, some of the institutional vulnerabilities will be discussed on the basis of these two bodies' caseloads. I have chosen to focus on more or less similar issues in this regard based on recent cases that primarily relate to a lack of procedural clarity and impartiality.¹⁷⁵

Institutional Concerns: The UK's SAP

In a recent case brought before the SAP—the Tate Gallery/Constable case—aspects of institutional vulnerability rose to the surface. In this case, right after the SAP's report was issued in which it recommended restitution, new evidence was brought forward. The Tate Gallery consequently revoked its decision to de-accession the painting to enable restitution due to the new facts, and neither the policy documents¹⁷⁶ nor the Holocaust (Return of Cultural Objects) Act 2009 enabled the possibility of some sort of appeal or reconsideration.¹⁷⁷ The Tate Gallery therefore approached the minister directly since there was a lack of clarity on how to proceed in the matter. It was ultimately decided to ask the SAP to reconsider the claim in

¹⁷¹In actual fact, at the time of the establishment, Parliament asked critical questions on the involvement of the minister as it feared for the independence of the RC. The minister explicitly stated that this construction was the logical choice given the fact that the Dutch state owned the NK collection. The Dutch government must be notified when restitution requests are forwarded; however, the minister explicitly stated it would not act like a sieve but as a mere transfer agency. General Consultation with the Standing Committee of Education Culture and Science, Kamerstukken (Parliamentary Papers) II, 2001–2002, 25839, no. 28, <https://zoek.officielebekendmakingen.nl/kst-25839-28.html> (accessed 26 March 2018).

¹⁷²See note 77.

¹⁷³It must be noted that not all SAP recommendations have to be approved, but only those falling under the 2009 Holocaust Act. However, the panel's reports are presented to Parliament and addressed to the secretary of state. The panel's recommendations are directed to the parties.

¹⁷⁴It must be stressed that in the UK it is ultimately, even after approval by the secretary of state, the prerogative of the trustees of the institution to transfer the object, see Oost 2012, 200–01; on the shortcomings in the SAP's procedure in this regard, see Woodhead 2016, 392–93.

¹⁷⁵It is not the aim of this article to provide an exhaustive discussion. The primary aim is to highlight and explain the institutional predicament.

¹⁷⁶SAP ToR; SAP Rules of Procedure, <https://www.gov.uk/government/groups/spoliation-advisory-panel#panel-reports> (accessed 26 March 2018).

¹⁷⁷Tate Gallery/Constable claim and the second report well over a year and a half later.

light of the new evidence.¹⁷⁸ Although the Tate's Board of Trustees unanimously agreed to follow the SAP's new recommendations in a second report, the 2015 review on the SAP indicated that there were legitimate concerns in this regard. According to the review, "there was widespread concern about 'appeals' or more accurately applications for reconsideration based on further evidence. Decisions on whether a claim should be referred back to the SAP are for the Secretary of State."¹⁷⁹

The review stressed that the criteria for "re-referral" should at least be published, and it therefore pointed out a lack of procedural transparency.¹⁸⁰ The UK SAP's review also paid attention more generally to a perceived lack of transparency or, rather, the "adequacy of public information," as this issue was raised by "numerous consultees."¹⁸¹ Proceeding on the basis of morality and, thus, infused by the new paradigm ended up having its downfalls; it led to a situation where there were no clear guidelines on how to present a case before the SAP, leading to complaints about a lack of transparency and clarity. The same situation occurred with respect to the changes to the SAP's Terms of Reference, which were made "without consultation or adequate promulgation."¹⁸²

The review's recommendations also displayed other aspects of institutional vulnerability. An expansion of the SAP was recommended—that is, that the SAP should no longer sit *en banc* on every claim. The review furthermore called upon the SAP's chairs as well as the secretary of state to be particularly alert for perceptions of bias.¹⁸³ Clearly, these recommendations related to concerns about the impartiality of the SAP. In this regard, the Tate Gallery/Constable case could serve as an illustration. When the first report on the Tate Gallery/Constable case was issued in 2014, the Tate's failure to properly investigate the provenance of the Constable painting was criticized by the SAP.¹⁸⁴ Although the decision of the state secretary to refer the case back to the SAP in light

¹⁷⁸"Minutes of the Meeting of the Board of Trustees of the Tate Gallery Held on Wednesday 18 March 2015," <http://www.tate.org.uk/download/file/fid/50121> (accessed 26 March 2018), para. 11.1. See also Woodhead 2016, 397.

¹⁷⁹Jenkins 2015, 28–29.

¹⁸⁰Jenkins 2015, 29, 6.73, mentioning "re-referral."

¹⁸¹Jenkins 2015, 33, 6.110.

¹⁸²Jenkins 2015, 24, 6.36. Where the first SAP ToR was presented to Parliament, its changes over time were not.

¹⁸³Jenkins 2015, 3, 9 (recommendations), 23–24, 33 (motivated).

¹⁸⁴Tate Gallery/Constable claim, para. 47. Although the SAP recognized that provenance research in 1986, at the time of the acquirement of the work did not "achieve the prominence" it has today, it nevertheless also referred to the Tate's special knowledge of the works of Constable and the growing consciousness about Nazi-looted art and underlined this with the inclusion of a footnote with a lengthy reference to art periodicals that as of the 1980s at the time of the acquirement of the object, show "a concern for the institutional challenges posed by Nazi-related dispersals of art." Such reference in relation to an institution's conduct at time of the acquirement was a first. This critique resonated in the media, see "Tate Halts Restitution Process of Looted Constable Painting," *Artnet*, <https://news.artnet.com/art-world/tate-restitution-constable-looted-282763> (accessed 26 March 2018); "Tate to Return 'Nazi Looted' Constable Painting," *BBC News*, <http://www.bbc.com/news/entertainment-arts-26768932> (accessed 26 March 2018).

of new facts is understandable, one could question whether the SAP was the proper institution to review the case for a second time since its earlier critique of the Tate Gallery may have cast doubts on its impartiality. The critique of the Tate's conduct in its provenance in the context of the claim was of course no surprise, as the SAP, on the basis of Article 7(g) of its Terms of Reference, was obliged to consider whether any moral obligation rested on the institution in terms of provenance research and its conduct in this regard. In the meantime, the SAP's Terms of Reference have been changed, as recommended by the 2015 review,¹⁸⁵ and the reference to the moral obligation of the institution has been dropped.¹⁸⁶ This change aims to clarify that the SAP's review ought to prioritize evidence of spoliation rather than the conduct of an institution.¹⁸⁷ One could argue, in terms of this paradigmatic predicament, that this change emphasizes that the priority should be remedying past injustices. However, it remains to be seen whether this change effectively results in removing the adversarial angle in such disputes; to this point, no new cases have been brought before the SAP after the changes to its Terms of Reference.

Institutional Concerns: The Dutch RC

In the Netherlands, there was also a procedural lack of clarity concerning criteria on re-referral, which was (or attempted to be) addressed as early as 2011.¹⁸⁸ Since that year, in the case of "new facts" or "procedural errors that harm the applicants' fundamental interests,"¹⁸⁹ a revision by the RC is possible.¹⁹⁰ These criteria must

¹⁸⁵Jenkins 2015, 6, 2.28 and the consequent government response to the review of the Spoliation Panel. Department for Culture Media and Sport, "Government Response to the Review of the Spoliation Panel," 13 March 2015, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/415962/Govt_Response_to_SAP_Review.pdf (accessed 26 March 2018). Before, the SAP's ToR, para. 15, provided for an obligatory consideration of the institute's conduct. In the latest version of the SAP's ToR (July 2016) is introduced on the basis of which the necessity of a review of the institution's conduct is left at the discretion of the SAP, when it deems it "necessary" to "arrive at a just and fair recommendation" (para. 16).

¹⁸⁶The SAP's ToR was updated in July 2016, see <https://www.gov.uk/government/groups/spoliation-advisory-panel#panel-reports> (accessed 26 March 2018).

¹⁸⁷Department for Culture, Media and Sport.

¹⁸⁸Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War 2011, 14, referred to as "requests for revised advice."

¹⁸⁹A "revised advice" must not be mistaken for "redoing a case as though an appeal has been lodged," however, the option for a revised advice was created in consultation with the minister. See Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War 2011, 14; 2012, 18.

¹⁹⁰On 4 October 2016, the minister announced that the possibility of appeal would be abolished, arguing that such disputes were better left to the discretion of civil courts. How this will actually transpire is not clear. A strong indication on this end is the RC's annual report of 2016 in which it did not make reference to this decision. Therefore, I will refrain from a discussion in this regard. Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War 2016.

primarily be seen in the context of the RC's task of issuing recommendations, as it proved in the course of 2010 that there was a need in this respect in relation to recommendations concerning the NK collection. However, it seems that the availability of these criteria has not solved the general concerns raised in the UK SAP's review. It seems that these criteria enhanced this vulnerability rather than improving the institutional framework, at least in the case of the Dutch RC. In particular, the second criterion concerning procedural errors harming the applicants' fundamental interests has given rise to problems in one of the claims of the Semmel heirs under the binding expert opinion procedure at the RC.¹⁹¹

As explained earlier in this article, the Semmel heirs brought their first claim before the RC in 2009, regarding an object belonging to the NK collection, in which restitution was awarded. In the following years, other claims were brought before the RC that resulted in binding opinions as those objects were in the possession of parties other than the Dutch state.¹⁹² One of these claims concerned an object that was in the possession of the municipality of Utrecht and on display at the Centraal Museum. In this case, the binding expert opinion given in 2013, which concluded that the object did not have to be restituted, was followed by legal proceedings.¹⁹³ The Semmel heirs contested the decision of the RC;¹⁹⁴ the circumstances of the loss of possession of the object in the 2013 claim were similar to those of the object for which restitution was awarded in 2009.¹⁹⁵ Their discontent was caused by confusion related to the two tasks of the RC, giving recommendations and giving binding opinions, and the different policies that were still applicable at that time to them. In contrast to the recommendation procedure, the interests of the respondent museum under the binding opinion procedure can be considered by the RC, which, in this case, caused the RC to reject the claim for restitution as it decided that the interests of the respondent museum outweighed those of the individual heirs due to distant family relations and a weak emotional link.

How then could these legal proceedings follow since the RC's establishment was linked to the absence of available legal venues in the Netherlands? The answer is simple. In 2007, based on Article 4, section 2, of the RC's Establishing Decree,

¹⁹¹Semmel/Centraal Museum.

¹⁹²Again, it must be noted that the Semmel heirs filed a total of four requests for the restitution of objects not currently possessed by the state as they were all in the possession of municipalities. See note 157.

¹⁹³The Semmel heirs' contestation of Semmel/De Fundatie was to no avail, therefore this case is left out of the discussion. *Heirs v. De Fundatie*, ECLI:NL:RBOVE:2014:3042 (District Court Overijssel, 11 June 2014).

¹⁹⁴Catherine Hickley, "Heirs Outraged as Dutch Panel Rejects Nazi-Era Art Claim," *Bloomberg*, 8 May 2013, <http://www.bloomberg.com/news/2013-05-08/heirs-outraged-as-dutch-panel-rejects-nazi-era-art-claim.html> (accessed 26 March 2018).

¹⁹⁵The circumstances under which the possession of the claimed objects were lost were similar. In both cases, the involved objects were (likely to be) sold at a 1933 auction in the Netherlands. See Recommendation regarding Semmel, paras. 8–9; Semmel/Centraal Museum, para. 3.2.

it was decided that the RC's opinions¹⁹⁶ were legally binding pursuant to Article 7:900 of the Dutch Civil Code.¹⁹⁷ Although it is not clear what guided the RC (and the minister) in this choice, it may well have been the wish to have such disputes settled once and for all and thus seems (at least partly) to be inspired by the legalist paradigm. However that may be, although the relevant procedure requires the mutual consent of both parties to settle a case once and for all, Article 7:904 opens the possibility for judicial review of such binding expert opinions.¹⁹⁸ A judge can quash the opinion if its content is unacceptable by the standards of reasonableness and fairness.

The RC's opinion concerning the Semmel/municipality of Utrecht's claim was indeed quashed by the judge due to fundamental procedural errors. The judge consequently advised the Semmel heirs to take their case back to the RC.¹⁹⁹ In a public reaction to this judgment, the RC's chair was quoted as being a bit "surprised" by the judgment.²⁰⁰ This statement caused the Semmel heirs' legal representative to ask the Dutch minister repeatedly to replace the entire committee since, according to him, the RC could no longer be perceived to be impartial. The lack of perceived impartiality is due not only to the statement of the RC's chairman but also to the fact that the RC itself, consisting of the same members that gave the first binding expert opinion, should have judged themselves on these fundamental procedural errors.²⁰¹ From an institutional point of view, this is indeed problematic. Interestingly, the Dutch review of the RC's functioning seems to underline this conclusion generally, as it stated that the modifications of the RC's institutional arrangement should be considered in order to avoid any appearance of partiality.²⁰²

Furthermore, when one studies the correspondence between the minister and the claimant as well as subsequent letters to Parliament, it is clear that the claimant's complaints in this regard strongly indicate that this institutional vulnerability is mainly due to the fact that from an institutional perspective the position of the RC indeed oscillates in between two paradigms.²⁰³ The Dutch RC seems to be

¹⁹⁶See note 80.

¹⁹⁷Regulations, Art. 2, sub 2 offer an alternative to such binding expert opinions as the RC can also "promote a settlement between parties." It remains to be seen whether this alternative will be used as, to date, the RC has only been asked to give binding expert opinions. See also Campfens 2014, 86–87.

¹⁹⁸It is unclear to what extent the possibility of such judicial review was anticipated at the time.

¹⁹⁹For the judgment of municipal district court of Midden-Nederland, see *Plaintiffs v. Municipality of Utrecht*, ECLI:NL:RBMNE:2014:6833 (District Court Midden Nederland, 10 December 2014).

²⁰⁰Statement in Dutch newspaper. See "Hernieuwde strijd om Van Scorels Madonna," *NRC Handelsblad*, 19 December 2014.

²⁰¹Letter to the Minister of Education Culture and Science from the legal representatives of the Semmel heirs, 16 January 2015 (on file with the author) (Letter to the Minister of Education Culture and Science 2015).

²⁰²Bureau Berenschot 2015, 28, 37–38, 40–44.

²⁰³Documentation provided by the attorney of the claimant in question (on file by author).

perceived by the Semmel heirs as a judicial body, which it is not.²⁰⁴ Especially when the RC was asked to issue a binding expert opinion, it was acting as a neutral third party with the intention of settling such disputes in an alternative dispute resolution process. The Semmel heirs' confusion, though, seems at least partly caused by the fact that the RC, in its task of issuing binding expert opinions, is the only alternative forum available for claimants. From this perspective, the RC seems to have been acting in a manner that Norman Palmer discerns as "an adjudicator, imposing an *ex cathedra* determination," which of course verges on a court-like situation.²⁰⁵ Seen from this perspective, it is not entirely strange that claimants such as the Semmel heirs advanced arguments that one would normally advance if there was a concern regarding the impartiality of the judges in court.

Issues that were similar to those raised by the Semmel heirs were raised in the Tokkie case. The Dutch Tokkie case may illustrate that a lack of transparency adds to the previously discussed institutional vulnerability of restitution committees. The RC had issued a negative advice on the Tokkie heirs' request for restitution due to evidentiary reasons. The claimant, in a television interview in November 2016, consequently claimed that there was a lack of (procedural) transparency at the RC due to a—purported—lack of publicly available information, which was also the case with the RC's English counterpart.²⁰⁶ This lack of transparency fueled subsequent doubts cast by Mr Tokkie, not only on the impartiality of the RC but also on its structural independence, especially in light of its strong ties with the Ministry of Education, Culture and Science. Mr Tokkie's questioning of the structural independence and impartiality of the RC seems furthermore rooted in confusion related to the odd positioning of the RC—in between two paradigms. This confusion is best illustrated by the claimants' letter sent to Parliament on 7 November 2016.²⁰⁷ In the letter, Mr Tokkie stresses that the "Restitutions Committee should be available at all times" to him as a descendent of a victim of the Nazi regime (grandson). From his perspective, the victim group-oriented paradigm

²⁰⁴The heirs advanced several arguments, also in relation to the fact that the RC contacted the institution where the object claimed by the Semmel heirs was held apparently to get a transcript of the judgment of the municipal court. In relation to this course of events, the claimant argued that such a contact is "inconsistent," considering its "judicial function" to unilaterally seek contact with only one of the parties to the dispute. The heirs considered this to be a display of bias by the RC. Letter to the Minister of Education Culture and Science 2015.

²⁰⁵Palmer 2015, 183.

²⁰⁶Recommendation Regarding the Painting Children on the Beach by Isaac Israels. A few months later, the Tokkie case featured in a documentary on the Dutch RC, entitled "The Claim," which was released to the greater public at the Dutch Festival on 5 December 2016 and was picked up by 2Vandaag, a Dutch current affairs television program. The item was broadcast on 16 November 2016 (only in Dutch). See http://cultuur.eenvandaag.nl/tvitems/70427/documentaire_de_zoektocht_naar_roofkunst_wo_ii (accessed 26 March 2018).

²⁰⁷Letter entitled "De ervaring met de Restitutie commissie" ["Experience with the Restitutions Committee"], 7 November 2016 (on file by author). The following quotations are from pages 3 and 4 of this letter.

was disregarded because the procedure at the RC was “formalistic, bureaucratic and cold.” Furthermore, he criticizes the RC for maintaining its independence as a hindrance to the RC’s task of providing a venue for remedying past injustices. The RC should not “function as a court” but, instead, act as a mediator accessible to all parties. Mr Tokkie’s criticism was picked up by several newspapers, showing that the public perception of these committees can easily be adversely affected.²⁰⁸

While the Dutch policy changes in regard to establishing one uniform policy going forward from 19 July 2012 were also motivated by the wish to avoid possible confusion by claimants,²⁰⁹ it remains to be seen whether this uniform policy will solve this confusion.²¹⁰ Where the new venue in the Netherlands is indeed inspired by the victim group-oriented paradigm, it is undeniable that due to the passage of time family relations will become more distant and that moral claims will weaken due to this simple fact. This is even more complicated due to a trend in these cases, as recently recognized by the Dutch minister, where the “tone, content and complexity of restitution requests are changing” and that “procedures that were meant to be easily accessible” are increasingly “juridifying.”²¹¹

CONCLUDING REMARKS

This article started by highlighting the continued attention that has been paid to the subject of Nazi-looted art. Though well over 70 years have passed since the Nazi atrocities, the two main ingredients of cultural objects with added special value and a tainted history that are a consequence of those atrocities

²⁰⁸See, e.g., “Kritiek op Restitutiecommissie rond Idfa-film,” *Parool*, 17 November 2016; “De Claim wordt verdraaid goed verteld,” *De Volkskrant*, 5 December 2016.

²⁰⁹Letter from the State Secretary 2012, 5.

²¹⁰The Dutch review by Bureau Berenschot was presented to Parliament on 4 October 2016, with an accompanying letter from the minister. In this letter, the minister made the principled statement that the restitutions policy’s starting points would undergo no change. However, in light of the review, some changes to the manner of execution/procedure were announced, among other things, and for reasons of transparency a centre of expertise to serve as an information centre for claimants as well as an independent research centre to support investigation into claims. Furthermore, it was announced that the procedure for re-referral would be repealed. How this will actually transpire is still not clear and, therefore, for the most part, has been excluded from this discussion. There has been a development that is worth mentioning in relation to one aspect of the letter. In 2017, the minister decided to ask for advice on a case that was already being considered by the RC and thus proceeded with the procedure for re-referral as developed in 2011. See Recommendation regarding Katz, RC 4:168, 15 November 2017. For the letter, see Letter from the Minister of Education, Culture and Science to Parliament, 4 October 2016, Kamerstukken (Parliamentary Papers) II, 2016–2017, 25839, no. 42, <https://zoek.officielebekendmakingen.nl/blg-784613> (accessed 26 March 2018) (Letter from the Minister 2016); see also Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War 2016, 15.

²¹¹Mainly by the increased involvement of legal representatives (lawyers) that work on a no-win-no-fee basis. Letter from the Minister 2016.

combine to generate a continuing need for proper solutions when conflicts arise over cultural objects. On its own, the substantial amount of time that has passed already makes providing such solutions a difficult task. Since the turn of this century, in both the Netherlands and the UK, solutions have been sought by way of government-installed advisory bodies that aim to provide fair and just solutions. While claimants, without bodies such as the Dutch RC and the UK's SAP, would most likely be left empty-handed due to the restrictions following from the legalist paradigm, these bodies have been subjected to criticism, particularly from claimants. These critiques seem to be linked to a predicament that exists for restitution committees in regard to the shift from a legalist to a victim group-oriented paradigm. On the one hand, these restitution committee foundations and their mandates originated in morality rather than in legality. The starting point for the newly founded venues, in both the Netherlands as well as the UK, are loose proceedings based mainly on policy documents, instead of being based on a proper legal foundation such as legislation. On the other hand, due to the special added value of the objects in question, which often relates to their monetary value in addition to their emotional and historical value, clear foreseeable rules concerning the eligibility of a claim as well as the manner of assessment are also necessary. The legalist paradigm, built upon rules that provide a certain predictability of proceedings and thus legal certainty, is essential. Proceeding on the basis of morality alone is not viable since the structure that comes from a legalistic approach is also required. It is this conundrum that creates the constant tension under which these committees have to proceed.

This article has shown furthermore that both this predicament can be perceived on both a substantive and institutional level when taking the Dutch and UK's restitution committees as an example. From a substantive perspective, in order to achieve just and fair solutions, moral considerations are not enough to properly assess individual claims. For one, this article has illustrated some of the difficulties when assessing individual claims since they could infringe on principles of equality. One of the most pressing examples in this regard is the matter of the earlier-received compensation; whereas the Dutch RC disregards such compensation, the UK's SAP does take it into consideration when assessing claims, which leads to different outcomes in similar cases. I agree with Matthias Weller in this regard that a solution can only be (perceived as) being just and fair when cases that are alike are treated equally and in a predictable manner.

The latter point touches upon the institutional predicament discussed in the last part of this article. Interestingly, in the Netherlands, as in the UK, it was felt that there was a need to review the institutional framework, and this resulted in semi-public reviews. Though officially not given as a reason, it seems that this need originated from criticism or at least public dissension over the lack of clarity in the institutional framework. Indeed, in both countries, there are some

institutional weaknesses in the newly founded restitution venues that seem to be related to this institutional predicament. Driven by morality, the framework within which these bodies operate is intentionally downsized to mere policy documents or, in the case of the Dutch RC, a ministerial order lacking substantive rules. Indeed, something can be said for the lack of clear rules since it provides high levels of flexibility. However, this flexibility has a clear disadvantage: uncertainty. In both countries, uncertainty exists regarding the possibility of the review of an earlier recommendation or of advice given. Although the Tate Gallery/Constable case in the UK was eventually settled to the satisfaction of all involved parties, the 2015 review still demanded more clarity. The clarity given in this regard in the Netherlands, however, has still given rise to problems. Recently, it resulted in the Semmel heirs questioning the independence of the RC, and, in the case of the Tokkie heirs, the decision of the RC was criticized mainly for a lack of transparency. This criticism lies at the core of this article's argument about the predicament of these committees—namely, that procedures for the newly founded venues that are too loose and lacking in clear procedural guidelines and proper instructions on restitution could potentially make it harder to arrive at a publicly and widely supported just and fair solution.

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