Ethics, Values and Legality in the Restoration of Cultural Artefacts: The case of South Africa

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As a relatively new democracy, South Africa is seeking ways to protect and promote its African heritage. As part of this process, there is increased interest in the repatriation of South African cultural artefacts, mostly taken during the colonial era, currently held in western museums. There are also increasing international calls for the repatriation of cultural artefacts from western museum collections back to their originating countries in the context of decolonisation and the 'Black Lives Matter' movement. This paper examines the arguments for and against the repatriation of African cultural artefacts, from the point of view of an African country. A values-based approach is used to analyse the debate. The ways in which South Africa has made progress towards defining, and protecting, artefacts 'of national importance', as well as some of the repatriation experiences of other sub-Saharan countries, is discussed.

Keywords: museum artefacts; restoration; value based approach; South Africa

1: Introduction

As one of the newest democracies in Africa, South Africa is reconstructing its identity through the restoration and 'decolonisation' of its past African heritage. Interest in the role of museums in society, and their role in driving the African Renaissance envisioned by the African Union (AU), is also increasing. The AU 'Agenda 2063 Plan of Action' has as one of its goals that at least 30% of cultural patrimonies and treasures would have been repatriated and catalogued for future use in the envisaged African Museum of 2035.

Internationally, while culture has always played an important role in diplomacy and international relations, policies relating to museums, and the museums themselves, have become increasingly important. Wang (2018) for example, argues that in the case of relationships between China and Germany, national museums have become integral

to the cultural diplomacy of their host countries as a means to facilitate intercultural communication and cooperation in other areas.

Debates about the restitution and repatriation of museum artefacts taken mostly during the colonial era have a long history. However, it was brought to high prominence recently by the French president, Emmanuel Macron (Codrea-Rado, 2017) in an address which explicitly acknowledged how significant the proportion of African heritage located outside the continent was. Paquette (2020) argues that the speech given by the president of France in Ouagadougou in 2017, while on a diplomatic tour of West African countries, can be seen as a turning point in the cultural policy of many Western countries in relation to the return or restitution of African museum artefacts. Macron's speech was given partly to improve the image of France amongst African youth, but also (as Paquette argues) as a way of building a relationship with future African leaders. There has also been increased public pressure for international museums to return at least some of the artefacts that were originally sourced from Africa (Ankoma 2020; Sarr and Savoy 2018).

South Africa is in the early stages of identifying how it might go about a process of the repatriation of cultural heritage. One of the functions of the National Heritage Council of South Africa (NHC, 2021) is to "investigate ways and mean of affecting the repatriation of South African heritage objects presently being held by foreign governments, public and private institutions and individuals". Draft policy on the Regulations on the Restitution of Heritage Objects is currently under discussion, signaling renewed interest in repatriation.

However, there have been no cases to date of the return of any such artefacts to South Africa. While there are national bodies tasked with protecting and managing cultural heritage that is deemed part of the 'national estate', there is also currently no

inventory of culturally important artefacts held abroad which might be subject to repatriation.

As a means of advancing the debate and feeding into draft national policy, this article reviews the theoretical arguments for and against the repatriation of African cultural artefacts using a values-based approach. International legal frameworks for the return of cultural property, and the experiences of other African countries seeking repatriation under such frameworks are discussed. Current systems for the protection of cultural heritage in South Africa, including examples of where it has been successful, and were it has failed, are reviewed. Finally, a practical way forward for South Africa is suggested.

2: Artefact Restitution and Repatriation: A Brief Conspectus

Ethical arguments for the return of artefacts collected (often stolen, looted, or bought illegally) during colonial times are the most frequently cited in the repatriation debate. There is growing recognition that 'the acquisition of cultural objects and resources and their transfer to the capitals of Europe were in fact at the heart of – and not the margins – of the colonial enterprise' (Sarr and Savoy 2018, 13).

Added to the ethical dimension is the sheer scale of the situation. Sarr and Savoy (2018) note that more than 90% of the cultural heritage artefacts of sub-Saharan Africa are found outside of Africa, which is what makes it a special case. While the cultures of other regions are also represented in Western museums, a significant portion of artefacts has remained in their country of origin.

Matthes (2017) identifies three main arguments against the repatriation of museum artefacts: identification of who the artefact should be returned to, uncertainty around the circumstances in which the article was obtained (very important for legal

claims of repatriation), and the 'universal museum' argument.

Matthes (2017) points out the difficulty of tracing the descendants, or inheritors, of particular cultural groups to which artefacts should be returned, especially if the artefacts are very old, and the people to whom they originally belonged have no clear descendants. 'When Nigerians claim a Nok sculpture as part of their patrimony, they are claiming for a nation whose boundaries are less than a century old, the work of a civilization more than two millennia ago, created by a people that no longer exists, and whose descendants we know nothing about' (Appiah 2006, 119).

Secondly, there is often uncertainty around the circumstances under which the artefact was obtained, so that even if it is generally agreed that artefacts obtained unjustly or illegally should be returned, establishing this may not be easy. Since the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970), there are stricter guidelines on the required provenance for legal cultural artefact acquisition. However, as Matthes (2017) points out, this does not assist with the very many artefacts in museum collections acquired before this date.

Finally, there is the argument of the 'universal museum', that the 'outstanding value of [some] objects and their consequent interest to all of humanity' (Matthes 2017) and their preservation take precedence over repatriation claims. That is, although repatriation claims may be legitimate, they are outweighed by other considerations. In this argument, cultural heritage is viewed as a global public good, and it is argued that the display and appreciation of artefacts from a diversity of cultures contributes to inter-cultural understanding, and to the value of the artefact itself. Yet, as Sarr and Savoy (2018, 37) point out, the curation and display of African artefacts puts the power of

'meaning making' into the hands of western museum officials, which 'are ways of controlling representations of societies', often imposing colonial categorisation onto African societies.

African scholars, such as Dr Kwame Opoku (2018), point out that most of the peoples whose cultures universal museums claim to celebrate will never be able to see them. Opoku (2018) gives great credit to Macron for reinvigorating the debates about restitution, even though there are conditions that he does not agree with. However, while Opoku argues fiercely for the unconditional return of the ownership of African artefacts, their physical location may be negotiated: 'It would be up to African States, in discussion with Western museums, to determine which artefacts are to be physically returned whilst those that should remain in the Western museums will be symbolically returned, with appropriate ceremonies and events'.

However, Opoku (2018) and other writers (such as Shyllon 2014) point out that African countries themselves have perhaps not acted as quickly as they should have to pursue the repatriation of cultural artefacts that were expropriated, stolen or illegally exported. Talking about the period following Macron's speech, Opoku states that, 'Our countries have not taken the opportunity of preparing a list of national treasures which would also contribute to teaching the general public about national culture. It is almost as if nobody cared…'.

Matthes (2017) points out that, if museums embrace the idea that they provide global public goods, of value to everyone, then purely as a matter of distributive justice, they should be promoting global access to cultural artefacts through redistribution. Western museums hold a disproportionate share of cultural artefacts, but they argue that they do promote wide access through, for example, educational outreach and low or no

ticket prices. However, much of the world's population is, de facto or de jure, prevented from travelling to these countries to access museum collections, and are thus deprived of the very global public good rights that museums claim to promote and protect.

African countries have tried for more than 50 years to advocate for the return of cultural artefacts taken during colonial times, mostly without success. Shyllon (2014, 121) notes that, 'African countries seeking the return of cultural objects must have the endurance of the long distance runner'. A large part of the reason for the failure of restitution rests on legal arguments relating to property rights, in particular that, after a certain time period (usually 50 years), artefacts become the property of their host nation and are inalienable.

That said, there may also be plausible reasons why African curators themselves would not pursue repatriation of artefacts held in foreign museums. First, public museums in many African countries may not have the resources (in terms of curatorial skills and physical infrastructure) that are needed to preserve and curate these objects. Adeshokan (2020), writing about repatriation of Nigerian cultural heritage, also points to issues of capacity: 'one of the major criticisms of demands for the returns of artworks back to African countries, especially Nigeria, has been the general absence of museums and a proper maintenance culture'.

Second, since the monetary value of these objects is greatest in western markets, some curators might be worried that, if returned, they would be deaccessioned and sold to private collections. An interesting feature of some African cultural artefacts is that their monetary value is greater in western markets than in African ones. Adeshokan (2020) interviewed a Nigerian art collector who expressed the idea that the value ascribed to many African artefacts exists because of their location outside of Africa:

'There is a working industry and infrastructure to support the works of art. The moment those works come back to our control, they will lose value just like the ones that are here. The conversation moving forward should be to claim ownership and then claim annual royalties to these works of art even as they remain where they are'.

3: Cultural Values as the Foundation of Restitution and Repatriation Claims

Like other cultural heritage, artefacts can be seen to embody the cultural capital of the country or society that produced it, and (like other forms of capital) thus has both stock and flow values. Goods with public good characteristics have long been recognised in economic theory as having different kinds of value. Total Economic Value (TEV) is made up of use value (which can be consumptive or non-consumptive), non-use (existence) value, option value, and bequest value.

In the case of museum artefacts, the object is never used up, so use values are non-consumptive: one person viewing or researching the object does not diminish it or prevent others from 'using' it. Even when people may feel strongly about repatriation of a particular cultural artefact, they may never actually go and visit it themselves. In this case, the value stems from the desire to know that the object exists, and perhaps to have the option of visiting it in the future. Bequest value is about wanting the artefact to be available for future generations, and speaks strongly to the idea of preserving cultural capital, and is linked sometimes to educational value (Klamer 2013).

Another useful valuation framework distinguishes between intrinsic value and instrumental value. Intrinsic values are those most often associated with the ethical or moral arguments for museum artefact repatriation. They are related to the unique symbolic, and aesthetic nature of the object itself, and are often based on an individual emotional and spiritual response to an artefact, and are related to artistic quality or

excellence (Holden and Baltà 2012; Hutter and Schusterman 2006).

Throsby (2001) first introduced the idea of 'cultural capital' in economics, defined as a way of 'representing culture which enables both tangible and intangible manifestations of culture to be articulated as long-lasting stores of value and providers of benefits for both individuals and groups' (Throsby 2001, 44). Hutter and Schusterman (2006) suggest various types of intrinsic cultural value including self-expression, communication, the expression of a moral or religious vision, entertainment, protest against (and a stimulator of debate about) societal norms and values, and aesthetic values. Intrinsic values are often unique to a particular artefact, or type of artefact, and do not have close substitutes.

Instrumental values are those that occur as a result of the artefact being in a particular location but may not be unique to the particular object. Instrumental values can be related to social or societal values, such as the role of cultural heritage in identity formation and building social cohesion. They may also be economic or financial, in that they may be associated with job creation, economic impact, education (human capital), tourism, and innovation (Böhm and Land 2008). While important, a focus on instrumental values (which are not unique to any particular artefact) may not provide as strong an argument for repatriation as the public good benefits associated with intrinsic values (Snowball 2008, 2011; Collins and Snowball 2014).

Returning to the idea of artefacts as a form of capital stock which results in a flow of value, Brodie (2010) identifies a number of ways in which the physical location of important artefacts benefits the owner. For example, the ownership of important artefacts may attract visitors (tourists) to a country, providing income for the specific museum, but also for those providing related services, such as accommodation, food

and drinks, guiding services, arts and crafts sales etc. Cultural tourism can provide a sustainable way to fund cultural heritage preservation, if managed carefully (Brodie, 2010). Important collections also attract public and private funding for a museum, as do research and publications about the collection, which in turn build the reputation both of researchers who have access to the artefacts, and of the museum itself. Brodie (2010) thus argues that, in addition to the ethical and legal arguments for the protection and restoration of cultural artefacts, economic arguments should not be overlooked, and could make repatriation arguments stronger.

Especially in developing, post-colonial African countries, intrinsic, social and economic values are important. In talking about post-colonial societies, Mulcahy (2017) argues that 'Reclaiming the past by a newly independent people is a necessary element for regaining political sovereignty . . . a process of cultural nation building'. As such, cultural policies in these societies need to be linked to values such as identity-building; inferring value into, and preserving, previously unvalued and neglected cultural heritage (a process sometimes referred to as 'valorization'); and, especially important in South Africa, building social cohesion.

A related question about value, is 'value to whom?' The perceived value embedded in cultural artefacts is created not by the value of the materials used to make it, but by the recognition and agreement that it has special value to individuals, specific cultural groups, and/or to society. Klamer (2013) maps the value of cultural heritage using four broad categories:

- *Cultural value*, usually determined by experts, and based on the artistic, historical, aesthetic and spiritual value inherent in the artefact;

- *Personal values*, related to the emotional response of individuals to a particular

site or artefact;

- *Societal values*, related to 'the historical consciousness of a community', and fostering a common identity, or 'shared story'; and

- *Social values*, which build relationships among people, through, for example, appreciation groups and societies that may form around particular heritage sites or objects.

Klamer (2013, 428) argues that instrumental values are important because they are necessary 'to realize the cultural, societal, social and personal values'. In the case of cultural artefacts, for example, protection, curation and display all come with associated financial costs, which need to be offset by values on the benefit side of the equation. This is especially the case in developing country contexts, where public and private funding for arts and culture is limited.

Throsby (2013 ,457) points out that determining the 'significance' of heritage may depend on fixed and unchanging intrinsic values, or contingent values that 'arise from the relationship between the physical, social and cultural context in which a given item is placed'. He notes that the difficulties in valuing heritage are that there is no one, generally accepted, or universal, typology of value, that value is a multifaceted concept made up of sub-categories, and that the sub-categories often have no common unit of account. In his theory of cultural capital, Throsby (2001) suggests a number of value attributes or categories for determining cultural value in the case of heritage (Table 1).

[Table 1 about here]

Some attributes of cultural artefacts can be described in an objective way, such as by their age, physical condition, association with historical events and location. However, these do not generally describe the most important features of an artefact.

4: International Legal Frameworks for the Return of Cultural Property

Various international agreements, conventions and mechanisms are available to assist a state in its quest for the return of its cultural property. Two conventions and a mechanism are important in this regard. The first convention is the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. South Africa is one of the 140 states that have ratified the treaty. Article 7 of the Convention recognises the obligation of States Parties to the Convention to take all appropriate steps to recover and return any imported cultural property stolen from a museum or a religious or secular public monument or similar institution in another State Party. A key requirement is that the illicit cultural property must be part of a national inventory.

The second convention is the 1975 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, concluded under the auspices of the International Institute for the Unification of Private Law (UNIDROIT). One key difference between the 1970 UNESCO Convention and the UNIDROIT Convention is the absence of a requirement of a state inventory to enjoy the benefit of the latter convention because of the wording of Article 3(7) of the UNIDROIT Convention that defines the 'public collection'. That definition of 'public collection' includes a group of inventoried or otherwise identified cultural objects owned by a contracting state, its regional or local authority, religious institution or an institution that is established for essentially cultural, educational or scientific purpose. Shyllon (2012) argues that the phrase 'otherwise

identified cultural objects' means other satisfactory evidence of the cultural property in addition to a national inventory. Secondly, Article 8(1) of the UNIDROIT Convention contemplates private and state claims before the courts or other competent authorities of the State where the cultural object is located. The 1970 UNESCO Convention, however, can only be activated by State Parties to the Convention. South Africa became a state party on 9th January 2018. Another advantage of the UNIDROIT Convention is the possibility of arbitration in terms of Article 8(2) of the Convention.

In 1973, the UN General Assembly Resolution 3187 on the 'Restitution of works of art to countries victims of expropriation' was passed. This led to the establishment of the *UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation* (ICPRCP) as a permanent intergovernmental body independent of the 1970 Convention. A key feature of the UNESCO 1970 Convention is its remit that includes cases occurring before the entry into force of the 1970 Convention. The ICPRCP is responsible for facilitating bilateral negotiations for the restitution or return of cultural property including mediation and conciliation.

[Figure 1 about here]

Yet, despite these international conventions, repatriation cases based on legal grounds have often not been successful. Brodie (2010) notes that cultural property laws have been ineffective for a variety of reasons: poor subscription at the international level to resolutions and conventions; poor enforcement of existing laws, particularly those relating to the illegal export and sale of cultural artefacts; and a lack of funding for long-term advocacy and enforcement. Another reason is the fact that the holders of the artefact are not under any direct liability in terms of the treaties for the return of

cultural property. The holders of the artefacts are indirectly liable and return of property in their custody depends on whether they acknowledge no vested legal interests or are unwilling to pursue such interests. When the holders of the artefacts assert a claim, return of such property can only proceed if their claims are exhausted before national courts. Shyllon (2014: 127-128) reports that negotiations between Tanzania and the Baribier-Muellar Museum in Geneva to return the Masonde Mask began in 1985 but was suspended in 2006 when Tanzania filed a formal request for return with the secretariat of the UNESCO Intergovernmental Committee For Promoting the Return of Cultural Property to its Countries of Origin or Restitution in the case of Illicit Appropriation. In August 2009, Tanzania began good faith negotiations when it became clear that the request would not yield the desired result. It is fair to conclude that Tanzania's quest for the artefact may have dragged on if the Museum sought to protect its vested rights.

Roehrenbeck (2010) comprehensively reviews the international protections (conventions) established by treaty signatories which need not be enacted into national laws but are also not retrospective in their application and thus limit their application in executing the return of some early plundered or looted items.

Beyond conventions, regulations and directives there is also a wide range of voluntary agreements by museum professional bodies operating in the domain of cultural property return, such as the Association of Art Museum Directors, Association of American Museums, and the International Council of Museums. In addition, there are policy initiatives directed at repatriation and restitutions. For example, in 2014, the African Union commissioned a report on 'The Establishment of the on-going Cooperation activities between European Union and Africa with regard to Cultural Goods' (Dandaura et al. 2014). The report included a review of strategies in place to

prevent illegal export and trade in cultural objects, as well as the return of illegally exported cultural objects. The challenges to the successful control of illegal trafficking in Africa were listed as, amongst other things: the abundance of undocumented artworks in Africa, and the growing interest of collectors and market value in western countries; corrupt public officials; permeable borders; and diplomats and officials who remove artefacts for study or on loan, but do not return them (Dandaura et al. 2014, 18). The report also found that there were low levels of awareness of the importance or significance of the protection of cultural objects in African countries, and that even where there were regulations mandating this, enforceability was low.

On repatriation, the AU report (Dandaura et al. 2014, 92) notes that 'The process involved in the repatriation of cultural properties is generally strenuous, tedious, wearisome and protracted'. The report makes a number of recommendations, mostly related to the protection of cultural artefacts still in African countries. However, of relevance to the repatriation debate, are recommendations that African museums create a digital inventory of their own collections, as well as those objects of national significance held outside the country, so that they can be better protected and managed. AFRICOM (African Council of Museums) strongly supports such digitisation projects (Dandaura et al. 2014).

As noted above and explored below, what appears crucial in the successful repatriation of looted African artefacts is international and bilateral negotiations, cooperation and understanding. It is in the interest of South Africa to explore diplomatic channels of communication and persuasion in addition to the legal avenues provided by international instruments.

5: Repatriation Case Studies from Africa

To our knowledge, there have been no high-profile repatriation cases in South Africa, other than the return of the body of Sarah Baartman, a Khoisan woman who was taken to France in the 1800s and displayed as an anthropological curiosity, dubbed 'The Hottentot Venus'. Her remains were eventually returned from France in 2002, and she was buried in the Eastern Cape (Shyllon, 2014). While this is an important case, the focus of this research is on the repatriation of cultural artefacts for the purpose of display in African museums. The repatriation of human remains is equally, if not more, important, but has different values, legislation, and ethical arguments associated with it. The selected case studies discussed here will thus focus on examples of the repatriation of cultural artefacts from foreign museums to African nations. <mark>Case studies were chosen to illustrate the variety of values and arguments associated with repatriation, as well as both successful and unsuccessful case studies in order to identify lessons for South Africa.</mark>

5.1: The Great Zimbabwe Bird

There were originally 8 carved soapstone birds found at Great Zimbabwe, excavated from 1889 onwards. The birds may be linked to Shona soapstone sculptures, recognised in modern times as a unique art form, in increasingly high demand by collectors and museums (ZimArt, 2021). The Great Zimbabwe site gives its name to the country, and the iconic bird sculptures are found on the national flag, banknotes, and as modern reproductions in public spaces. Great Zimbabwe is designated as a UNESCO World Heritage site. The head of Zimbabwe's national museums, Godfrey Mahachi, said: 'The birds are among the most symbolic cultural objects of our time. They connect the present with our past' (Aljazeera, 2020).

Some of the birds were in the South African Museum in Cape Town until 1981, when four of them were unconditionally returned to Zimbabwe on its independence. One of the birds still remains in South Africa, bequeathed to the state as part of the estate of Cecil John Rhodes (Africa Global News, 2020).

The top half of one bird was excavated by a British archaeologist and handed to local authorities. It is not clear how the lower half of the bird left the country, but it was sold to a museum in Berlin in 1907. It was sold to other German museums, taken to Russia during their occupation of the city, and eventually returned to Germany. Under pressure from the German Federal Government, it was officially returned to Zimbabwe in 2003, after spending more than 100 years outside the country. Shyllon (2014) documents the complex and lengthy repatriation process. Dewey (2006) claims that the lower half of the bird was, in fact, secretly handed over in 2000 under a memorandum of understanding in which the bird was being returned on permanent loan, and 'thus technically avoided the subject of restitution'. The return was therefore conditional, with the Prussian Cultural Heritage Foundation (who manage the museum in Berlin which held the fragment), retaining legal ownership. As Shyllon, 2014: 143) argues, 'A permanent loan is used as a face saving formula. In this instance, it is being used as a sword instead of a shield'.

5.2: Benin Bronzes and Digital Benin as an Example of Digital Repatriation

Until the 19th century, the Kingdom of Benin was a major power in what is now northwest Nigeria. In 1897, the British invaded the country, and looted many valuable bronze, ivory and wooden artefacts from the royal palace. The bronze plaques that decorated the palace became particularly famous, as they showed complex scenes of court life. They were probably made between 1550 and 1650. The objects, thousands of

them, were taken to London, and thereafter spread through the world in sales to museums and private collectors. The money was used to defray the costs of the war. Many of the artefacts were bought by the Germans, and according to Shyllon (2015), it was they who recognised and described the value of the bronzes, thus making them internationally famous.

Since 1968, when Nigeria opened the National Museum of Benin in Lagos, attempts have been made to have at least some of the objects returned from museums, private collections and embassies. Despite an ICOM resolution calling for the return of the objects, the only bronzes in the museum when it opened were purchased by the Nigerian government at auction. It later emerged that at least some of these items were sold at auction by the British Museum themselves (Kennedy, 2002). At the time of writing in 2015, Shyllon recorded less than 100 Benin artefacts in Nigeria.

The Benin Dialogue Group (BDG), founded in 2010, is a collaboration of museum directors and delegates from Austria, Germany, the Netherlands, Sweden, and the United Kingdom with representatives of the Edo State Government, the Royal Court of Benin, and the National Commission for Museums and Monuments, Nigeria. The aim of the BDG is to facilitate the permanent return and display of Benin artefacts in a new Royal Museum in Benin City, Nigeria, planned for 2023. In a 2019 press statement (Tropen Museum, 2019), the BDG reported that they had 'shared knowledge regarding various initiatives across Europe that are currently seeking to address the questions of return and restitution', but acknowledged that there were legal complexities that needed to be taken into consideration. Opuku (2019), an African scholar and writer about repatriation, has been critical of some of the repatriation options proposed by the group, including that, while the artefacts would be displayed in the museum in Benin City, legal ownership would be retained by Western museums, which Opuku derides as being

'ridiculous and insulting'. The BDG, although originally interested in repatriation through the transfer of legal ownership, now seems to be focused on other, less legally time consuming and complex options related to 'sharing collections' on the basis of an 'equal partnership' (BDG, 2018). This practical solution, focused on providing access, could include digital and printed publications of Benin artefacts, enhancing accessibility of the collections, waiving of reproduction fees, support for curatorial education, and the development of libraries and archives of the National Commission of Museums and Monuments of Nigeria (Shyllon, 2018). In this regard a *Digital Benin* project was launched in 2020 to establish a digital catalogues to bring together object data and related documentation such as historical accounts, archival materials, eye witness accounts' publications and oral traditions of looted Benin art (Digital Benin 2021). *Digital Benin* will be populated through the use of cutting edge digitisation methods and media approaches. A Royal Museum is to be established in Benin Nigeria and is expected to be the main provider of the online resource in English and the local 'Edo' language. Locating the online source of the digital collection in Nigeria and in the host community addresses concerns of access for the host community. Engaging with the curatorial expertise and consent of the community of origin addresses some of the concerns of stakeholders (Pavis and Wallace, 2019) who have called for caution in the digitization of looted art by European Museums through engagement and consultation with African communities of origin.

In a Joint Agreed Statement of the Cambridge meeting, the BDG (2018) emphasised that their work 'does not imply that Nigerian partners have waived claims for the eventual return of works of art removed from the Royal Court of Benin, nor have the European museums excluded the possibility of such returns'.

5.3: The Return of the Makonde Mask to Tanzania

In 1984, a Makonde mask was stolen from the National Museum of Tanzania, Dar Es Salaam. The theft was reported to Interpol, ICOM and the Tanzanian police (Shyllon, 2013). These wooden masks are worn during initiation ceremonies for men and women, and represent the connection to past ancestors. They are worn when the newly initiated youths are welcomed back to their communities after a period of seclusion. They thus have strong cultural and religious significance (Cosgrove, 2021).

In 1990, a researcher visiting the Barbier- Mueller museum in Geneva, recognized one of the Makonde Masks on display there as being the one stolen in 1984. He immediately reported it. The museum had bought the mask in Paris in 1985. Although they immediately began negotiations for its return to Tanzania, they only communicated the conditions that would need to be met for the transfer of ownership to take place in 2002. No compromise could be reached, and in 2006 Tanzania filed a request for the return of the mask with the UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or Restitution in the case of Illicit Appropriation. Still, no progress occurred, partly because the museum pointed out that Intergovernmental Committee only has the power to deal with requests addressed to it by Member States or Associate Members of UNESCO, so could not intervene in this case. The Tanzanian government accused the museum of acting 'in bad faith' in that they did not check the provenance of the artifact, which had been reported stolen to Interpol, before purchase. However, Swiss law at the time set the time limit for the return of articles acquired in this way to 5 years (Bandle et al., 2013).

In 2009 Tanzania agreed to accept the conditions for the return demanded by the Barbier- Mueller museum in 2002. There is some uncertainty about what these

conditions were. Bandle et al. (2013) say that the conditions included that the mask should be 'properly looked after', but Shyllon (2013) records that the Daily News of Tanzania reported one of the conditions as a payment for storage charges be made to the museum for the time that they had it in their collection. Finally, after 20 years, the mask was 'donated' in a 'mask giving ceremony' in Paris in 2010.

6: The Protection of Cultural Heritage in South Africa

In South Africa, there are bodies and organisations that regulate and protect South African cultural heritage. The ultimate driver is the Department of Sport, Arts and Culture (DSAC), supported directly by ministers and officials who are responsible for policy, legislation, co-ordination and oversight. They are supported by heritage sector structures, such as the South African Heritage Resources Agency (SAHRA), the National Archives Council and the Museums Council, who are responsible for implementation, as well as playing advisory and co-ordination roles (DSAC, Review of Heritage Legislation, 2008).

[Figure 2 about here]

The principal South African legislation is the National Heritage Resources Act (1999), which established SAHRA and set out the principles for the management and protection of the 'national estate'. SAHRA's mandate includes a directive to 'co-ordinate and promote the management of heritage resources at national level'. This specifically includes introducing a system for the management of national heritage resources, as well as the control of the export of South African heritage objects. An additional role of SAHRA is to 'investigate and advise the Council on…the repatriation of heritage resources which have been removed from South Africa and which SAHRA considers to be significant as part of the national estate' (Government Gazette 1999,

27). The elaboration of the National Estate, including the updated 'List of Types' of heritage objects that may not be exported without a permit (2019), are important steps in the use of the 1970 UNESCO Convention and the UNIDROIT Convention in the return of cultural property to South Africa.

The limited capacity of SAHRA has so far not enabled the construction of such a list of cases. Another important restriction is that, if an export permit is denied, the owners may require the compulsory purchase of the object by SAHRA, or another party within South Africa, within 30 days. If this condition cannot be met, then the permit must be granted.

Two emerging normative instruments – the Draft National Policy on the Repatriation and Restitution of Human Remains and Heritage Objects (Draft National Policy 2018) and the draft gazetted Regulations on the Restitution of Heritage Objects (Draft Regulations 2018) prepared in terms of s.41 of the National Heritage Resources Act 2019 – are indications of a 'new' process of international and intra-national return and restitution of heritage objects. Although the Draft Regulations related to human remains are not part of the focus of this research, the negotiations and mediation inherent in the draft regulations suggest South Africa's preferred means of return for cultural objects as well.

For the international sale of certain kinds of heritage objects that have been in the country for more than 50 years, the seller is required to apply for a permit from SAHRA. If objects are deemed to be part of the 'National Estate', that is, they are of national historical and cultural significance, then export permits may not be granted. This applies to objects in both public and private collections.

The National Estate is very broadly defined and includes intangible cultural

heritage, natural landscapes, archaeological sites, graves of historical figures and historical settlements, as well as 'objects of historical and cultural significance'.

An object is considered to be part of the National Estate if it has 'special value' because of: its importance in South African history; its rarity or uniqueness; its potential educational or research value; its representation of characteristics of a community or cultural group; its representation of creative or technical achievement; or its 'strong or special' association with the cultural or spiritual values of a community, cultural group, person, or organisation of historical importance (Government Gazette 1999, 14).

In 2019, an updated definition of Identified Type of Objects that are Protected and may not be exported without a permit was published (Government Gazette 2019). As before, the permit requirement applied to objects of South African or international origin that had been in the country for more than 50 years. Reasons for the refusal of export permits include objects with attributes whose loss 'would significantly diminish the national heritage'.

The additional emphasis is particularly on rarity, uniqueness, and scarcity in the South African context, as well as international significance and associations with historical events or people. There is thus already an officially accepted South African definition of what makes a heritage object of national significance, and so part of the 'National Estate'. The attributes listed align well with those identified by Throsby (2001, 2013) shown in Table 1. Such attributes could be the starting point for defining South African objects in foreign museums which might be subject to repatriation requests.

7. South African case studies of the protection of cultural artefacts

As noted already, there are currently no high profile cases of the return of cultural artefacts to South Africa. However, there have been cases, but successful and unsuccessful, where public bodies, like SAHRA, or NGOs have attempted to intervene, which are reviewed below.

7.1 Examples of successful interventions

SAHRA intervenes in the case of South African heritage objects coming up for sale in international markets if they are designated as part of the "national estate". One such case is the Victor Kullberg, Longcase Regulator Clock. The clock was made in London in 1880 and installed in the Natal Observatory in 1884. Connected to the post office, it was the timekeeper for Natal Province for 26 years, and for a short period, for the Union of South Africa. When the Observatory was closed in 1911, the clock was moved to the Observatory library, and when that was closed in 1961, it was sold to a private collector (SAHRA Case Reference, 2019).

The private owner of the clock applied to SAHRA for an export permit, which was denied on two grounds: that it was of outstanding significance by reason of its close association with South African history or culture' and that 'it is of such a degree of national importance that its loss to South Africa would significantly diminish the national heritage' (SAHRA Case Reference, 2019). Funding for the purchase of the clock was made available by the National Research Foundation, and it is now at the South African Astronomical Observatory, a national heritage site (SAHRA Annual Report, 2020).

Another successful intervention was the sale of the work of fine artist Irma Stern entitled "Arab Priest" (painted in 1945), which was sold at auction in 2011 for a record-breaking price at the time (39 million Rand, or just over 3 million pounds). The work was auctioned in London, and bought by the Qatar Museums Authority for its Orientalist Museum. In addition to the quality of work itself, it is also regarded as

having important cultural values related to "the Orientalist subtexts that are evident in Stern's work, as well as in works by her contemporaries in the dominant colonial culture of South Africa of the 1940s" (Jafta, 2019).

SAHRA initially declined to grant an export permit, on the grounds that Irma Stern is a noted South African artist (there is an Irma Stern museum in Cape Town), and that her work was part of the national estate. Indeed, the artwork had been on loan to the museum in Cape Town for many years prior to the sale, but a newspaper report of the time indicated that "the museum decided it could not continue to house the work because of the insurance costs, prompting a decision to sell it" (Krouse, 2011). However, after negotiations with the Qatar Museum, a settlement was reached which granted a temporary export permit for the work on the basis of a 20 year "loan", as long as the work is exhibited in South Africa for one out of every five years. At the time of writing, the artwork is on display in South Africa at the Javett Art Centre at the University of Pretoria (Javett Art Centre, 2020).

There are also some private sector interventions that have proved successful. In the contemporary fine art space, the Ifa Lethu Foundation 'promotes partnerships and initiatives that focus on repatriation and preservation of our heritage' (Ifa Lethu, 2021). The Foundation was established in 2005 as a non-profit organisation with the specific mandate to repatriate township art produced in South Africa in the apartheid period (Maaba, 2009). Since there was little local market for such art during apartheid, many works were bought by diplomats, journalists and foreign tourists. The Foundation was provided with seed funding of R4 million by the national Department of Arts and Culture and start up project funding of R3 million by BHP Billiton and other funders.

In 2011, the Foundation reported to the Parliamentary Monitoring Group that in the previous three years it had repatriated 415 artworks, art objects and archival

collections from 11 countries (PMG, 2011). The most important challenges it faced were funding continuity and 'the absence of a legislative framework on repatriation'. In 2017/18, the Foundation hosted an exhibition of repatriated works (mostly donations from private foreign buyers) at Constitution Hill. The repatriated works were shown alongside works by contemporary South African artists. According to the Visual Art Network of South Africa (VANSA, 2021), Ifa Lethu 'manages the largest heritage repatriation effort in South Africa, with collections having been repatriated from countries such as the United States of America, Canada, France, Australia, Spain, Holland, the United Kingdom and Germany'.

7.2 Examples of unsuccessful interventions

Not all the interventions to prevent the sale of heritage artefacts have been successful, often because of the legal limits to SAHRA's mandate, or because of the difficulty in enforcing them in international markets.

For example, the Graham Beck Collection of African and Oceanic Headrests was auctioned in the US in November 2019. The auction included a Tsonga/Shangaan headrest from Limpopo province with an estimated value of $30 000 (Property360, 2019). The headrests have symbolic and cultural value (as well as their original practical use) in that the designs signalled the wealth and status of their owners and as a way to communicate with the ancestors. However, the ability of SAHRA to intervene in the case was limited, because although the headrests had originally been made in South Africa, they were only bought by their most recent owners in 2005. SAHRA's jurisdiction only extends to artefacts which have been in South Africa for at least the previous 50 years.

Steve Biko was an important anti-apartheid activist in South Africa, and is commonly regarded as the founder of the Black Consciousness Movement. In 2017, a

letter signed by Biko from 1973, addressed to the Magistrate of East London, requesting leave to travel in order to visit his wife came up for online auction in Britain. SAHRA contacted the auction house, since their view was that the letter, in addition to being state property, constituted part of the "national estate" (Hahndiek and Isaacs, 2018). Their argument was based on the Gazetted "list of types" for objects of national importance, which includes objects of historical importance associated with leaders.

However, the auction house would not reveal the name of the seller, and SAHRA could not prevent the ultimate sale of the letter to an unknown buyer. As Hahndiek and Isaacs (2018) noted:

> "This particular case exemplifies perhaps, the vulnerability of objects such as these especially because it was written to the Magistrate and belongs to the State, yet it ended up in private ownership and was sold online to the highest bidder. It highlights the need for more concerted efforts for heightened awareness and interconnectedness between SAHRA, the public, South African Museums; the National Archives, State Institutions, Auction houses as well as Customs and Excise officials".

7. Discussion and the way forward for South Africa

As a relatively new democracy, South Africa is seeking ways to protect and promote its African heritage, much of which was not protected or valued under Apartheid. As part of this process, there is increased interest in the process of the repatriation of South African cultural artefacts currently held in western museums. There are also increasing international calls for the repatriation of cultural artefacts from western museum collections back to their originating countries.

The arguments for the repatriation of African cultural artefacts rest on three

main pillars: (i) justice and moral rights of ownership, (ii) social and cultural significance and value, and (iii) economic values. Difficulties in applying these arguments in a practical way are, however, many. While some of the attributes of cultural artefacts can be described in an objective way, others (such as aesthetic, spiritual, and symbolic values) are more difficult to define. South Africa has made some progress towards defining, and protecting, artefacts 'of national importance' through SAHRA. However, there is currently no list of South African artefacts held in western collections which may be subject to repatriation.

What the case studies of the repatriation of cultural artefacts to other sub-Saharan countries demonstrated is that, even when there appears to be the international will to return the ownership of artefacts to their country of origin, the legal and institutional requirements may be prohibitive. In writing about the 'donation' of the Makhode mask, Opoku (2010) says, for example, that, 'Perhaps we should not worry too much about the formulation of the agreement in view of the concrete result achieved. We should congratulate the parties concerned and hope that the many other African artefacts which are alleged to have been illegitimately acquired will soon be subjects of agreement'.

The other way of getting around legislation, as seen in the case of the Great Zimbabwe bird, is the 'permanent loan' of the artifact – a method also proposed by the Benin Dialogue Group in the case of returning the bronzes to Nigeria for display in their new museum. It is noteworthy that, even in the case where there was a clear record of an artifact being stolen, there were legal barriers to formal restitution or return. How much more complex are cases where no documented paper trial exists? As Yu (2018) notes, China has increasingly relied on a blended approach to the recovery of its cultural artefacts, including 'gift and purchase' and 'negotiation'. Only in a very small number

of cases was international law or civil litigation successful.

The South African case studies demonstrate a range of values sought through the protection or repatriation of cultural artefacts. In terms of arguments associated with justice and the moral rights of ownership, the main values sought are the acknowledgement of rightful ownership and, in some cases, redress for past injustice. Examples here are the repatriation of "township" art by the Ifa Lethu Foundation, the attempt by SAHRA to prevent the export of the collection of African Headrests, and the sale of the letter by Steve Biko, which they argued rightfully belonged to the state.

All the cases link to arguments of social and cultural significance and value, which include intrinsic and social values that are enabled through access to artefacts for reasons of appreciation, education and research. An example is the Victor Kullberg Longcase Regulator Clock, which SAHRA helped to retain in the country by organising funding by the National Research Foundation through the South African Astronomical Observatory. Social and cultural values are also cited in the work of the NPO Ifa Lethu Foundation and the Irma Stern "Arab Priest" work.

Economic values are also (potentially) present, mainly for artefacts that may be expected to generate public interest because of their aesthetic, historical, or symbolic value, or research interest (enhancing institutional reputation and funding). Although these values may be regarded as instrumental, they may be important in developing country contexts where public funding for cultural heritage is limited. The Irma Stern painting, which sold for a record-breaking price to an international collection, is a clear example of a work that could be expected generate significant public interest, and thus cultural tourism. The negotiated agreement that allows the painting to be owned by the Qatar Museum, while still being exhibited some of the time in South Africa, is an interesting example of how shared values can be created.

Despite Opuku's (2018) assertion that 'permanent loans' are unacceptable, they may be the only way, in some cases, in which the physical return of artefacts can be achieved. In the 'Study on the Establishment of the on-going Cooperation activities between the European Union and Africa with regard to Cultural Goods' commissioned by the African Union (AU, 2014: 74-5), a similar point is made: 'The issue of power relations and diplomatic wellbeing of relations seems to favour the arbitration and negotiation approach. The use of 'permanent loan to the Government of Zimbabwe' is a crafty way of avoiding undiplomatic and embarrassing words like 'repatriation of stolen cultural goods' back to their original country'.

In addition, the physical return of cultural artefacts to their country of origin may not be the only acceptable (or even the most desirable) repatriation option. As Whitaker et al (2020) point out, new technologies, like blockchain, may allow the separation and sharing of ownership rights, so that value (monetary and non-monetary) of the artefact can still be maximised.

The renewed international political will to consider the restoration of cultural artefacts provides a window of opportunity for South Africa, taking into account the experiences of other African countries. South Africa already has a comprehensive definition of artefacts that make up the 'national estate' the Draft policy on the Regulations on the Restitution of Heritage Objects is currently under discussion.

At present, there is no list of significant South African cultural artefacts held outside the country. A potential starting point is thus to start such a database, as has been done in the case of the Kenyan online International Inventories Programme. SAHRA has a detailed online database and GIS (Geographical Information Systems) mapping facility that tracks heritage sites and objects within South Africa. With the additional resources,

this platform could be extended to include international holdings. Private institutions and NGOs (like the Ifa Lethu Foundation) could also be invited to contribute.

Investing in the digitsation of current South African museum holdings could be an important part of such a project: It would improve the curation and accessibility of collections, improve security, and may help to allay the fears of curators that repatriated artefacts might be sold back into lucrative western markets. Such systems could open the way for digital repatriation options, although caution is also needed around maintaining security and copyrights.

An important recommendation of the AU report (2014:75) is that AU member states should individually ratify existing international conventions related to the protection of cultural heritage, as well as the Charter for African Cultural Renaissance (2006), which has provisions for cultural heritage protection. Having such documentation in place will be important, as demonstrated in the case study of the Makonde Mask.

However, the experiences of other countries have shown that the strictly legal route may not be the most productive line. Voluntary and good faith agreements and negotiations have tended to produce more productive results, as South Africa has already found with the loan agreement relating to the export of the Irma Stern painting.

Acknowledgements

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