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Beyond Property. A Reflection on the Value of Restitution of Looted Cultural Objects

Wouter Veraart*

Angelus Novus, a monprint by Paul Klee, is probably the most widely discussed artwork in the history of philosophy of the twentieth century. The painting, currently part of the collection of the Israel Museum in Jerusalem, has been closely intertwined with the life and work of the German-Jewish philosopher Walter Benjamin. Benjamin purchased the painting in a gallery in München, during a visit to his friend, the philosopher Gershom Scholem, in 1921.¹ Benjamin's interpretation of the artwork in his essay 'On the Concept of History', written in 1940, the year of his death, is well known and very often quoted:

'A Klee painting named Angelus Novus shows an angel looking as though he is about to move away from something he is fixedly contemplating. His eyes are staring, his mouth is open, his wings are spread. This is how one pictures the angel of history. His face is turned toward the past. Where a chain of events appears before *us*, *he* sees one single catastrophe which keeps piling wreckage upon wreckage and hurls it in front of his feet. The angel would like to stay, awaken the dead, and make whole what has been smashed. But a storm is blowing from Paradise; it has got caught in his wings with such strength that the angel can no longer close them. The storm irresistibly propels him into the future to which his back is turned, while the pile of debris before him grows skyward. *This* storm is what we call progress.'²

This passage is often mentioned in debates on historical memory and the unjust past³, but rarely used in debates around restitution of Nazi-looted cultural objects, let alone of colonial objects. There are good reasons to do so today. First of all, this passage deals with *restitution*. The angel of history, turned towards the past, desires to *undo* the wrongs committed. In the second place, the angel's endeavour to correct past wrongs is related to both human *subjects* and material *objects*: he would like to awaken the dead *and* to make whole what has been smashed. In the third place, the angel's mission is apparently doomed to fail. However, whereas awakening the dead is impossible in an absolute sense, at least for an angel – the restoration of what has been smashed is blocked by *an external force*: a storm

* Professor of Legal Philosophy, Vrije Universiteit Amsterdam. This lecture has been presented on 11 December 2019 at 'The Restitution Dialogues: A Transnational Conversation on Cultural Loss, Return and Renewal', Faculty of Law, Tel Aviv University, 11-12 December 2019. An earlier version of this lecture was delivered on 2 December 2019 at 'Restitution of Colonial Collections in Europe. Possibilities, Challenges, Dilemma's', Faculty of Arts and Philosophy, Ghent University, 2-3 December 2019. With special thanks to Sarah Malko and Marc de Wilde for their input and remarks.

¹ Gershom Scholem, *Walter Benjamin und sein Engel. Vierzehn Aufsätze und kleine Beiträge*, Frankfurt am Main: Suhrkamp Verlag 1983, p. 44-45.

² Walter Benjamin, 'Über den Begriff der Geschichte' [1940], in: W. Benjamin, *Illuminationen*, Frankfurt am Main: Suhrkamp 1977, p. 255. Translation Harry Zohn, with modifications WV.

³ See e.g. John Torpey, *Making Whole What Has Been Smashed. On Reparation Politics*, Cambridge Mass.-London: Harvard University Press 2006, p. 11-12; 92; Michael Rothberg, *Multidirectional Memory. Remembering the Holocaust in the Age of Decolonization*, Stanford: Stanford University Press 2009, p. 43-44, 133; Berber Bevernage, *History, Memory and State-Sponsored Violence. Time and Justice*, New York: Routledge 2012, p. 1-2.

blowing from paradise, which has got caught in his wings and propels him towards the future.

Let us try to connect these three aspects. Benjamin's angel of history takes his time to pause and to look backwards, in an endeavour to undo the unjust past. Not able to revive the dead, he might be able to restore what has been broken; but an external force, called progress, prevents him from doing so. Benjamin's angel therefore certainly cannot fulfil the promise of a *restitutio in integrum* or *Tikkun*, a notion which in the Kabbalist tradition is understood as the 'universal restoration of all things' or 'the return of all things to its proprietor'.⁴ But the impotence of the angel in this theological regard does not imply that he cannot do anything at all. The struggle of Benjamin's angel resembles the human struggle whenever societies are confronted with a legacy of past injustice. Earlier in his essay, Benjamin refers to this responsibility when alluding to a 'secret agreement' between earlier generations and the present one: 'Like every generation that preceded us, we have been endowed with a weak messianic power, a power on which the past has a claim. *Such a claim cannot be settled cheaply.*'⁵

If we were to take this claim seriously, how could the present generation respond to such a claim in a meaningful way – that is, not cheaply? In my reading of Benjamin, it is clear that cultural objects must play an important role in any process of restoration worthy of the name. Many of these objects are still here, at one point pillaged or looted, acquired under duress or force, and subsequently sold, stored or even exhibited in collections across the world. These must be the material objects which in Benjamin's text are repeatedly designated as 'treasures', 'spoils' or 'war booty':

'Whoever has emerged victorious participates to this day in the triumphal procession in which today's rulers tread over those who are sprawled underfoot. The spoils are, as was ever the case, carried along in the procession. They are known as cultural objects, and a historical materialist views them with cautious detachment. For in every case these cultural objects have a provenance which he cannot contemplate without horror.'⁶

In the remainder of this lecture, I would like to explore the responsibility of the current generation with regard to these cultural objects a bit further. But first, let us briefly have a closer look at Benjamin's concept of cultural objects. In one of his other essays, Benjamin gives the following definition of the authenticity of cultural objects:

'The authenticity of a thing is the essence of all that is transmissible in it from its origin, ranging from its material duration to its acting as a witness of history.'⁷

⁴ Walter Benjamin, *The Arcades Project* (N, 1a, 3), New York: Belknap Press 2002, p. 459; Walter Benjamin, 'Theologisch-politisches Fragment', in: W. Benjamin, *Illuminationen*, Frankfurt am Main: Suhrkamp 1977, p. 262; Scholem, *Walter Benjamin und sein Engel*, p. 66; Richard Eldridge, 'Benjamin's Modernism', in: R. Eldridge, *Images of History: Kant, Benjamin, Freedom and the Human Subject*, Oxford: Oxford University Press, p. 103-104.

⁵ Benjamin, 'Über den Begriff der Geschichte', p. 252. Emphasis WV.

⁶ Benjamin, 'Über den Begriff der Geschichte', p. 254. Translation Lloyd Spencer, with modifications WV.

⁷ Walter Benjamin, 'Das Kunstwerk im Zeitalter seiner technischen Reproduzierbarkeit', in: W. Benjamin, *Illuminationen*, Frankfurt am Main: Suhrkamp 1977, p. 140. Translation WV.

Let me give an example of how this definition could be of relevance for us today. A friend of mine in Amsterdam inherited a silver object from her grandmother's estate in 2010. It is a cake server, an object of use with no particular cultural value. However, this is one of the few silver objects my friend's grandmother, a Polish-Jewish woman named Dora Malko, took with her on her flight from the Warsaw Ghetto in German-occupied Poland during the Second World War. By selling some of these objects she managed to flee to the east and to survive persecution and war. After the war had ended, there were two items left she had not sold, and this cake server was one of them. For my friend this tangible object is what remains from her grandmother's life before her flight from the Warsaw Ghetto. The cake server, still used sometimes, constitutes a precious and enduring fragment of this former life. It is precisely its material durability which makes this object irreplaceable as a witness of history, to borrow Benjamin's terms.

Benjamin's definition of the cultural object as a witness of history is a beginning of an answer to the question of *the value of restitution* of looted cultural objects, in contrast to alternative solutions, such as offering replica's or compensation. And what counts for an object of use, applies even more to objects with a particular cultural or religious significance. Being deprived of cultural objects directly hurts those affected by it in their possibilities of being human. If one cannot awaken the dead, the restitution of the cultural object may reconnect the living heirs (descendants) with a history which otherwise may be irretrievably lost. In this light, cultural objects are not mere objects, but also subjects in their own right. Or, to put it slightly differently: human subjects and cultural objects are mutually constitutive. It is within their open and dynamic relationships that life on earth acquires its meaning.

Reflecting on the current predicament of the so-called Benin Bronzes – the thousands of invaluable royal and sacred objects looted by British military forces during the sacking and burning of Benin City, capital of the Edo Kingdom (in present-day Nigeria) in 1897 – the Nigerian professor of law Folarin Shyllon remarked a decade ago: 'The refusal to return such cultural objects is tantamount to keeping a people's history and heritage in captivity. And there is no doubt that the colonial powers knew the import and the devastating effect of the removal of irreplaceable cultural heritage.'⁸

Shyllon's forceful remark hints at the fact that in contexts of genocide or crimes against humanity, there is always a narrow link between the physical destruction of a people and the looting of its cultural objects.⁹ It is the concept of 'captivity' that Shyllon uses that I would like to highlight here. The Benin objects are still held in *captivity* – as cultural prisoners of war – in a large number of Western museum collections. The fact that their present guards are also *captivated by them*, is one of the main obstacles in the long quest for restitution.

⁸ Folarin Shyllon, 'Unraveling History. Return of African Cultural Objects Repatriated and Looted in Colonial Times', in: James Nafziger and Ann Nicgorski (eds.), *Cultural Heritage Issues. The Legacy of Conquest, Colonization and Commerce*, The Hague: Martinus Nijhoff 2009, p. 163.

⁹ Hannes Hartung, *Kunstraub in Krieg und Verfolgung, Die Restitution der Beute- und Raubkunst im Kollisions- und Völkerrecht*, Berlin: De Gruyter 2005, p. 226-227.

Benjamin's own longstanding relation to the Klee painting *Angelus Novus* offers a moving example of the entanglement of human subject and cultural object. According to many commentators Benjamin's spirit was concentrated in this painting – 'he had possessed it like it possessed him, because he was possessed by it' as one of them put it¹⁰ – or, in Scholem's words, Benjamin's life 'took place in its saturnic light'.¹¹ During his exile in France and under threat of persecution by the Nazi's, Benjamin considered selling the painting, his one and only valuable possession. With the proceeds from the sale, he planned to finance his future stay in the United States, or pay the costs of his projected flight.¹²

But Benjamin postponed the decision, hesitated, could not separate himself from it¹³ – in any case did not succeed in selling it – and his belated flight ended in suicide, in September 1940, in the Pyrenees, in a small border town on the French-Spanish frontier. At that moment the painting was, at Benjamin's request, hidden by the French philosopher Bataille at the *Bibliothèque Nationale* in Paris. In the immediate post-war period, the Klee-painting went to the philosopher Adorno, another of Benjamin's friends.¹⁴ A few years after Adorno's death in 1969 it went, not without controversy, to Scholem. In 1987, after Scholem's death, it was donated to the Israel Museum in Jerusalem.¹⁵

Suppose that Benjamin had in fact sold the Klee-painting in order to pay for his flight. In that case the artwork would have been qualified as a 'forced sale', since the artwork would have been sold under the threat of persecution, deportation and murder during the Second World War.¹⁶ In the last decades, a number of countries have set steps to enable the return of Nazi-

¹⁰ Roland Lambrecht as quoted in Verena Lenzen, 'Benjamins Engel', in: Jochen Sautermeister (ed.), *Verantwortung und Integrität heute*, Freiburg-Basel-Wien: Herder 2013, p. 443. See also Howard Eiland & Michael W. Jennings, *Walter Benjamin. A Critical Life*, Cambridge Mass.-London: The Belknap Press of Harvard University Press 2014, p. 694 (fn 24), quoting Charlotte Wolff: 'He had a personal relationship with this picture, as if it were part of his mind.'

¹¹ Scholem, *Walter Benjamin und sein Engel*, p. 68.

¹² Uwe Steiner, *Walter Benjamin. An Introduction to His Work and Thought*, Chicago-London: The University of Chicago Press 2010, p. 165-166;

¹³ Lenzen, 'Benjamins Engel', p. 443; Walter Benjamin, letter to Stephan Lackner, Paris, 5 May 1940, in: Walter Benjamin, *Gesammelte Briefe. Band VI. 1938-140*, Frankfurt am Main: Suhrkamp Verlag 2000, p. 442: 'As for me, the moment when I would leave Europe does not seem close to me at all. If ever the difficulties that oppose it are overcome, it will require a long chain of effort. This brings me back to the Klee painting about which you were kind enough to inquire. This picture being the only important and realizable object that has remained to me, I have the greatest hesitations to dispose of it to provide for ordinary expenses. It is precisely the Klee I have always counted on in the event I would reach America. Since this day is not yet in sight, I would not want to give in to the temptation to sacrifice this canvas to deal with transient difficulties.' Translation (from French original) WV.

¹⁴ This is how Scholem relates the story in Scholem, *Walter Benjamin und sein Engel*, p. 45. However, according to another, recent theory the painting would have reached Adorno already in 1941. See Reto Sorg, 'The Angel of Angels. Paul Klee's *Angelus Novus*', in Michael Baumgartner e.a., *Paul Klee: The Angels*, Bern: Hatje Cantz, 2012, p. 126-127.

¹⁵ In 1969 the painting was also claimed by Walter Benjamin's son Stefan. Scholem's claim to the painting was based on Walter Benjamin's unpublished and little known will from 1932. Only after Stefan's death in 1971, the painting went to Scholem. For details, see Sorg, 'The Angel of Angels', p. 125-128; Carl Djerassi, *Four Jews on Parnassus. A Conversation. Benjamin, Adorno, Scholem, Schönberg*, New York: Columbia University Press 2008, p. 79-84; Scholem, *Walter Benjamin und sein Engel*, p. 145; Juri Steiner & Armin Kerber, *Lost Paradise: The Angel's Gaze*, Bern: Zentrum Paul Klee 2008, p. 53-54.

¹⁶ If Benjamin had been able to flee to the United States and had subsequently sold the artwork to pay for his daily existence over there, then the artwork would have been qualified as *Fluchtgut* (flight good), pertaining to

looted artworks to heirs of former, mostly Jewish owners, by the establishment of restitution panels and a relaxation of the rules – a reduction of the burden of proof and a lifting of legal time bars. According to the Washington Principles of 1998, steps should be taken to achieve ‘fair and just solutions’ with regard to ‘art that had been confiscated by the Nazis and not subsequently restituted’.¹⁷

I cannot go into any details, but this internationally mobilized effort to overcome legal obstacles and to set steps to provide for the return of Nazi-looted artworks or to find alternative solutions has proven to be comparatively successful – notwithstanding the complexities, national and local differences, criticisms and disappointments which are also part of this history. What has been successful is the fact that in a number of countries specific procedures have been laid down which are based in the law itself. The commitment to achieve a fair and just solution is, in other words, not gratuitous – as an act of charity would be – but effectuating a change within the heart of these legal systems.¹⁸ Thus, not only the image of history is changed, but the law of the land is changed as well: two parameters we should keep in mind when reflecting on restitution.

In order to be successful, the criteria for restitution need to be clear and concentrate on, firstly, the tainted provenance; the moment of involuntary loss – the instance of looting or sale under duress, especially in a context of genocide or crimes against humanity – and, in the second place, the absence of an act of restitution or proof of an alternative solution afterwards. Of course, each and every case should be dealt with individually, with much attention paid to its specific historical and present circumstances, implying some balance of interests as part of the decision making process.

However, even if the *value* of restitution appears to reside in the restoration – or better: renewal – of a broken relation between a human subject or subjects (the heir, the descendants, et cetera) and a cultural object, *the nature of this relation itself* should, I believe, *not* serve as a separate criterion or benchmark of the assessment framework. To give only one example: suppose that a restitution panel would deny the return of a cultural object to a claimant with the argument: this object has been looted in the context of genocide. It has never been returned. However, we deny restitution, because you are only a distant relative and we do not have the impression that this object is really valuable or meaningful to you. At this point, restitution seems to transform from a legal-moral obligation in response to the most serious crimes into a rather paternalistic act of charity. It

sales effectuated outside Nazi-occupied territory. I am grateful to Matthias Weller for a clarification on this point.

¹⁷ Washington Conference Principles on Nazi-Confiscated Art, 3 December 1998 (in particular principle 8), available at <https://www.lootedartcommission.com/Washington-principles> (consulted December 2019).

¹⁸ Tabitha Oost, ‘Restitution Policies on Nazi-Looted Art in the Netherlands and the United Kingdom: A Change from a Legal to a Moral Paradigm?’, *International Journal of Cultural Property* (2018) 25: 139–178, at 173: ‘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 [restitution] committees have to proceed.’

is no co-incidence, I believe, that precisely this aspect has led to a heated debate around a recent binding opinion of the Dutch Restitutions Committee.¹⁹

Developing exceptional procedures to deal with the restitution of Nazi-looted cultural objects is one thing, dealing with demands for the restitution of looted cultural objects in territories of the former colonies is clearly something else. Why is it, that positive developments around restitution of Nazi-looted cultural objects – even after the speech of the French president Macron in 2017²⁰ and the Sarr-Savoy report in 2018²¹ – have not yet been followed by restitutions of any significance of ‘colonial’ cultural objects?²²

A reason for this may be that it is easier to respond to an exceptional situation (World War II) than to a more or less permanent situation of colonial injustice which was legally normalized and existed for centuries in large parts of the world. A situation in short – to quote Walter Benjamin once more – in which ‘the state of exception was the rule’ for millions of people over many generations.²³ Undoing cases of colonial injustice means addressing a past based on a legalized structure of racial inequalities and deeply entrenched patterns of deliberate and ruthless exploitation of human subjects *and* destruction of their cultural and ecological environments. These colonial legal structures may belong to the past, but this past is in a legal sense still very much in place.²⁴ It is no accident that many of the obstacles on the road to restitution of African cultural objects have a legal character. Principles as the non-retro-activity of treaties prevent access to justice, even with regard to atrocities which did occur in the middle of the twentieth century. Western museums have changed their discourse with regard to the colonial past and their collections, but they still try to avoid any *legal* solutions – proclaiming ethical guidelines which leave the ‘ownership issue’ aside and propagating shared heritage as the way to move forward. Many existing guidelines strike me as paternalistic, still referring to colonial legalities or demanding proof of a ‘living tradition’ or a ‘genuine cultural link’ from claimants – benchmarks which, as I indicated already, strike me as highly problematic.²⁵

To come to an adequate response to evident cases of colonial injustice, steps should be taken to legally recognize the illegality of the most obvious colonial crimes against humanity, starting with those which occurred in the late nineteenth and twentieth centuries. In these

¹⁹ Catherine Hickley, ‘Dutch policy on Nazi-loot restitutions under fire’, *The Art Newspaper*, 21 December 2018, available at www.theartnewspaper.com (consulted December 2019).

²⁰ Emmanuel Macron’s Speech at the University of Ouagadougou, 28 November 2017, available at www.elysee.fr (consulted December 2019).

²¹ Felwine Sarr & Bénédicte Savoy, *The Restitution of African Cultural Heritage. Toward a New Relational Ethics*, Paris, November 2018.

²² Farah Nayeri, ‘France Lags on Return Of Looted African Relics’, *New York Times*, 26 November 2019, Section C, p. 2.

²³ Benjamin, ‘Über den Begriff der Geschichte’, p. 254: ‘The tradition of the oppressed teaches us that the “state of exception” in which we live, is the rule.’ Translation WV.

²⁴ Brenna Bhandar, *Colonial Lives of Property. Law, Land, and Racial Regimes of Ownership*, Durham-London: Duke University Press 2018, p. 181-200.

²⁵ For an example, see the recent ethical guidelines of the Dutch National Museum of World Cultures: ‘Return of Cultural Objects: Principles and Process’, National Museum of World Cultures, 7 March 2019, in particular sections 4.2.1 and 5.3.3, available at www.tropenmuseum.nl (consulted December 2019).

cases independent restitution panels would need to be established, leaving much room for the input and desires of representatives of the specific claim communities involved.

Any act of restitution or alternative solution in these cases should produce a change of the image of history and a change within the law itself. In order to make progress, legal discourse should no longer only be used to deny claims, but, much more creatively, offer innovative remedies to address these wrongs in flexible and thought-provoking ways. Only a form of legal inclusion can offer a sensible answer to the legal wrongs of the past, and open up new ways of living together on a planetary scale– in which basic legal concepts such as ‘ownership’ and ‘property’ may open up and acquire different meanings.

These preliminary thoughts do resonate, I hope, with the interesting series of lectures on restitution recently given by the Cameroonian philosopher Achille Mbembe in South Africa and elsewhere.²⁶ In one of last year’s restitution debates in Germany, Mbembe referred to his close colleague, the Senegalese philosopher Felwine Sarr (co-author of the Sarr-Savoy report) to explain why a legal approach of restitution issues really matters. I would like to end my talk today with his remarks:

‘Even if you believe in circulation, restitution is a necessary step towards circulation. Because you can only set in circulation what belongs to you. You have to solve this question of to whom these objects belong. That is his [Felwine Sarr’s] take. [...] Cornerstone is to respond to the question: who are the legal owners of these objects? It does not foreclose circulation.’²⁷

²⁶ See Achille Mbembe, ‘On the Restitution of African Art Objects. Three Lectures’, Wits Institute for Social & Economic Research (WISER), University of the Witwatersrand, 6, 13 and 20 March 2019, available at <https://archive.org/details/MbembeOnTheRestitutionOfAfricanArtObjects> (consulted December 2019).

²⁷ Achille Mbembe, ‘Memory and Restitution’, Museum Conversation in Rautenstrauch-Joest-Museum, University of Cologne, 18 June 2019, available through <http://amp.phil-fak.uni-koeln.de/9279.html>, at 31:28-32:12 (consulted December 2019).