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Vanessa Tünsmeyer

Repatriation of Sacred Indigenous Cultural Heritage and the Law

Lessons from the United States and Canada

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Preface

Recent discussions on the return of colonial heritage located in European museums have reminded me frequently of discussions, narratives, articles and books I read on the subject of repatriation in the context of Indigenous Peoples.[1] While not everything is the same, neither in lived experiences nor legally, there are enough similarities to make it worthwhile to take a deeper look at the repatriation of heritage to Indigenous Peoples in legal systems outside of Europe. I hope that by looking at this topic through the lens of human rights the discussion will be of use not only to us in Europe, but also to those of you who have been engaging with this topic in their own countries and institutions for some time already.

As diverse as the legal systems and geographical locations that we find ourselves in are, so are the backgrounds that shape us and the way in which we approach each other. It is quite clear to me that the question of dispossession of heritage is only a small piece of the past and present experience of Indigenous Peoples. The journey towards decolonization—and I often fear that we are still on the road struggling to achieve it—does not end with a ceremony in which heritage is handed over and apologies are made.[2] However, cultural heritage can be a good entry point for many of us to consider our (colonial) past. When we visit museums, we can ask ourselves how did this object come to be here? What do I feel about it being here? Do I know some of what the object has witnessed? Each piece of heritage becomes a microcosmos that showcases many of the difficulties, pain, suffering, and the continuing tension that surrounds our shared past. It is also a lens through which we can approach legal questions: Who do we call the 'owner' of the heritage in question? Why? Which cultural tradition are we applying when we begin to talk about the ownership of heritage in the law, whether it is religious heritage or not? Why do we accept that the legal rules continue to have the effect of cementing past wrongs?

[1] Please note that this preface adopts the capitalization of the terms Indigenous Peoples and Indigenous (except for when used in citations) for reasons explained in Chap. 1.

[2] The latter still seems to be a problem for numerous institutions and countries by the way.

Suffice to say, there is more to each object and more questions to be asked and answered than I could possibly hope to answer in this volume.

Yet, by presenting my research and analysis of the legal experiences in repatriation that exist already, contrasted with the advances we have made so far in Indigenous rights on the international (legal) level, I can highlight some of the possibilities that exist. I believe that the law (if we can speak of it as an entity) can be used to enable us to meet each other with respect rather than as an excuse or obstacle to repatriation, and possibly reconciliation. Ultimately, my wish is of course that my work will be of help to Indigenous Peoples and other actors who are engaged in this process.

Lastly, I also hope that the ongoing conversations on repatriation can be an opportunity to take a step back, evaluate our shared history and look honestly, humbly and respectfully at past wrongs and how they continue to shape the present. I know that delving into the issue of repatriation was such a moment for me. It is a road of learning, which does not have a clear ending in sight. To confront one's own history, and even scientific discipline, and to see the continuing influence of colonial experiences and mindsets is sobering. For this reason, I would like to thank you, my reader, for picking up this book, and for deciding to walk a bit of this path with me. I hope we can continue to learn together. I am always open to reflection, critical comments, questions and suggestions.

Maastricht, The Netherlands Vanessa Tünsmeyer

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List of Select Abbreviations

ADRM	American Declaration of Rights and Duties of Man
AIRFA	American Indian Religious Freedom Act
ARPA	Archaeological Resources Protection Act
BIA	Bureau of Indian Affairs
CERD	Committee on the Elimination of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CMH	Canadian Museum of History
CPEIA	Cultural Property Export and Import Act
FNSCORA	First Nation Sacred Ceremonial Objects Repatriation Act
HRCee	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
NAGPRA	Native American Graves Protection and Repatriation Act
RAM	Royal Alberta Museum
RBCM	Royal British Columbia Museum
RFRA	Religious Freedom Restoration Act
SCC	Supreme Court of Canada
SCOTUS	Supreme Court of the United States
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization

Chapter 1
Introduction

1.1 Current Claims for Indigenous Cultural Heritage in Museum Collections

1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; [. . .] the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.
2. *States shall seek to enable the access and/or repatriation of ceremonial objects* and human remains in their possession *through fair, transparent and effective mechanisms* developed in conjunction with indigenous peoples concerned.—Article 12 of the United Nations Declaration on the Rights of Indigenous Peoples (adopted in 2007, emphasis added)

I believe, in line with the Commission's first recommendation, that by taking possession of cultural goods against their will, the original population of the colonial territories has been wronged.[1]—Ingrid van Engelshoven, Dutch Minister of Education, Culture and Science, 2021

Many (Indigenous) objects that are currently located in museums have a tumultuous, even violent history. Invasions, armed conflicts and other forms of violent clashes between different cultures have been the setting for the collection and exportation of cultural objects out of their original and into a new cultural context. This has happened on a massive scale during different historical periods, notably during

[1] I. van Engelshoven, Beleidsvisie Collecties uit een koloniale context (29.01.2021) [Letter of government, Appendix], p. 4. Retrieved from: https://www.rijksoverheid.nl/ministeries/ministerie-van-onderwijs-cultuur-en-wetenschap/documenten/kamerstukken/2021/01/29/beleidsvisie-collecties-uit-een-koloniale-context. Unofficial translation, original quotation: "Ik ben van oordeel, in lijn met de eerste aanbeveling van de Commissie, dat door het tegen hun wil in bezit nemen van cultuurgoederen, de oorspronkelijke bevolking van de koloniale gebieden onrecht is aangedaan." [last accessed 30.07.2021].

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European colonialism, beginning in the fifteenth century.[2] Members of the civil and military services of European colonial powers, such as the Netherlands, Great Britain or Germany, took objects for private or governmental collections or sold or donated cultural heritage to other collectors. This history of cultural dispossession also occurred under settler colonialism in countries such as the United States or Canada. Objects may have been taken violently, under duress, in accordance with colonial legislation but in unequal power relationships, or they may have been part of a sale or gifts between parties.[3] All of these modes of acquisition have to be evaluated against the colonial (legal) background that created significant power inequalities between the parties. Current museum collections remain as evidence of such practices, for example in the British Museum or Dutch colonial collections of Indonesian and Benin objects.[4] These are subject to international claims for their return, issued by governments, museums or individuals of former European colonies.

Within former settler colonies, the claims for the return of Indigenous heritage (referred to as repatriation, see Sect. 1.4.1) by Indigenous communities cover cultural heritage located abroad and located in museums that are situated within the same country as the community. Both private and public collections encompass cultural heritage of mixed origins: some may have been legally owned (gifted or purchased) at a certain point in the past, others may have been taken against the will of the owner or maker. These objects can thus be legally owned by a museum today, but may originally have been taken from their owner or creator by illegal or unethical means. Due to the nature of the art market (longevity of the object and trade in the object) we, as a society, are thus continuously confronted with the question: how did an object arrive in a collection? Should a certain piece of cultural heritage be returned? And, if yes, to whom?

Recent decades have witnessed a growing trend of a critical examination of colonial collections and a confrontation with these questions in the wider museum community and public debate that has finally entered the wider European debate. Calls for returns of colonial-era heritage occurred first in connection with the decolonization wave in Africa,[5] then in the context of settler colonialism, notably

[2] Other historical examples are Hitler's specific targeting of art collections all over Europe or Napoleon's collection of art for the glorification of France. Looting of cultural objects during conflict has a long history, we can even read of Caesar's looting campaigns in the poet Virgil who rhymed "*Mighty Cæsar, thund'ring from afar, Seeks on Euphrates Banks the Spoils of War*" Virgil (1792), line 809–810. For a long time, looting was considered a right of the warring parties, the *ius praedere.* W. Kowlaski views 1815 and the end of the Napoleonic wars as a fundamental date which marked the emergence of a generally accepted ban on looting, Kowalski (2005), p. 87. See also Lubina (2009), pp. 54–55.

[3] For another typology see van Beurden (2017), p. 41.

[4] van Beurden (2014). For a general overview of different colonial takings and return proceedings, see van Beurden (2017).

[5] As exemplified by the famous speech of the Senegalese Director-General of UNESCO Amadou-Mahtar Mbow 7.06.1978.

in the United States, with the adoption of a law facilitating the return of human remains and sacred objects in 1990.[6] Finally, the discussion on returning colonial (including Indigenous) heritage recently regained momentum in Europe. In 2017, newspapers all across the globe reported on Emmanuel Macron's pledge to return colonial heritage to African countries.[7] "France", it has been observed, "has electrified an old debate by pushing to repatriate art works".[8]

Current examples of international requests range from requests to return works of art looted from Royal Palaces of Abomey in Benin to requests by Rapa Nui elders for the return of important statues.[9] Macron has called for the necessary legal changes to be made to French heritage legislation to enable the return of colonial heritage. A report by the French art historian Bénédicte Savoy and the Senegalese economist Felwine Sarr, commissioned by Macron, called for developing new "relational ethics" between France and Africa through the restitution of African cultural heritage that is hoped to have a much larger greater impact on the relationship between the two continents.[10]

In Germany, the discussion has arisen anew both in the context of establishing the Humboldt Forum and the call by Hermann Parzinger for rules on the restitution of colonial objects.[11] In April of 2021 the German government announced an update on their part of the Benin dialogues, including a timeline for publishing details on Benin bronzes in public collections online and a confirmation of their intention to return the bronzes in 2022.[12]

In the Netherlands, several initiatives are underway.[13] Most well-known has been the recently issued by an advisory body to the Dutch government on a future framework policy for colonial collections.[14] The minister has stated her intention to largely follow the advice and to act upon the recommendations of the commission[15] and, as indicated in the quote at the beginning of this chapter, will proceed with the admission and understanding that the original population was wronged by the taking of heritage during colonialism. At the time of editing this volume it is still too early to evaluate the outcome of this process. The Rijksmuseum started with provenance research into parts of its collection, as well as engaging in talks with

[6] The Native American Graves Protection and Repatriation Act (NAGPRA), Pub. L. 101-601, 25 U.S.C. 3001 et seq., 104 Stat. 3048 was enacted 16.11.1990.

[7] Harris (2017).

[8] Thomas (2018).

[9] Thomas (2018).

[10] Sarr and Savoy (2018).

[11] Hickley (2018); Braun (2019). See also interview (in German) Parzinger and Polenz (2016). [Last accessed 29.05.2016].

[12] Federal Foreign Office of Germany (30.04.2021) Press release: Statement on the handling of the Benin Bronzes in German museums and institutions.

[13] Hickley (2019).

[14] Gonçalves-Ho Kang You et al. (2021).

[15] I. van Engelshoven, Beleidsvisie Collecties uit een koloniale context (29.01.2021) [Letter of government, Appendix].

former colonies. The National Museum of World Cultures[16] has published principles on how to deal with claims for the return of colonial objects. These principles reflect some of the changes in the museum community, including the desire to place "communities on an equal footing as national collections" and to engage in a dialogue with both source communities and source nations.[17]

In sum, both the taking of cultural objects as well as the debate over their return has a long tradition. There has been a progression towards actual returns in some areas, but a slow one. This is also illustrated by the selected quotations on page one. While colonial Indigenous collections have been the subject of debate in some settler colonial systems for several decades now, the discussion in Europe, which had already been initiated by notable African scholars and politicians after the independence movement of African states was met with resistance by different actors, including European politicians and museum professionals, at the time.[18] Only since 2017 has it gained renewed momentum and more widespread support amongst European museums and politicians. Moreover, not all of these initiatives have been inclusive, in the sense that Indigenous communities were involved or consulted where their heritage is being discussed. In fact, it often appears to be an intergovernmental affair. This has many reasons, legal, historical, and political. For one, the current structure of international law still reserves the majority of legal power in international dealings for states. Moreover, Indigenous objects taken during colonialism are at the intersection of several processes, namely the quest for the realization of Indigenous rights by the communities in question, decolonization of museum collections, and the realization that to impose conditions for return discussions on the governments of former colonies unilaterally would be akin to imposing neo-colonial structures.[19] Of course, such observations are not new, and it is to be hoped that they will not be "forgotten" in a way that happened to the earlier debate in Europe which took place between the 1960s and 1980s.[20]

However, from an Indigenous rights perspective this also bears the potential for conflict. Ultimately, this approach means that decisions on international returns are at the discretion of the respective state governments. Some governments support their Indigenous populations in their efforts for international repatriations, if not of cultural heritage then at least for the return of human remains.[21] Talks can be inclusive, featuring all interested parties coming together to negotiate (governments,

[16] The Dutch National Museum of World Cultures is in fact an amalgam of the Museum Volkenkunde, the Tropenmuseum and the Afrika Museum.

[17] Nationaal Museum van Wereldculturen, Return of Cultural Objects: Principles and Process National Museum van Wereldculturen (7 March 2019), p. 2.

[18] Savoy (2021).

[19] Gonçalves-Ho Kang You et al. (2021), Recommendation nr.3.

[20] See Savoy (2021), on p. 193 who describes an open letter written by a German politician member of the green party in July 1985 as one of the final moments of the first of the restitution debate in Europe.

[21] For example, the Australian government has been actively negotiating for the repatriation of ancestral remains of the country's Indigenous population on the international level. Feikert (2009).

communities, museum representatives and representatives of the Diaspora, for example). It also means that where the government of a former colonized power is unwilling to involve an Indigenous community from their territory—even if the latter may have expressed their desire to be involved—their involvement is unlikely. This is a result of both the historical evolution of international law and its current legal structure. However, all governments do have obligations towards their Indigenous populations under international human rights law, as will be discussed in Chap. 2. This is crucial as it means that, in the absence of any direct involvement of Indigenous populations in international return negotiations (which would be preferable from an Indigenous rights perspective) there are still rights that such communities hold vis-à-vis the respective state government of their territory and which come to play in intranational returns. Or to put it simply, any international return of Indigenous heritage holds the potential for an intranational repatriation. In how far such rights can be claimed against an unwilling government in practice is of course a different matter.

So far, no clear, internationally undisputed answer has been found to the question whether or not, and how, items taken during colonialism should be returned, be it to the state or to descendants of those from whom they were originally taken. There is no obligation to return colonial-era heritage under international law. On the international level, the Human Rights Council has called for the establishment of an international repatriation mechanism,[22] which so far does not exist (setting aside the Intergovernmental Committee acting under the auspices of UNESCO, for reasons that will be discussed in Chap. 3). The Expert Mechanism on the Rights of Indigenous Peoples in its report on repatriation recommends that stakeholders take a human-rights based approach to repatriation.[23] This contribution follows this call and seeks to concretize how such a human rights-based approach would look like exactly. Different legal mechanisms of regulating returns have sprung up and, in the context of international returns, the standards so far are comparatively loose and broad, as can be seen in the principles issued by the National Museum of World Cultures in the Netherlands, the policy vision adopted by the Dutch government, or the bottom-up proposal that has recently been published by a number of academics and heritage actors in Belgium.[24] However, for returns *within* individual countries legal repatriation mechanisms have already been adopted or are being considered at this moment, both in the form of hard and soft law. In fact, the context of the takings, the cultures and the identity of the actors are so diverse that a one-size-fits-all solution does not seem likely or even advisable. How then, should repatriation be regulated legally within a specific context?

[22] Human Rights Council, Resolution 42/19 on Human Rights and Indigenous Peoples, U.N. Doc. A/HRC/42/L.24 [26.09.2019], para 18.

[23] Human Rights Council, Report of the Expert Mechanism on the Rights of Indigenous Peoples, Repatriation of ceremonial objects, human remains and intangible cultural heritage under the United Nations Declaration on the Rights of Indigenous Peoples, U.N. Doc. A/HRC/45/35 [21.07.2020].

[24] Boele et al. (2021).

This study focusses on the claims for the repatriation of Indigenous heritage by Indigenous claimants for three main reasons: first, during colonialism, Indigenous Peoples were the group who, across the globe, lost a significant part of their cultural objects. Different peoples have been trying to reclaim this heritage, both as distinct communities as well as through state organs since the start of the decolonization process. Second, given the rise of Indigenous rights on the international level and the disadvantaged position of Indigenous Peoples across the globe, the relationship between Indigenous rights and the repatriation of cultural heritage deserves further attention, especially in light of the renewed wave of (calls for) repatriation. Third, there have been successful negotiations on repatriation and laws mandating the repatriation of Indigenous colonial heritage. There is thus a comparative wealth of materials to draw lessons from.

1.2 Research Questions and Methodology

1.2.1 Normative, Comparative Legal Research

The question of how repatriation should be regulated legally is of a normative nature. It requires us to make a value judgement about one regulatory choice over another. This implies both the existence of different regulatory options and a standard by which to measure them. To answer this, we thus first have to establish whether there are different ways of regulating repatriation in the form of different repatriation models. To explore whether different repatriation legislation in effect uses different methods for regulating this matter, the author will use comparative legal research to analyse a sample of legal repatriation frameworks that already exist. The author has chosen the United States and Canada for the reasons motivated in Sect. 1.3.3 below.

Second, there must be a standard against which to measure these frameworks or models. To establish such standards, the author will make use of international law for a number of reasons: By having ratified relevant international treaties, states have incurred legal obligations. The research thus works on the understanding that international law (a) qualifies as law (not purely international relations) that (b) gives rise to obligations either towards other states or individuals or communities under international law, (c) irrespective of whether a treaty has been implemented in domestic law or not, and regardless of whether (d) a legal system is monist or dualist. While rights arising out of human rights treaties might not be enforceable at the national level depending on state (in)action, this does not negate the existence of the legal right or the state obligation on the international legal level. As a result, assessing national repatriation schemes in light of these international standards is warranted regardless of how Canadian or US domestic law structures its relationship to international law. The focus on national regulatory frameworks on repatriation therefore does not imply that there is no role for international law in the examination. In fact, there are two fields of public international law that directly relate to the

repatriation of Indigenous cultural heritage: international cultural heritage law and international human rights law.

International cultural heritage law evolved as a field to enhance the protection of cultural heritage in light of different dangers. It first arose in light of the dangers of war to cultural heritage, evolved to encompass natural dangers and the risks of an increased art trade and globalization. It imposes duties upon states in connection with different categories of cultural heritage. International human rights law in turn enshrines a large catalogue of rights that are held by every human being by the simple virtue of their existence. It imposes obligations upon states to respect every individual in its territory, irrespective of their citizenship. There are a number of rights that connect to sacred Indigenous cultural heritage, notably cultural rights, the freedom of religion, minority rights, and Indigenous rights. Both impose obligations that a state must respect within its territory, with respect to either cultural heritage or Indigenous Peoples.

Since the main treaties of human rights law are almost universally recognized, different countries that seek to learn from existing repatriations can also use this standard to measure their respective drafting legislation. Since the aim of this research is to identify how best to regulate repatriation legally, both national and international law must be incorporated into the examination. These observations raise the first, main research question:

How Should the Repatriation of Sacred Indigenous Cultural Heritage Be Regulated Legally in Light of International Cultural Heritage and Human Rights Law Standards?

This research question raises three sub-questions, namely: How is the repatriation of sacred cultural heritage regulated in the selected examples? What international standards apply to repatriation? Which method of repatriation is the most in line with these standards?

Neither international cultural heritage law nor international human rights law explicitly regulate repatriation. However, they affect repatriation incidentally, as repatriating sacred cultural heritage connects to questions of heritage protection, rights held by Indigenous individuals, communities or the general public to cultural heritage and the exercise of religious practices. Moreover, since these objects are mostly held by museums, standards that bind museum behaviour, even soft law, can also affect how repatriation is handled. In short, repatriation does not occur in a vacuum. It is connected to diverse legal and policy areas. For example, if repatriation legislation intends to ensure the revitalization of religious practices, other factors that undermine religious practices affect in how far Indigenous communities can engage in such revitalization practices. Alternatively, if repatriation seeks to remedy the effects of a long tradition of trading in Indigenous art works, how can this be successful if no measures are taken to protect against their contemporary trade?

This requires an examination of national repatriation legislation and an evaluation of national cultural heritage legislation, the legal-historical conditions under which the objects were taken, museum (self-) regulation, and laws governing Indigenous religious freedoms. Repatriation frameworks are embedded in this wider framework,

and the choice for one over another framework was taken against this backdrop. To portray an accurate picture of repatriation, both in the national legal context and in light of international standards, goes beyond an examination of the repatriation law to examine linked policy areas. The national examination will thus consider these areas not only to consider whether they affect the repatriation framework but also to evaluate these areas in light of the standards derived in part I. This is done in the understanding that broader questions of cultural heritage law and policy are connected to and affect the repatriation experience of Indigenous communities and are, simultaneously, subject to relevant human rights standards. This leads to the second main research question that this research will answer, namely:

What—If Anything—Can We Derive from the Findings of the Country Analysis in Light of the International Standards for the Cultural Heritage Law and Policy of the Selected Countries?

This research thus seeks to establish how to best regulate repatriation within its given legal context, considering both the specific repatriation legislation by itself and the legal context in which it operates. This context includes national heritage law and policy and international legal standards, in particular in human rights law. The recent decades have seen a strengthening of Indigenous and cultural rights, and these standards have not (yet) been fully taken into account by those engaged in repatriation and heritage management. This study aims to remedy this gap and to further the repatriation discussion by incorporating the developments of human rights law more explicitly in repatriation laws. It thus also builds upon an existing debate that began with the question whether to repatriate or not, which is summarized below.

1.2.2 To Repatriate or Not to Repatriate: And If Yes to Whom? The Repatriation Dilemma and the Existing Debate

Many factors appear to influence whether an object is repatriated, i.e. the context of the original taking, the current location of the object, its role in its current environment, the original nature (and value) of the objects for their maker or original community, the nature (and value) for the current possessor and owner, the ethnic (social and/or institutional) background of the claimant and current possessor, the media attention the claim for return has triggered and, last but not least, the legal framework in place at the time of the taking and at the time of the request for return.[25] This multitude of factors, which ultimately decides whether or not an object which is (re-)claimed will be retained or returned, gives a first impression of the

[25] Compare Prott in Prott (2009), p. xxii. She observes that "the nature of the taking of the cultural property is never the sole concern in the dispute and often only a minor issue compared, for example with cultural arguments."

complexity which lies at the heart of the return of colonial-era cultural objects to Indigenous Peoples.

To gain a better understanding of this complexity, the next section summarizes common arguments brought forward in the debate, focussing on the return of Indigenous cultural heritage taken during colonialism.

1.2.2.1 Actors in the Repatriation Debate[26]

To start the discussion on repatriation, the decision to repatriate objects of questionable origins is not self-evident to all actors in the debate. In Europe, the discussion on returning colonial-era heritage has only recently picked up speed and is slowly starting to mirror some of the discussions on repatriating Indigenous heritage in North America in or since the 1990s.

Depending on the actors involved, perspectives can differ significantly. Some scientists and archaeologists may advise against the repatriation of objects on conservationist grounds, for fear that the object, once returned, may be destroyed and/or not available for future scientific research.[27] Others may argue in favour of repatriation to establish new partnerships with Indigenous Peoples and out of ethical motivations. Some museums might fear the precedent which the return of one object can set (this is the well-known 'we will have nothing left in our collections' argument).[28] Other museums might be much more open towards repatriation, viewing it as a possibility to create the foundation for a lasting relationship with neighbouring communities and to learn more about their cultures.[29] At times, it may be the museum community of the formerly colonized country that pleads for their return.[30] In fact, repatriation claims have raised difficult questions for museums, both specific to their Indigenous collections as well as challenging their role as an educative and scientific institution.[31] For example, if a museum is to preserve, for

[26] As the focus of this analysis rests on repatriation, not international returns, the position of the Diaspora, which should be taken in account in international returns, is not considered separately. In repatriations by contrast, attention as to be paid to the Indigenous Peoples living outside of their communities, i.e. in urban areas.

[27] Such scientific considerations were *inter alia* highlighted by the Museums and Galleries Commission (2009), pp. 131–132. Krzystof Pomian, by contrast, has argued in favour of conservation but highlights that repatriation and conservation can be combined (presumably if conditions are made to which the Indigenous community has to agree to), Rivière et al. (2007), p. 50.

[28] Critically, Prott (2009), p. 43.

[29] As Argued by Bernice Murphy, Chair of the ICOMOS Ethics Committee in Rivière et al. (2007).

[30] Abungu (2009), p. 121.

[31] Compare Welsh (1992), p. 847. He enumerates a number of what he calls fundamental contradictions that have guided museums: "First, they attempt to preserve collections in perpetuity and yet desire to make them accessible to everyone. Second, they strive for new understanding, yet speak in the simplest terms to their audiences. Third, they encourage scientific inquiry, but rarely do it. Fourth, they attempt to foster cross-cultural respect, yet are thrown into turmoil when faced

whom does it do so? If a museum is to educate, whom should it educate, and which story or stories should it tell?

One group which has frequently voiced claims for the return of (their) cultural objects are Indigenous Peoples, both internationally and nationally. Repatriation claims can involve contradicting claims by different groups. At times, due to the nature of the object, an Indigenous community might require it back for its collective spiritual wellbeing or may not wish to receive it back for precisely the same reason and would prefer it to stay in the collection of the museum. It might also be that a community desires the return of all objects held in a museum, irrespective of their nature (sacred and everyday objects). Claims of an international dimension concern objects which were taken by European colonial powers in the past and now remain abroad. These were, for example, exported to be displayed by the colonial power in its own territory. Universally known examples of this are in the British Museum and the State Museums of Bavaria in Munich.[32] Claims of a national dimension concern those objects which are now located within the state where the specific Indigenous community resides but which they no longer own (referred to as intra-national throughout this book).

This change of ownership may have a variety of causes. The items could have been taken against the will of the Indigenous community but in accordance with the law at the time. They could have been sold under duress or sold by the caretaker of the object, yet without the consent of the community, or they could have been stolen.[33] Past takings may also have been motivated by a number of different reasons. Depending on the number of objects taken and their importance, to remove the object could suppress resistance, disrupt the transmission of cultural knowledge, which in turn rendered younger generations more open to being influenced by the colonial culture and could highlight (similar to how looted objects have been used in the past) the importance of the colonial power.[34]

Current requests for return, in contrast, can be linked to such diverse concerns as treaty negotiations, claims for self-determination, the increase of political power within the state, attempts to revitalize the community or attempts to further the reconciliation between Indigenous Peoples and the state.[35] The refusal to return objects in turn can be motivated by a fear that it would set a precedent, which could in turn mean the loss of a significant part of its collection or alternatively the loss of a more valuable collection. Alternatively, to return where there is no legal obligation

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with representatives of another culture calling for the return of an object for use with a religious purpose."

[32] I.e. Samoan artefacts in the Staatliche Museum für Völkerkunde, see this exhibition as reported by the Bavarian Ministry for Culture: http://www.km.bayern.de/kunst-und-kultur/meldung/2474/bayern-und-samoa-eine-ausstellung-zeigt-ein-spannendes-stueck-kolonialgeschichte.html [last accessed 30.07.2021].

[33] The loss of sacred objects of other religions is often as or even more convoluted. Compare O'Keefe (2009), pp. 226–229. Section 'How Sacred Objects are Lost and Repatriated'.

[34] Bengs (1996), p. 511.

[35] Glass (2004), p. 116.

to do so has an apologetic note to it, and not every institution or country is open to admitting that past actions were at least unethical or immoral, if not unlawful, and would in all likelihood qualify as illegal if judged by contemporary standards. Yet, even if an institution acknowledges past wrongs and is not afraid to set a precedent, to return an object might violate its trust-holder position,[36] considering that public collections are held for the general public of the region and country in which the museum is located or even for humanity in general (as museums, which identify themselves as universal, claim[37]).

Representatives of the art market, in turn, are likely to be focussed on the economic aspects of a repatriation dispute, where the demand for ethnographic material is high and the return to Indigenous communities could make it less likely that these objects enter the art market again.[38] Next to Indigenous communities, governments of previous colonies may also reclaim the cultural heritage of Indigenous Peoples from former colonial powers as part of their national cultural heritage. These government representatives could either favour repatriation to Indigenous communities as a step in a wider reconciliation project or be opposed to repatriation fearing that it may increase ethnical tensions in their territory, that past violations are brought back into public consciousness, that the cultural heritage is national cultural heritage, or that it may increase claims for the self-determination of the Indigenous community within the state. Having considered the different interest groups involved, it is not surprising that a variety of arguments have been made in favour and against repatriation. These arguments are summarized briefly below.

1.2.2.2 Arguments on Whether to Repatriate or Not

The arguments on repatriation can roughly be divided into four themes: the place of an object within an Indigenous culture, the value of the object to the non-Indigenous community (educative, scientific or financial), the history of the object, and Indigenous rights (including the value of the object for the community).[39] First, proponents of repatriation cite the cultural value of an object to the community which

[36] Excerpts from 'Restitution and Repatriation: Guidelines for Good Practice' 2000 issued by Museums and Galleries Commission (2009), see Sects. 2.1 and 2.2.1.

[37] Declaration on the Importance and Value of Universal Museums 10.12.2002, "we should acknowledge that museums serve not just the citizens of one nation, but the people of every nation."

[38] Of course other arguments are advanced in favour of the free trade of cultural objects, *inter alia* that, by means of the market, objects will move towards the person or institution which has sufficient funds to care for them and ensure their safety, that the art market because of its global nature will in fact increase the accessibility of the objects in question or that it aids in educating the public. For a brief yet rightfully critical summary see Gerstenblith (2001), p. 206.

[39] Sarah Harding distinguishes three approaches to justify the repatriation of Native American Cultural Property [compensation for past destruction, relationship between importance of an object and ownership and impossibility to own cultural property] in Harding (1997). For an insightful discussion of the value of cultural heritage more generally see Harding (1999), p.

produced it as an important reason for repatriation.[40] Repatriation then gains an important role in the preservation or revitalization of the source community.[41] This argument is therefore highly relevant for sacred objects. The link of this argument to the cultural diversity concept is clear. Proponents of cultural diversity will highlight the need to revitalize a culture. Sceptics will oppose it for its emphasis on cultural revivalism and a fear of increased ethnic or religious tensions.[42] Fears of revivalism aside, the revitalization argument operates on the assumption that the object is first and foremost important to the group which produced it. If the group decides that the proper method of handling an object in line with its cultural tradition is a ritual use, which will lead to its destruction, then this must be accepted under this approach. The idea that a group is hindered in exercising its religious freedom if it is not allowed access to vital religious objects is another argument in favour of repatriation.[43]

The centrality of reclaimed objects within the source community disregards arguments made by cultural internationalists, including the renowned art law expert John Merryman, who viewed heritage mostly in global terms, as the heritage of mankind, best cared for by market nations.[44] Coombe describes this approach as originating in the law of war.[45] To condemn the destruction of cultural property in times of war requires a strong justification, this restriction is justified by elevating heritage from objects of national importance to objects of international concern. She criticizes Merryman, arguing that one of his most central assumptions was ill-founded, namely his argument that rich 'market' states are those most suited to preserving and finding pleasure in the objects.[46] Nafziger and Paterson similarly criticize the internationalist approach, and the debate in itself. They argue that the concept seeks to legitimate a type of international art trade which benefits the private individual rather than the wider public. This being said, they find this and similar confrontational concepts to be "yielding to more cooperative approaches for accommodating the many diverse interests in the cultural heritage of humankind."[47]

As indicated above, the debate on the value of repatriation is linked to a central concept in the area of cultural heritage, the concept of a cultural heritage which is of

[40] Welsh (1992), pp. 847–848.

[41] Welsh (1992), pp. 847–848.

[42] Singh (2009), pp. 128–129. K. Singh, influenced by the history of violent clashes between the Hindu and Muslim communities in India, has observed: "We are not, we are never returning things to the past – that moment is gone- we are assisting contemporary revivalism. And coming from India where we have a history of current Hindus avenging themselves on current day Muslims for 800 years of Islamic rule, current day low castes waiting to get into a position to avenge themselves against 5000 years of oppression by the upper cases, I have to say that even the well-intentioned acts of respecting other cultures which then lead to revivalism terrify me."

[43] Welsh (1992), p. 846.

[44] Merryman (1986).

[45] Coombe (2004), pp. 541–542.

[46] Coombe (2004), pp. 541–542.

[47] Nafziger and Paterson (2014), p. 16.