



ARTICLE

RETURN OF ARTWORKS TO AFRICA: A LEGAL CONUNDRUM

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The report prepared by Felwine Sarr and Bénédicte Savoy, which was delivered to President Macron on November 23, 2018, recommend that French museums return African artworks to their countries of origin. Easier said than done.

On November 28, 2017, Emmanuel Macron, then visiting Burkina Faso, delivered a bold speech at the University of Ouagadougou in which he declared

"Africa's heritage cannot be found only in private collections and European museums. Africa's heritage must be showcased in Paris, but also in Dakar, Lagos, Cotonou. This will be one of my priorities. I want to see the conditions in place within five years for temporary or definitive restitution of African cultural heritage to Africa."

Less than a year later, Felwine Sarr, an economist at the Gaston-Berger University in Saint-Louis (Senegal) and Bénédicte Savoy, an art historian at the Technische Universität in Berlin (Germany), who were commissioned by the French President last March to study the touchy issue of restitution to Africa, submitted their report. What does this 232-page report contain? What are the legal consequence of its propositions?

While the report mentions the figure of 70,000 African objects currently in the collections of the Quai Branly Museum in Paris, it initially only recommends the return of 25 pieces specifically identified in Benin, Senegal, Nigeria, Ethiopia, Mali and Cameroon, which have been "long claimed by their countries of origin" according to the authors.

Defining restitution

The French Heritage Code defines restitution as the return of property unlawfully removed from the territory of another State back to that State (Article L112-1). The report defines "return" as the act of "returning property to its rightful owner (...) re-establishing the rightful owner of the property in its right of use and enjoyment, as well as in all the prerogatives conferred by ownership". Restitution therefore implies illegitimate property acquired by theft, looting or other illegal act with a vitiated consent. It also requires identifying a legitimate owner to whom the property can be returned.

The report recommends returning not only objects seized as spoils of war by the French and foreign military during the colonial period, but also pieces collected during civil, scientific or ethnographic missions "unless there is clear evidence of the full consent of the owners", those gifted to French museums by agents of the colonial administration "unless the seller's consent can be proven", or any items acquired after 1960 in an unlawful manner.

Shifting of the burden of proof

Mr. Sarr and Ms. Savoy thus assume that all artwork acquisitions in Africa before 1960 have been concluded in an illegitimate manner and shift the standard burden of proof. Under French law, the burden of proof is on the person challenging the validity of the act, whereas the report proposes shifting it on the owner of the object. However, it could prove very difficult for the owner to provide evidence of free consent to the sale for transactions that occurred more than a century ago. Moreover, the authors of the report believe that pre-1960 sales at prices they consider too low could amount to spoliation.

Additionally, the report questions the legality of spoils of war before 1899, when the first Hague Convention eliminated this practice.

Although the authors initially recommend the return of only 25 specifically identified artworks (8 objects from the sack of Abomey in Benin, 3 pieces from the spoils of war taken in Segou in Senegal, 5 objects from the sack of Benin City in Benin, the paintings of the Church of St Anthony in Ethiopia, 7 masks and other objects in Mali and a throne in Cameroon), they then suggest a complete inventory of all African artifacts held by French museums and much larger returns applying the criteria described earlier. Based on these criteria, restitution could eventually extend to most African objects acquired before 1960 and held by French public museums. For the Quai Branly Museum alone, more than 50,000 objects could meet the restitution criteria set out in the report.

Proposed legal mechanisms for restitution

The main legal obstacle to restitution in France is the principle of inalienability of public collections, set out in articles L451-5 of the French Heritage Code and L3111-1 of the General Code of Public Ownership (CGPPP), as well as the principles of unseizability (article L2311-1 of the CGPPP) and of imprescriptibility (article L3111-1 of the CGPPP).

To overcome this difficulty, the report proposes an amendment of the French Heritage Code, by introducing a new restitution procedure for all cultural property coming from former French colonies, protectorates or other French mandates. The procedure would require a prior request submitted by the country of origin of the artwork, which would



then be subject to the opinion of a scientific commission of experts. The report further recommends the adoption of bilateral agreements between France and each of the African countries seeking restitution.

While Benin was the only country to have asked for restitution of its artifacts as of the date of publication of the report, Senegal and Côte d'Ivoire have since demanded restitution of artworks to their country (10,000 objects so far requested by Senegal and 100 objects by Côte d'Ivoire).

Regarding objects included in public collections by gift or bequest, the French Heritage Code provides that those may not be decommissioned (article L451-7 of the French Heritage Code). To overcome this obstacle, Mr. Sarr and Ms. Savoy recommend to "derogate from the Civil Code and override the existence of a gift or bequest, regardless of its history and specific terms, for objects initially acquired without consent (or strongly presumed to have been so) and whose restitution is requested". No further explanation is provided by the authors on the mechanisms to be implemented to achieve this goal.

It is surprising to note the brevity and vagueness of the section of the report devoted to legal aspects (8 pages in the report and 3 pages of annexes out of 232 pages), and the underrepresentation of lawyers in the report's "legal workshop" (two professors of public law and an Italian lawyer for a total of 14 participants).

As the report recommends to pass a new law to allow restitution, it also suggests that the return of objects should start between November 2018 and November 2019. This timetable seems excessively optimistic considering the long and complex procedure to pass a new law in France. First of all, the government must draft a bill, which is then filed in the National Assembly and the Senate, then examined by a parliamentary committee, followed by the appointment of a rapporteur, who establishes a report on the bill, which can be amended, and finally voted on by the two houses (after a back and forth between the houses to decide on any amendments to the bill). After the vote there can be a new reading of the bill, which is then adopted and promulgated as a law. Restitution could only legally start after the conclusion of this process, which could take at least several months to up to years to complete.

By comparison, the *ad hoc* laws adopted in 2002 for the return of the Venus Hottentote to South Africa and in 2010 for the return of the Maori heads to New Zealand took several years to pass.

Furthermore, the bilateral agreements recommended in the report would have to be submitted to Parliament for ratification, and would require passing a law authorizing the ratification, which is also a lengthy process.

Therefore, the legal mechanisms proposed by Mr. Sarr and Ms. Savoy would not allow the quick restitution process they call for.

Moreover, the report does not address how the new scientific commissions of experts in charge of examining restitution requests will work with the existing national scientific commission provided for in articles L115-1 of the French Heritage Code and L.2112-1 of the CGPPP, whose mission is to advise public institutions on the decommissioning or transfer of cultural property belonging to French museums, and to verify that the decommissioning does not unduly affect the national heritage.

Transfers of ownership or long-term loans?

Pending the passing of a law and the signature (and ratification) of bilateral agreements that would allow transfers of ownership from France to the countries of origin, long-term loans could be considered, following the solutions used in the case of Korean manuscripts taken by the French navy in 1866 and kept at the Bibliothèque Nationale de France, which are subject to five-year renewable loans since November 12, 2010 (and for which France retains ownership).

