# Book Review

## Restitution: The Return of Cultural Artefacts by Alexander Herman

**Lund Humphries, 2021, ISBN 9781848225367, 104 pages**

**Leora Bilsky***

Herman's book seeks to identify a new paradigm of restitution and map its evolution in five different areas since the 1990s. This paradigm replaces a legalist approach to restitution with an ethical one.

The first chapter provides a 'negative example'– the long struggle for the restitution of the Parthenon Marbles from the British Museum to Greece that did not succeed. Herman argues that the roots to this failure lie in the fact that both sides cling to a legalist paradigm based on a private law conception of ownership, which dictates the return of cultural material taken unlawfully from an individual, group or nation, according to strict legal rules and procedures. This paradigm decides on the 'exclusive' ownership of such material ('all-or-nothing approach'). Against this 'negative' example, the book as a whole is dedicated to identifying an alternative ethical approach. Such approach rejects strict legalism and mandatory rules in favour of 'soft law', that is principles and guidelines that are voluntarily adopted by the parties. This approach is permissive rather than compulsory, based on principles, encourages transparency and proactive provenance research, and seeks to arrive at 'fair and just' solutions that often involve compromises. Herman shows how the ethical paradigm can overcome difficult legalist obstacles – such as a 'good faith' acquisition, limitation statutes, jurisdiction rules, prohibitions on museums to dispose of items in their collections, and so forth.

Restitution, writes Herman, is rarely simply a question of the physical return of a tangible object or a collection which had been wrongfully taken. The restitution struggles documented in the book, even when promoted by individuals, are the result of a collective/historical injustice. This is why they concern large issues of state sovereignty, cultural identity, history and memory of groups and nations. All this is not new. The difference in the current wave of restitution struggles according to Herman is that they arise not after a war or a revolution, but in times of peace and undertaken by stable, democratic regimes. Previous large-scale restitution efforts were undertaken post-war, after the Napoleonic wars or after the Second World War and the systematic cultural spoliation orchestrated by the Nazi regime throughout Europe. The willingness to

* Professor of Law, Tel Aviv University Faculty of Law; Director of the Minerva Center for Human Rights at Tel Aviv University. I would like to thank Maya Gonen for research assistance.
The Israel Science Foundation supported this research under Grants no. 1163/19.

promote a policy of large-scale restitution post-war comes from the realisation that ordinary laws of private property are ill suited to deal with the scale of spoliation, with the deep involvement of the State and its bureaucratic structures, and most important – because of the involvement of the law. The law, as Herman explains is doubly involved. First, by decreeing or permitting the original spoliation/loot. Second, by imposing barriers for restitution (such as the protection of 'cultural heritage' in museums).

In contrast, the current wave of restitution demands arise many decades after the original injustice (Holocaust, Colonialism). Usually they are addressed to museums and galleries and not to the original wrongdoer. And the claimants are often weak States or heirs of victims demanding return of artefacts from rich/strong States. In short, the difficulty is connected to the 'normalisation' of the historical demands for restitution. How can we give effect to claims rooted in historical injustice – in ordinary times and under normal laws? Put differently, how can we promote 'transitional justice' involving cultural restitutions without/outside a political transition?

The surprising answer that Herman offers is to turn our gaze away from what caught the public's imagination – for example, the struggle over Klimt's *Woman in Gold*, or Schiele's *Portrait of Wally*, legal struggles that involved millions of dollars. Instead, Herman finds his answers in unexpected places – in the decades' long struggle of Indigenous peoples against ex-colonial-settler States such as Canada, the USA or Australia, demanding the return of human remains, ritual objects and masks from anthropological museums and collections. Here, he detects a progressive change – a growing recognition of the injustice, translated into a willingness of museums to take upon themselves research into their collections, the State's enactment of statutes that impose pro-active duties of research and documentation on museums, and providing federal money to support restitution and the creation of new cultural centres for wronged Indigenous communities.

Herman's choice to discuss together restitution struggles that originate from very different historical injustices – settler-colonialism, Holocaust, illegal trade in antiquities – goes against the current. Many books are published today that are dedicated to identifying and explaining the differences: of the historical injustice (Holocaust vs. Colonialism) of the injured community (State, local community, ancient cultures) of the object of restitution (human remains, books or works of art) etc. Herman does not ignore the unique historical and political context of each struggle and devotes a separate chapter to each one. But his book as a whole is dedicated to identifying a new paradigm of ethical restitution, and to exploring its common features. Each chapter ends with lessons for 'successful restitution' that underline these commonalities. These include a piecemeal approach, settlement and compromise, gradual change, preference of scientific/professional level over the political level, collaborative work and pragmatic instead of symbolic struggles. Most important, for Herman, the turn to the ethical overcomes strict legalism and opens up room for creative solutions. Thus, the book draws an optimistic picture and outlines a progressive narrative of how – over time – the adversaries learn the meaning of the object to the identity of the group. It also shows how racist arguments for the taking of the items (such as the cultural inferiority/barbarity of the Other) or paternalistic justifications for their remaining in the museum (the lack of expertise or facilities by the State of origin) give way to a gradual recognition of the importance of cultural heritage to each group, and the need for international collaboration in order to protect culture for the sake of humanity.

The book is to be commended for its contribution to the identification of a new paradigm of restitution and its many advantages. In the remainder of this review I would like to highlight some tensions or questions that are not discussed in the book, as a way of critically evaluating the presuppositions of the 'ethical paradigm of restitution' promoted by Herman.

## Further Reflections

### Cultural Heritage and Transitional Justice

In his book, *Legalized Identities: Cultural Heritage Law and the Shaping of Transitional Justice*,[1] Lucas Lixinski advocates adding the aspect of cultural heritage to the field of transitional justice, a field that has for too long been focused on criminal law and physical injuries. Transitional Justice (TJ) is a field of practice and research which has developed since the 1990s advocating two cornerstones for the establishment of stable democracy – historical truth and accountability for past wrongs (rule of law). To date, the material aspects, concerning issues of cultural heritage, reparations and restitution have not received proper attention. According to Lixinski there is a:

> blind spot in the field of TJ whereby cultural heritage is perceived as an amorphous piece in the puzzle of memorialization, as opposed to a rich and nuanced set of practices, rules, and institutions that can work with or against TJ.[2]

As a result, cultural heritage law was largely ignored by this literature. Lixinski believes that this omission is not accidental, but connected to a 'conservation paradigm' around which the international law of Cultural Heritage has developed since the Second World War.[3] The conservation paradigm means the:

> preservation of heritage in its original form, and it assumes that heritage is a product of the past that needs to be kept in that position lest a sense of loss is experienced, for the appreciation of present and future generations.[4]

As a result the conservation paradigm tends to promote a 'frozen' past over the needs of the present and future and prefers the 'State' over communities. These biases can prove detrimental to the field of transitional justice since the community's culture is often targeted by the State itself, and, as a result, giving the State a monopoly over territorial cultural heritage might thwart the communities' interests in reparation.[5] Moreover, the conservation approach prioritises experts over the community, and does not allow for a non-museum uses of cultural heritage (such as religious rituals, education, distribution etc.).[6]

This tension between State and communities is discussed by Herman in the second chapter of his book which deals with the Indigenous struggles against the settler-colonial State. For example, the Indian Act of 1876 in Canada promoted not only the taking by the State of Indigenous communities' lands, but also assimilation of their children and the

1 Lucas Lixinski, *Legalized Identities: Cultural Heritage Law and the Shaping of Transitional Justice*, (Cambridge University Press, 2021).
2 *Ibid.* at p. 34.
3 *Ibid.* at p. 13.
4 *Ibid.* at p. 37.
5 *Ibid*. at pp. 37-38, and 52-53.
6 *Ibid*, at pp. 16-17 and 46-47.

separation of the group from its cultural artefacts. Change was possible only through the determination and many years of struggle by Indigenous groups against the State. But it also depended on the 'decolonisation' of the law itself.[7] The ethical paradigm in itself, as shown by Herman, could not overcome the structural difficulties standing in the way of reparative justice. However, when Herman moves on from Indigenous repatriation of cultural objects to other restitution struggles – this tension between the State and the community, or the question who should be the proper addressee of restitution – the State or the community seems to fade away.

Two examples discussed in Herman's book can demonstrate this difficulty: the case of Poland and its refusal to restitute Jewish cultural objects and the Germany-Namibia restitution agreement.

**Poland's Resistance to Restitution**

Herman writes:

> In Poland… the prospect of restitution to individual claimants remains dire. While the country had endorsed the Washington Principles in 1998, it has since ignored them and in January 2020 declaration by the Ministry of Culture and National Heritage, has purposely rejected them in spirit. The policy in Poland is to favor the state… both in its attempts to recover looted Polish material abroad and in protecting its own national collections against claims from families or individuals seeking restitution…[8]

Herman presents the Polish stance towards restitution as a failure to adhere to the spirit of the new ethical paradigm. The Polish State relies on the 1998 Washington Conference Principles in order to return looted Polish heritage to its museums, but refuses to respond to Jewish claimants' demands for restitution. In fact, it refuses to allow provenance research into its museums, and has not returned a single item to Jewish claimants. What can explain this failure? Is it simply a type of opportunism, or a sense of victimisation that stands in the way of restitution?[9]

The growing literature on 'democratic retrogression' in Poland and elsewhere points to the 'dark side' that the protection of cultural heritage, and more generally, the misuse of memory laws can play in the process.[10] The need to control the historical narrative by presenting the Polish State as a victim of Nazi occupation, while deliberately ignoring the phenomenon of collaboration and local lootings of Jewish property – raises the stakes for the Polish State in monopolising the control over archives and using cultural heritage to commemorate and promote a one-sided historical narrative.

---

7 Alexander Herman, *Restitution: The Return of Cultural Artefacts* (Lund Humphries, 2021) pp. 22-24.

8 *Ibid*, at pp. 33-34.

9 Herman writes that "the obstinate government response has been that Poland itself was occupied by Germany, and as a victim owes no obligation of return to Jewish claimants", *ibid*. at p. 34.

10 On Poland and memory laws see Lixinski, above, note 1, pp. 179-180; Aleksandra Gliszczynska-Grabias, 'Memory Laws or Memory Loss? Europe in Search of Its Historical Identity through the National and International Law' (2014) 34 *Polish Yearbook of International Law* 161-186. More generally see Eran Fish, 'Memory Laws as a Misuse of Legislation' (2021) 54 *Israel Law Review* 324-339.

**Germany-Namibia: a Successful Restitution?**

Herman writes that:

> In Germany, one priority has been on returning human remains and cultural artefacts to Namibia, once part of the German colony of South-West Africa, where the local population had suffered terribly at the hands of German Imperial forces, most notably during the genocide of the Herero and Nama people between 1904 and 1907. In 2019 the Linden Museum of Stuttgart restituted to Namibia a whip and bible taken in the 19th century from the resistance fighter Hendrik Witbooi.[11]

The Namibian case is presented by Herman as a sign of progress, the willingness of Germany to acknowledge its responsibility for the crimes of colonialism. Indeed, in May 2021 the *Guardian* reported that Germany had agreed to pay Namibia 1.1 billion Euro, and to officially recognise the Herero-Nama genocide.[12] However, the agreement omitted the words 'reparations' or 'compensation' to avoid the use of legal terminology and the establishment of a precedent (and maybe also to distance itself from the Luxemburg Holocaust reparation agreement of 1952), and the payment was characterised as 'development aid'. Moreover, Germany and Namibia refused to include at the negotiation table the Nama and Herero tribes, claiming that they were represented by the Government.[13] Namibian analyst Emsie Erastus in a BBC News op-ed, argues that Germany's apology to Namibia arrives late and represents a 'patronising' approach to development aid. She points out that:

> Jewish victims have been given reparations for the Holocaust, and Ovaherero and Nama communities are grappling with how they can secure the same.[14]

The 1998 Washington Principles, hailed by Herman as promoting a new ethical paradigm of restitution, adheres to the state-centric approach of international law. Even though they were put forward as a correction to the Allies' restitution policy following the Second World War that relied on wholesale restitution to the States of origin. While recognising the individual as a proper claimant, the Washington Principles do not challenge the state-centric approach and continue to give control to the State over the rules and structures of restitution. The Namibian case allows us to see the potential tensions between the 'State' and the 'community of victims' – how States that are responsible for diplomatic negotiation over reparations and restitution might end up silencing representatives of the injured communities. (This is especially so, when the tribes are dispersed among several States and have a large diaspora outside of Africa.) It also shows how Holocaust reparations can stand not as a 'model' conductive for restitution but as a barrier to accountability in other contexts.

---

11 Herman, above, note 8, at p. 29.

12 See Philip Oltermann, 'Germany Agrees to Pay Namibia €1.1bn over Historical Herero-Nama Genocide', *Guardian* (28 May 2021) <www.theguardian.com/world/2021/may/28/germany-agrees-to-pay-namibia-11bn-over-historical-herero-nama-genocide> (last visited 13 March 2022).

13 See Bayron van Wyk, 'Apology and Reparations? Reflections on the Genocide Reparations Agreement between Germany and Namibia', *Rosa-Luxemburg Stiftung* (21 Sept. 2021) <www.rosalux.de/en/news/id/45028/apology-and-reparations> (last visited 13 March 2022).

14 Emsie Erastus,'Viewpoint: Why Germany's Namibia Genocide Apology is not Enough', *BBC News* (1 June 2021) <www.bbc.com/news/world-africa-57306144> (last visited 13 March 2022).

## The Holocaust and the Ethical Paradigm of Restitution

In chapter 4, Herman discusses the restitution struggle that resumed in the 1990s to return Nazi looted art, and which culminated in the 1998 Washington Principles, a major building block in the ethical paradigm of restitution.

Why so late?

According to the prevailing historical narrative, after the Second World War the loss and destruction that Jewish survivors experienced was so overwhelming that their energy was focused on everyday survival and on the collective struggle for reparations.[15] The Allies' policy of restitution which sought to reverse the results of Nazi spoliation throughout Europe by adopting a principle of return to the 'territorial State of origin' was not welcomed by Jewish organisations. On the contrary, the state control over the restitution together with the legalist paradigm, created insurmountable legal obstacles for Jewish organisations and claimants. Thus, the Jewish campaign to return Nazi-looted art was delayed for 50 years. The trigger to renew the efforts was the monetary restitution campaign against German corporations and Swiss banks of the mid 1990s, which led the way to art-restitution struggles. [16] However, the legal obstacles were enormous – limitation periods, jurisdiction of US courts, retroactive change in the definition of genocide etc., On the other hand, the moral claim of the Holocaust art-restitution campaign was strong. Thus, an international consensus developed to overcome legalist obstacles by promoting an ethical paradigm to enable a 'just and fair' restitution.[17] This, in turn, led to the establishment of administrative panels in five West European States – that transform the Washington vision into a practice of large-scale restitution.[18]

It is tempting to endorse Herman's historical narrative of a gross historical injustice leading to a late rectification and restitution. However, this narrative ignores and obscures an earlier Jewish campaign for cultural restitution in the immediate post war. This campaign was initiated and organised by Jewish jurists and intellectuals, and carried forward by Jewish international organisations.[19]

Why should we return to this forgotten early Jewish restitution struggle (forgotten mostly by lawyers and the international community)? Because it can challenge some of the fundamental assumptions of the new ethical paradigm, and present an alternative.

- First, the preference of the State over the community.
- Second, the focus on art works worth millions of dollars.
- Third, the preference for experts over grass-root initiatives.

15 See Michael Robert Marrus, *Some Measure of Justice: The Holocaust Era Restitution Campaign of the 1990s* (University of Wisconsin Press, 2009).

16 On the new paradigm of restitution developed by the transnational Holocaust litigation against Swiss banks and German corporations see, Leora Bilsky, *The Holocaust, Corporations and the Law* (University of Michigan Press, 2017).

17 Principle 8 of The Washington Conference Principles on Nazi-Confiscated Art.

18 Matthias Weller, 'In Search of 'Just and Fair' Solutions', Guide to the Work of the Restitution Committees: Five ways of Resolving Claims, <www.civs.gouv.fr/images/pdf/CIVS-GUIDE-web(dec2019).pdf>, p.10.

19 Leora Bilsky, 'Cultural Genocide and Restitution: The Early Wave of Jewish Cultural Restitution in the Aftermath of World War II' (2020) 27(3) *International Journal of Cultural Property* 349.

In several articles I wrote with Rachel Klagsbrun we examined the Early Jewish restitution campaign in order to distil the outlines of an alternative cultural restitution-model.[20] This model, although critical of the law of restitution, did not abandon a legalist approach in favour of an ethical one, but tried to reform the law to adjust it to the demands of a non-statist group.

On the critical side, the Jewish organisations understood early on the deep involvement of the law, not only in the looting (legal looting under the letter of the law, and without international prohibition), but also in preventing effective restitution. From a Jewish perspective the Allies' policy of returning looted art to its State of origin was seen as particularly unjust. Given the huge category of 'heirless' Jewish property that resulted from the genocide, and given the legal rule of escheat, according to which heirless property returns to the State – Jewish organisations faced a reality in which Jewish property would be returned to the German State, responsible for their annihilation, or to States from which the Jewish population had almost completely vanished. For this reason, Jewish jurists and organisations looked for a different paradigm of restitution – a collective paradigm that could recognise – the Jewish people as the addressee and allow for redistribution. To facilitate this, they created successors' organisations that would act as trustees for 'heirless Jewish property'. And after a long campaign they succeeded in convincing the Allies to recognise these organisations, give their claims priority over the claims of the territorial State, and allow them to redistribute the cultural artefacts to new Jewish centres. Note that although they were critical of the law, they did not seek to move to an ethical paradigm – but rather to change the law of restitution. They fought to replace a 'private property' conception of 'return to rightful owner' – with a distributive justice conception. For this purpose, they promoted an interpretation of the crime of genocide as an attempt to destroy a group not only physically but also culturally, and saw the 'return' of its cultural heritage as meant to rehabilitate the group as such. Another innovation was the attempt to overcome the 'territoriality' basis of restitution in favour of restitution that could follow the Jewish refugees to their new centres in the USA and Palestine. For this purpose they advocated a 'forward looking' restitution instead of a 'return to the *status quo ante*'.

One of the reasons that the early Jewish campaign is forgotten may be its focus on books and archives and not on expensive works of art. Although there were important Jewish collectors of modern art, especially in western Europe, the cultural treasures at the centre of the early restitution campaign were Jewish books and archives of Jewish communities and institutions from East and West Europe. Understanding genocide as targeting the Jewish culture, led to seeing the books as 'transitional objects' carrying the memory of the past and allowing the reconstruction of the communities. Importantly, they rejected a 'museum' type of restitution – because they wanted to let the Jewish communities use the books and religious artefacts according to their needs and understanding. Restitution was understood as a counter-response to genocide – a way to reconnect the people to its

20 See: Leora Bilsky and Rachel Klagsbrun, 'The Return of Cultural Genocide?' (2018) 29(2) *European Journal of International Law* 373; Leora Bilsky, and Rachel Klagsbrun, 'Cultural Genocide: Between Law and History', in *Oxford Handbook of Legal History*, 1081-1094 (Markus D. Dubber and Christopher Tomlins eds, Oxford University Press, 2018); Leora Bilsky and Rachel Klagsbrun, 'Cultural Genocide and Cultural Return: Jewish Polish Comparison', (2021) 43 *Iyunei Mishpat* (*Tel Aviv Law Review*) 553-630 [in Hebrew].

culture in an effort of reconstruction. In other words, they rejected the 'conservation' paradigm that has become so central to international law of cultural heritage. For this reason, the organisation they created was named 'Jewish Cultural Reconstruction' – not Jewish cultural restitution.

Herman does not mention this earlier Jewish struggle in his chapter on Holocaust restitution. Maybe, because it did not focus on works of art, or because it did not culminate in an international treaty or a change of law. It remained a particularistic Jewish struggle that led to *ad-hoc* agreements (with the Allies). But I believe it is important to return to this early struggle because it offers an alternative that might be better suited to the struggles we witness today about the decolonisation of European museums.

The post-war cultural restitution campaign allows us to question some of the assumptions of the current paradigm. One such assumption is the priority given to the territorial State. The second assumption, is the individualist private-property approach over a communal/collective approach. Third, the preference of art experts and cultural institutions over more grass-roots approaches that see restitution as a way for communities to regain agency over their culture and historical heritage. In this respect we see today exciting developments in the cultural field in Africa where we witness cultural activities such as artist collectives together with philosophers and poets who offer a critical perspective on existing practices of restitution, ask about the meaning of the 'void' in their culture and debate how and to whom these objects should be returned.[21] These young people do not wait for answers from experts in Africa or Europe, or for restitution to be completed. Instead they act to make present the 'absences' in their culture, creating critical art that addresses the difficult questions arising from the massive colonial looting. I think we should pay attention to these interventions.

21 See, for instance, the activities of groups such as 'International Inventories Programme' that asks the question 'How can Kenyan cultural objects that are in the possession of cultural institutions in Europe and the US be made accessible in Kenya?' Through a series of exhibitions, a large-scale project of creating a database of objects that originated in Kenya and are now housed in museums in the North/West and other artistic and critical projects, the members of the group try to think alternatively on questions of postcolonial restitution. <www.inventoriesprogramme.org/>, <www.youtube.com/channel/UCEI7xNa6803d_ghA5c-6E4g/videos>. See also the activities of the group 'Talking Objects Lab' which declares: 'The think tank, exhibition and event series TALKING OBJECTS LAB explores plural forms and practices of knowledge of the African continent as well as poly-perspective strategies of mediation and visualization.' Barazani.Berlin and 'the Coalition of Cultural Workers against the Humboldt Forum' act against the Humboldt Forum as a continuation of the colonial system of injustice. <https://barazani.berlin/about>, <https://ccwah.info/>.