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Reviewing the experience with the repatriation of sacred ceremonial objects: A comparative legal analysis of Canada and South Africa

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Abstract

Recent global interest in preserving cultural identity and heritage for the future of previously colonized Indigenous groups has prompted the resuscitation of local and Indigenous cultures from the brink of extinction. The pertinence of protecting and managing cultural heritage as an endowment that transcends generations of people and serves as a ligature between their past, present, and future cannot be overstated. In this respect, the repatriation or restitution of sacred ceremonial objects (SCOs) and cultural artifacts constitutes an integral aspect of reviving Indigenous people's cultural and living heritage, which has been eroded by colonialism and other forms of occupation. In Alberta, Canada, the First Nations Sacred Ceremonial Objects Repatriation Act is the foremost legislation that provides a formal mechanism for the return of SCOs to the First Nations. Thus far, it has successfully facilitated the repatriation of several hundred repatriated several SCOs. In contrast, South Africa's primary heritage legislation, the National Heritage Resources Act, lacks direction and detail on the restitution of SCOs, specifically to cultural communities. With the aid of a comparative approach, this article critically examines one successful approach to the repatriation of specific sets of heritage objects in Canada and analyzes South Africa's legal frameworks that consider SCOs as a component of its national estate within its framework for restitution and the promotion of cultural revival in cultural communities.

Introduction

For centuries, the human remains and cultural objects of Indigenous groups have been the subject of scientific study and curiosity. These objects have been prominently displayed in museums as relics of past civilizations. Since the arrival of Europeans in North America and Africa, cultural artifacts and objects have provided social scientists and historians with invaluable information about the cultures, social structures, religious beliefs, and migration patterns of Indigenous peoples.¹ In the early twentieth century, African and North American museums “salvaged” collected artifacts by creating exhibits that portrayed the artifacts

¹ Specific terms are used in this article to denote Indigenous groups and cultures, with specific community names mentioned where appropriate. In Canada, the term “Indigenous” is used to refer to First Nations, Inuit, and

from their own, non-Indigenous perspectives.² For many years, colonial policies have sought to assimilate Indigenous cultures. However, the recent revitalization and perpetuation of Indigenous cultures has prompted many groups to ensure that their communities remain culturally vibrant and relevant. Central to this cultural revival are the sacred cultural objects that remain housed in museums worldwide. Indigenous groups interested in protecting their cultural beliefs have requested the return of such sacred objects for ceremonial and spiritual use.³

In Alberta, Canada, more than 250 sacred ceremonial objects (SCOs) have been returned (repatriated) from public museums for use in sacred ceremonies.⁴ In 2000, the government of Alberta took a bold step when it enacted the First Nations Sacred Ceremonial Objects Repatriation Act (FNSCORA).⁵ The FNSCORA is unique in Canada in that it provides a formal legal framework that facilitates the return of SCOs to First Nations groups. In South Africa, the primary legislation governing the general protection and preservation of heritage objects is the National Heritage Resources Act (NHRA).⁶ Although the Act does not make specific provision for SCOs, it may be inferred from the definition of the “national estate.”⁷

This article examines Alberta’s recent experience with the FNSCORA and extrapolates valuable lessons for South Africa from that experience. The analysis of the current state of South African law focuses on the extent to which general protection of heritage objects listed as the national estate and laid out by the NHRA can be applied to the restitution of heritage objects, including the SCOs of cultural communities. To achieve this goal, we shall first present an overview of the spiritual importance of a select group of heritage objects as well as the significance of these objects to belief systems and cultures of Indigenous peoples. We will examine the problems posed by early Eurocentric European beliefs and the attendant threat to Indigenous cultures. The Canadian approach to the repatriation of Indigenous cultural objects will be discussed by analyzing relevant Canadian legislation. We argue that, although the creation of ad hoc museum repatriation policies does encourage the return of SCOs, the enactment of Alberta’s FNSCORA⁸ and its accompanying regulations has proven to be a more effective approach for the return of Indigenous artifacts. This is because the legislation evinces the government and the public’s willingness to return SCOs to First Nations groups and specifies repatriation procedures to be followed by civil servants, museum curators, and First Nations groups.

With regard to South Africa, this article explores the influence of the country’s Constitution on protecting cultural heritage and the extent to which it permits the restitution of culturally relevant materials to cultural communities. We conclude with a critical

Metis peoples and their cultures, whereas, in South Africa, cultural communities refer to Indigenous African communities and other cultures that were previously limited or excluded from formal cultural conservation and protection. It is important to note that the First Nations Sacred Ceremonial Objects Repatriation Act (FNSCORA), which is part of the focus of this article, only applies to First Nations peoples in the province of Alberta. During the apartheid era in South Africa, the concept of culture (and, subsequently, cultural heritage) was used as an argument to perpetuate the idea of racial separation and segregation. This led to the disparagement of the notion that ethnic cultures should receive the same protection of their cultural heritage as the heritage of the governing colonials. See Roodt 2000, 235.

² Appelbaum 1995.

³ Appelbaum 1995.

⁴ Dawn Walton, “Sacred Bundles Returning to Native Lands: Unique Law That Led to the Return of Ceremonial Objects to Blackfoot Confederacy Bands Is Cause for Celebration,” *Globe and Mail*, 30 July 2009, A8.

⁵ RSA 2000, c. F-14 (FNSCORA).

⁶ No. 25, 1999 (NHRA).

⁷ See NHRA, s. 3(2)(i)(ii), where “national estate” may include movable objects, including objects to which oral traditions are attached or which are associated with living heritage; see also subsections (3)(a) and (g).

⁸ FNSCORA.

assessment of the extent to which the legal framework for restitution of heritage objects in South Africa respects the constitutionally protected right to culture entrenched in the Bill of Rights. South Africa and Canada were chosen for this comparative study as both countries share historic colonial convergence points. Indigenous groups in both countries have experienced colonial domination and oppression. The First Nations in Canada have been targets of racism, and South African Indigenous communities were victims of the apartheid separationist movement.⁹

In this article, culture is perceived through the lens of European cultural theory, which itself is premised on European nationalism.¹⁰ According to Jewel Amoah, this conception of culture encompasses the totality of everything that humans acquire by belonging to a distinct community, such as a people's wealth of knowledge, beliefs, arts, morals, laws, and customs.¹¹ By doing so, a community asserts its identity and preserves its beliefs and cultural practices. Sacred and ceremonial objects fall within the ambits of cultural heritage due to the recognition of a right to culture in the 1996 Constitution of the Republic of South Africa (1996 Constitution)¹² and the subsequent legislative and policy approaches to heritage protection during the apartheid era and the current democratic dispensation.

In South Africa, although the Khoisan cultural community is deemed to be Indigenous (the original inhabitants) by various historical accounts, there is no specific recognition in the South African legal or policy landscape. Following the dawn of democratically constituted governance in 1994, South Africa embarked on a cultural renaissance to protect all peoples' heritage resources to foster a sense of national pride, unity, and identity in South Africa.¹³ A remarkable amount of research has been conducted on the Khoisan cultural community's legitimate recognition and identification as an Indigenous group in South Africa.¹⁴ Currently, they are classified as a "cultural community," just like other communities in South Africa such as the Bantu people, who comprise the Black communities

⁹ In South Africa, since colonial times, the Khoisan people have been dispossessed of their lands and described as not "living in a pristine state of pre-colonial African antiquity." See Parliamentary Monitoring Group South Africa, "Khoisan Communities in South Africa," 4 October 2000, https://pmg.org.za/files/160203KHOISAN_RESEARCH.doc. They are however, agitating for national recognition as Indigenous people. The status and recognition of the Indigenous people (the Khoisan specifically) have been subject to an ongoing debate despite South Africa's vote in favor of adopting United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295, UN GAOR, UN Doc. A/RES/61/295, 13 September 2007 (UNDRIP). The term "Khoisan" is used here as a convenient composite term for the KhoiKhoi and the San. The KhoiKhoi include the Nama residing mainly in the Northern Cape Province; Koranna mainly in Kimberley and Free State Province; Griqua residing in the Western Cape, Eastern Cape, Northern Cape, Free State, and Kwa-Zulu-Natal provinces and the Cape KhoiKhoi residing in the Western Cape and Eastern Cape, with growing pockets in Gauteng and Free State Provinces. The San groups include the Khomani San, residing mainly in the Kalahari region. See The International Work Group for Indigenous Affairs, "Indigenous Peoples in South Africa," 12 September 2021, <https://www.iwgia.org/en/south-africa/722-indigenous-peoples-in-south-africa>; see also Klaasen 2018, 4143–57. Bantu-speaking populations, on the other hand, refer to those Black South African communities that migrated south from further north in Africa within the last few thousand years. These populations brought with them several languages that have transformed over time and been included as some of the 11 official languages of South Africa. Part of those official languages are English and Afrikaans brought to South Africa during from colonial rule.

¹⁰ Culture is linked to self-determination, which is recognized in section 1(1) of the International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171 (ICCPR), which provides that, by virtue of the right to self-determination, all peoples are entitled to pursue their own cultural development.

¹¹ Amoah 2008, 368.

¹² See Constitution of the Republic of South Africa, 1996, s. 31(1) (1996 Constitution). This right is contained in the Bill of Rights. Section 31(2) expressly prohibits the exercise of cultural rights in any manner that is inconsistent with any other provision of the Bill of Rights.

¹³ Glazewski 2000, 603.

¹⁴ Smith 1986, 36–41; Verbuyst 2016, 85–87; Brown and Deumert 2017, 571–94; Veracini and Verbuyst 2020, 265–70.

whose languages are listed among the 11 official languages in section 6 of the 1996 Constitution.

Interestingly, the recent enactment into law of the Traditional and Khoi-San Leadership Act¹⁵ is set to recognize and involve the traditional leadership of the Khoisan communities in the constitutional state. This Act identifies specific criteria¹⁶ that need to be met for each traditional community within the larger Khoisan community to be recognized as Khoisan. Although it is a laudable achievement in their recent agitation for recognition, the Act still fails to acknowledge that the community is Indigenous to South Africa and should be recognized as such.¹⁷ Lack of recognition fosters a continued dearth of cultural awareness of the Khoisan Indigenous people. Such recognition would provide the necessary legislative impetus for the group to pursue the restitution of their cultural property in furtherance of the revival of their identity and culture. However, even without this recognition, the current heritage and cultural property protection regime in South Africa applies to all cultural and/or traditional communities in South Africa.

This article adopts a doctrinal approach focusing on case law, statutes, and other legal sources to investigate cultural heritage and heritage objects that include SCOs. The study does not involve any form of quantitative research or analysis. There will be substantial inference drawn from media coverage of events at cultural institutions relevant to the discourse.

The significance of cultural heritage property to First Nations and Indigenous communities

A fundamental aspect of the healing process for Indigenous communities around the world arises from increasing societal respect for Indigenous groups' cultural, religious, and social beliefs.¹⁸ These belief systems are essential to the well-being of present and future generations because of the association with their cultural heritage and sense of community.¹⁹ In addition, these systems provide them with a sense of communal connection to the past.²⁰ An important part of demonstrating respect for the belief systems that cumulatively constitute the cultural (living) heritage of these groups of people includes the repatriation or restitution of their cultural property and heritage objects such as sacred objects for spiritual or religious ceremonies.²¹ In the past, the colonial theft and coercive dispossession of

¹⁵ No. 3, 2019 (Traditional Leadership Act). The Act is yet to come into operation at the time the research for this article was completed.

¹⁶ Traditional Leadership Act, s. 3.

¹⁷ FNSCOR.

¹⁸ UNDRIP.

¹⁹ Appelbaum 1995, 218.

²⁰ Weiss 1989, 257.

²¹ In South Africa, for the purpose of this research, the definition of repatriation and restitution in the National Policy on the Repatriations and Restitution of Human Remains and Heritage Objects, 2021, (2021 National Policy) was presented and adopted by the South African Cabinet Committee at its sitting on 16 March 2021. I am indebted to the anonymous reviewer for supplying me with a copy of the latest version of the policy. The policy has not been circulated to the public at the time of the completion of this research. The policy is currently in need of funding for implementation, as explained by the Department of Sports, Arts and Culture in Maputi Sibongile, "Proposed Repatriation Policy in Need of Funding," *Parliament of South Africa*, <https://www.parliament.gov.za/news/proposed-repatriation-policy-need-funding>, 28 July 2021. The policy defines repatriation as "the return of human remains and heritage objects from another country to South Africa." While defining restitution as the "restoration of an original loss such as the return of human remains or heritage objects and documentation that occurs formally according to a claim for return and restoration, either based on ownership or unethical or illegal acquisition." For the Canadian context, we adopt the definition of repatriation laid out in the FNSCOR. The term "repatriation" is

Indigenous cultural property has been a part of the oppression of minority groups and the assertion of the dominance of a new regime over an old one.²² The removal of cultural property from these groups significantly weakened their sense of cultural cohesion.²³ Therefore, any object or property²⁴ belonging to any Indigenous group as a symbol of their cultural practices or rituals deserves to be protected and preserved for present and future generations. The domestic and international restitution or repatriation of such heritage objects from the coffers of cultural institutions deserves to be pursued using legislative or other legal measures.²⁵

The last three decades have been characterized by increasing concern among Indigenous peoples that colonial policies of assimilation have resulted in an immense loss of cultural knowledge in many communities. According to Terri-Lynn Williams, the return of cultural objects “can fill a gap in many First Nations communities; a gap created by the removal of cultural heritage from First Nations.”²⁶ To fully understand the importance of the return of SCOs to Indigenous groups, it is essential to examine the meaning and significance of this type of cultural property.

SCOs as a unique form of cultural property

There are strong emotional ties between members of an Indigenous group and particular sacred objects sites that involve cultural property.²⁷ These objects and sites play a significant role in the religious, social, and cultural ceremonies of Indigenous groups. In her comparative study of US and Canadian repatriation laws, Elizabeth Koehler alludes to the crucial difference between cultural property and other types of property: “Cultural property, more than most other forms of property, seems to be bound up with the identity of its holder and particularly important to the owner’s self-development and fulfillment. This is one reason why it is entitled to greater respect than other forms of property.”²⁸ Koehler further notes that “[t]he understanding and appreciation of a nation’s cultural origins and heritage are fundamental to the development of cultural maturity.”²⁹ This implies that, for Indigenous groups to re-energize and solidify their collective sense of identity, they must either have direct access to, or be in possession of, those objects central to their culture’s existence. During the last century, the display and housing of many of these objects was largely determined by museum curators. Curators generally assumed that they should decide which objects were remarkable and representative enough to be displayed and considered meaningful. However, the US experience shows that this type of decision and control is “vital to the ability of Native American tribes to communicate their cultural image.”³⁰ The same experience resonates in Canada and South Africa.

clearly defined in the Act as the “transfer to a First Nation by the Crown (Government of Alberta) of the Crown’s title to a sacred ceremonial object and the acceptance by the First Nation of that transfer.” FNSCOR, ss. 1(d)(i)(ii).

²² Gottlieb 2005, 858.

²³ Williams 1995, 184.

²⁴ We only focus on heritage objects that are of cultural, symbolic, or traditional significance to First Nations, cultural communities, and Indigenous people to the exclusion of objects that contravene any other provisions of the law.

²⁵ This is also affirmed in the UNDRIP. See Glazewski 2000, 603.

²⁶ Williams 1995, 184.

²⁷ Koehler 2007, 105.

²⁸ Koehler 2007, 106.

²⁹ Phelan 1993, 64, cited in Koehler 2007, 106.

³⁰ Painter-Thorne 2002, 1264.

SCOs are indispensable to the perpetuation of cultures because they are believed to have an “independent life “and are “inextricably linked to ceremonies.”³¹ Unfortunately, cultural property and human remains have “uniquely suffered from being the object of a significant market for thieves and vandals,”³² in addition to curious colonists, settlers, collectors, anthropologists, and researchers. The removal of these cultural objects from their respective descendant communities for anthropological and scientific purposes, sheer greed, or curiosity is akin to stripping them of their cultural identity. More importantly, it has been responsible for leaving several Indigenous groups moving toward the edge of cultural demise. Consequently, cultural preservation in many Indigenous communities has become a pertinent issue of concern.

The long-held tradition of unscrupulously utilizing and displaying sacred ceremonial objects under the guise of scientific and anthropological study has gradually been replaced by a broader understanding that these objects are vital to many Indigenous groups’ cultural survival. With a renewed sense of spiritual and cultural purpose, many groups have begun to assert their authority “over the interpretation and exhibition of their people, spirituality, and their way of life, in an attempt to generate cultural revival.”³³ In Canada, this renewed understanding of the dynamic significance of artifacts has triggered a shift away from the reliance on ad hoc museum policies toward legal requirements that better respond to the desire of First Nations to reclaim and safeguard their SCOs. Alberta is the first Canadian jurisdiction to implement legislation – the FNSCOR – which has already prompted the return of numerous SCOs when requested by the Blackfoot people.³⁴ This formal recognition of the importance of action to return the sacred objects in the legislation clearly demonstrates respect for Indigenous culture.

Notwithstanding the formal restitution process or repatriation of such heritage objects to the First Nations in Canada, one significant challenge to any repatriation initiative is that Eurocentric beliefs, which are ubiquitous and prevalent in many societies, are in direct conflict with First Nations and Indigenous groups. We examine the nature of this issue to emphasize the need for a legislative approach in South Africa that facilitates the restitution and repatriation of heritage objects to communities from which they were taken.

Cultural property and the difficulty posed by Eurocentric beliefs

Recent interest in cultural revitalization has sparked debates surrounding cultural property. One issue concerns the discrepancy between the different conceptualizations of cultural property between Indigenous and European groups. Given the diversity of Indigenous groups, it is difficult to articulate a single belief regarding cultural objects. Nonetheless, Indigenous beliefs differ significantly from the Eurocentric dichotomy between animate and inanimate objects in the sense that many Indigenous groups, such as the Blackfoot, believe that humans control inanimate objects and the destiny of non-human animate objects.³⁵ According to Gerald Conaty, the former senior curator of ethnology at the Glenbow Museum in Calgary, the Blackfoot people revere certain objects such as sacred bundles (a suite of sacred objects wrapped in one bundle that are used in Blackfoot spiritual ceremonies)

³¹ Williams 1995, 186.

³² Koehler 2007, 111.

³³ Bell 1992, 461; Janes and Conaty 1992; Schaepe and Rowley 2021, 139–50.

³⁴ In Alberta, the First Nations group that has been at the forefront of the repatriation of sacred ceremonial objects are the Blackfoot Confederacy. The Blackfoot were nomadic buffalo hunters that migrated from the Great Lakes region to the plains. A fierce and powerful group, they came to be known as the “Lords of the Great Plains.” See Blackfoot Confederacy, <https://blackfootconfederacy.ca/>.

³⁵ Williams 1995, 184; Conaty 2008, 248; 2015a, 23.

because they believe that the bundles allow the people to connect to an important part of their history through ceremonial celebrations and, as such, possess a spirit and act as a medium through which communications are received from the spirit world.³⁶ One national correspondent, Dawn Walton, provides this explanation:

For generations, Blackfoot peoples would use sacred bundles in elaborate and secret ceremonies that tied the northern plains Indians to the land and instilled a sense of history and social order in the community. But over the years, the sacred bundles made their way into the hands of museum curators and private collectors around the world, as native bands wrestled with the loss of the bison, modernization and dwindling homegrown interest in cultural traditions. “Normally, those items are very precious, but with the economic times they were facing, there was starvation, and now it’s a different generation that’s embracing our culture and trying to make sure it doesn’t happen again. ... more than 100 sacred bundles containing 200 ceremonial objects [have been returned] to bands in the Blackfoot Confederacy.” Collectors are believed to own more items of historical significance to native bands than do Canadian aboriginal people. Pieces have fetched more than \$1 million on the open market. Rarely do sacred bundles go up for auction, but band chiefs in Alberta have been lobbying for their recovery. According to information from Blackfoot Crossing Historical Park, about 100 kilometres east of Calgary, sacred bundles were given to the Blackfoot by a supernatural spirit encountered usually in dreams or visions, as a means of connection, and a way to ask for help from the creator. They are to be displayed in certain ways indoors and outside. Their mere presence commands respect.³⁷

Describing the difference between Indigenous and Eurocentric beliefs, Andrew Gulliford explains: “While Christianity affirms ethical behavior in human relationships, native American spirituality is cyclical, not linear, and involves both person-to-person relationships as well as person-to-animal relationships and a profound belief in the power of nature. Native American sacred objects thus signify a completely different world view.”³⁸ The prominent Haida artist in the province of British Columbia, Robert Davidson, further expatiates this non-linear spiritual relationship: “[W]hen I make a mask, it is actually copying an image from the spirit world. I believe that we’re connected to the supernatural or spirit world through our minds. When I create a new mask or dance or image, I’m a medium to transmit those images from the spirit world ... masks are images that shine through us from the spirit world.”³⁹ The heritage management legal framework during the apartheid era in South Africa was also Eurocentric in nature as it sought to protect only the heritage of the white minority while expropriating and undermining the heritage of other communities and ignoring the intangible aspects such as rituals and cultural ceremonies.⁴⁰

The approach to repatriating SCOs in Alberta, Canada

The Canadian Constitution provides for the allocation of exclusive “heads of power” between federal and provincial governments in the federal state.⁴¹ Under section 92

³⁶ Conaty 2015a, 81–82.

³⁷ Walton 2009, “Sacred Bundles,” quoting Rick Tailfeathers, a spokesperson for the Blood Tribe in Southern Alberta.

³⁸ Gulliford 1992, 27.

³⁹ Davidson and Steltzer 1994, 96.

⁴⁰ Kotze and Jansen Van Rensburg 2003, 140.

⁴¹ Constitution Act (UK), 1867, 30 and 31 Vict., c. 3, s. 58, reprinted in RSC 1985, App. II, no. 5 (Can) (Constitution Act).

(13) of the Constitution Act 1867,⁴² provincial governments have jurisdiction over “property and civil rights.” The cultural property that is discussed in this article are the objects created by Indigenous peoples in the collections of two major public museums under the jurisdiction of the provincial government of Alberta. In addition, the protection of human rights is another matter that falls under provincial jurisdiction that incorporates respect for religious beliefs, and, in Alberta, such protection includes the spiritual beliefs of Indigenous peoples.⁴³ The FNSCORAs provides a concrete legal framework to repatriate SCOs. Conaty has reported that, since the FNSCORAs was enacted in 2000, more than 250 SCOs requested by First Nations have been returned to Indigenous groups for use in ceremonial practices.⁴⁴ Before enacting the FNSCORAs, the removal of objects from publicly owned collections could have exposed the Glenbow Museum and the Government of Alberta to lawsuits brought by members of the public since objects in the museum collections are held by the provincial government and the Glenbow Museum in trust on behalf of all Alberta residents. Amendments to other relevant museum legislation, such as the Glenbow-Alberta Institute Act,⁴⁵ have removed the liability of the public museums and government officials that have facilitated the repatriation of objects when conducted in good faith.⁴⁶

Events leading up to the creation of the FNSCORAs in Canada

The FNSCORAs was created in response to persistent lobbying by the Blackfoot peoples for the return of SCOs, an increased awareness of the importance of human rights protection in the province about these concerns, and the inadvertent involvement of a major Alberta museum in a controversy arising from a high-profile travelling exhibit. The Alberta Human Rights Act (HRA)⁴⁷ states: “Whereas it is recognized in Alberta as a fundamental principle and as a matter of public policy that all persons are equal ... without regard to ... religious beliefs ... and it is fitting that these principles be affirmed by the Legislature of Alberta in an enactment whereby those equality rights and that diversity may be protected.”⁴⁸ The Alberta government amended the HRA to include “native spirituality” as part of the “religious beliefs” that must be protected under the Act.⁴⁹

Participating in sacred ceremonies and the use of SCOs in these ceremonies is a protected right under the HRA. By creating a formal repatriation process for SCOs used in sacred ceremonial practices under the FNSCORAs, the Alberta government has taken concrete steps to protect the religious beliefs of the Blackfoot peoples. The HRA provides that “it is the function of the Commission... to forward the principle that all persons are equal in dignity, rights and responsibilities without regard to race and religious beliefs.”⁵⁰ Under the HRA, any person can make a complaint for investigation and enforcement to the Human Rights Commission (HRC), “who has reasonable grounds for believing that a person has contravened the Act.”⁵¹ As provided under the FNSCORAs, by transferring ownership of SCOs to the concerned Indigenous peoples, the Alberta government has prevented potential human

⁴² Constitution Act, s. 92(13).

⁴³ Human Rights Act, RSA 2000, c. A-25.5, ss. 44(1)(m) (HRA).

⁴⁴ Conaty 2015b; see also Glenbow Museum, www.glenbow.org/?gclid=Cj0KCQiAiZPvBRDZARIsAORkq7fs82mVDBiH4KL-aRDl7VELdphyZB8gWLxInazXJ7nLo0PcXU2cSHUaAsJjEALw_wcB.

⁴⁵ RSA 2000, c. G-6.

⁴⁶ Bell 2009, 41.

⁴⁷ HRA, ss. 44(1)(m).

⁴⁸ HRA, preamble.

⁴⁹ HRA, ss. 44(1)(m).

⁵⁰ HRA, s. 16(1)(a).

⁵¹ HRA, s. 20(1).

rights complaints under the HRA as well as legal actions that might arise if action had not been taken to adhere to the protection for religious beliefs in the HRA.

Another factor that contributed to museum support for the adoption of repatriation legislation rather than providing SCO loans was the inadvertent involvement of the Glenbow Museum in an international public relations nightmare arising from one of its exhibits. In preparation for visitors from around the globe for the 1988 Olympics, which were hosted in Calgary, the museum created a traveling exhibit called *The Spirit Sings: Artistic Traditions of Canada's First Peoples*,⁵² which featured objects created by Indigenous peoples. One Alberta Indigenous group, the Lubicon Cree, boycotted the exhibit due to outstanding native land claims grievances against an oil company that had sponsored the exhibit, and another group, the Mohawk Nations, initiated a lawsuit for the return of a mask that had been lent to the museum. Seema Bharadia, a legal researcher, has noted that, “[e]ven though First Nations representatives had been employed by the Glenbow to assist in the execution of the exhibit, some First Nations groups felt compelled to focus on the discomfiting issues regarding collections and the exhibition of sacred objects.”⁵³

In response to the controversy, the museum became more sympathetic to the concerns of Indigenous peoples about the museum's use of Indigenous objects and supportive of the Blackfoot peoples' requests to borrow sacred objects in the museum collection such as headdresses, medicine ceremonial bundles, pipes, and rattles for use in spiritual ceremonies.⁵⁴ In addition, the controversy also prompted Glenbow and other major Canadian museums to create a national task force to discuss with the First Nations in other provinces and territories their concerns about museum practices and an opportunity to address the concerns. This action led to the publication in 1992 of *Turning the Page: Forging New Partnerships between Museums and First Peoples* which increased access to museum collections by Indigenous people and the repatriation of SCOs such as medicine bundles were identified as important issues that needed to be addressed.⁵⁵ Since the release of the task force report, both the Glenbow Museum and its counterpart in Edmonton, the Provincial Museum of Alberta (PMA),⁵⁶ have responded positively to First Nations' requests for the loan of sacred objects and, ultimately, repatriation for use in spiritual ceremonies.

An important issue that the Glenbow Museum has experienced with the temporary loan of SCOs was the clash between its collection preservation policy and the Blackfoot spiritual belief that medicine bundles are “living beings” that require special handling and treatment by only those people who have the traditional right to do so. As with many other museums, Glenbow's policy has been to preserve objects in its collections for posterity to benefit future generations. A practical issue that emerged with the loans was the mandatory inspection and fumigation of SCOs upon their return to protect and preserve objects in the museum collections from pests. Bharadia notes that the fumigation of sacred objects conflicted with the Blackfoot perspective on how sacred objects must be handled – for example,

due to its involvement in ceremonies, the medicine bundle became empowered and therefore activated once more for spiritual purposes. Therefore, in keeping with the traditional requirements of the Blackfoot, it could not be handled by those without the traditional right to do so. ... The bundle having been used in ceremonies, is considered by the Blackfoot to be a living being and is treated very much as one's own child.⁵⁷

⁵² Harrison 1993, 334–57.

⁵³ Bharadia 1999, 18.

⁵⁴ Bharadia 1999, 7, 18.

⁵⁵ Task Force Report on Museums and First Peoples 1992, 1.

⁵⁶ The Provincial Museum of Alberta was renamed the Royal Alberta Museum in 2005.

⁵⁷ Bharadia 1999, 26.

After becoming aware of Blackfoot spiritual concerns about the fumigation of SCOs, Glenbow staff realized that its collection preservation policy was incompatible with Blackfoot spiritual practices.⁵⁸ As Bharadia reported one year before the adoption of the FNSCORA, the museum recognized that “the Blackfoot peoples were a very relevant Alberta community that museums are obliged to respect as equally as any other community, particularly in light of their cultural and spiritual revival, and restrictions on the ability of the Blackfoot to use sacred ceremonial objects in their spiritual practices suggests a lack of respect.”⁵⁹ Therefore, transitioning beyond SCO loans to repatriation – the permanent transfer of title to these objects from the government to the First Nations – ended the fumigation conflict.

John Ives reports that, in the 1980s and 1990s, the PMA, like the Glenbow, had acquired collections that contained SCOs.⁶⁰ During the early 1990s, as with the Glenbow, the preferred practice of the PMA was to lend sacred objects on a short-term basis when requested by the Blackfoot peoples. However, dissatisfaction with temporary loans prompted increased visits and representations to the PMA by the Blackfoot in the mid-1990s to the Alberta government, and, then by late 1997, to the premier’s office to lobby for repatriation of the objects.⁶¹ Since Ralph Klein, the premier at the time, was empathetic to the concerns of the Blackfoot peoples, he directed the PMA to enter into negotiations with the interested First Nations to develop policies for potential longer-term loans of sacred materials.⁶²

In addition, as SCOs in both the Glenbow and PMA collections are owned by the government, the premier’s office noted the importance of a uniform provincial-wide approach toward SCOs and requested a policy review in this regard.⁶³ As part of the policy review, consultation was undertaken with respected Blackfoot ceremonialists who requested the creation of a government advisory committee with the participation of recognized ceremonialists to evaluate requests from interested First Nations for the return of SCOs.⁶⁴ In 1998, Ives attended a workshop hosted by the Glenbow Museum to discuss loan and repatriation issues,⁶⁵ and, the following year, he noted that both museums were lending an increasing number of SCOs for use in Blackfoot ceremonies.⁶⁶ Since the museum collections are held in the public trust for future generations, consideration of the implications of transferring ownership of this select group of objects was undertaken, along with the objectives of the repatriation legislation, which specify that objects in the museum collections should be included and defined as SCOs and acknowledge the potential for multiple and conflicting repatriation requests and disputes among members of different Indigenous groups, and encourages the repatriation process to be followed.

Legislative objectives

After consultation and negotiations with the interested nations in the Blackfoot Confederacy, the FNSCORA was adopted in 2000. Consistent with what has been discussed in the previous section of this article, the preamble to the act states:

⁵⁸ Bharadia 1999.

⁵⁹ Bharadia 1999, 27.

⁶⁰ Ives 2015, 224.

⁶¹ Ives 2015, 225.

⁶² Bharadia 1999, 22–23.

⁶³ Bharadia 1999, 22–23; Ives 2015, 225.

⁶⁴ Ives 2015, 225.

⁶⁵ Bharadia 1999, 22–23.

⁶⁶ Ives 2015, 227.

For several decades Alberta museums had held sacred ceremonial objects of great spiritual value to First Nations to preserve them for the benefit of future generations; First Nations desire the return of sacred ceremonial objects vital to the practice of their sacred ceremonial traditions; and the government...desires to harmonize the role museums play in the preservation of human heritage with the aspirations of First Nations to support traditional values in strong, confident First Nations communities.⁶⁷

Repatriation process

The FNSCORR defines “repatriation” as the transfer to a First Nation by the Crown (Government of Alberta) of the Crown’s title to a SCO along with the acceptance by the First Nation of that transfer.⁶⁸ In light of the potential number of objects to be removed from publicly owned collections, a second issue that needed to be clarified was the type and use of objects to be included in the special SCO category. As members of the interested First Nations who engage in spiritual practices are the most knowledgeable to identify the objects they require in sacred ceremonies, experts were consulted by the museums. Based on her interviews with members of the Blackfoot, Bharadia has reported that useful insights were contributed by them as to which objects, they considered to be SCOs. She explains, for example:

While almost every object is considered to be animate by the Blackfoot, they themselves have boundaries regarding which objects from the museum are within the realm of possible repatriation.⁶⁹ According to a Blood Elder, Florence Scout, objects that are (a) used directly within a ceremony, and are (b) valued by the community at large – as opposed to objects that are personal objects – are the kinds of objects (sacred) that interest the Blackfoot.⁷⁰ Objects of a personal value such as moccasins or a dress worn by an attendant at a ceremony are not considered to be part of the definition of a “sacred object”.⁷¹

Another member of the Blood Tribe, Jenny Bruised Head, expressed the opinion that “only sacred objects for which there are teachings in the community, and which can be incorporated into active use are of consideration.”⁷² After considering this input, the FNSCORR defined a SCO to be adopted as an object “used by a First Nation in the practice of sacred ceremonial traditions, ... that it is vital to the practice of the First Nation’s sacred ceremonial traditions.”⁷³

In 2004, the Blackfoot First Nations Sacred Ceremonial Objects Repatriation Regulations were developed that provide specific details on the repatriation process.⁷⁴ The regulations define “First Nations” as the Blood Tribe, the Siksika Nation, and the Piikani Nation and outline the procedures for applying to the minister to repatriate SCOs. For example, section 3 of the regulations requires any First Nation group that applies for repatriation

⁶⁷ FNSCORR, preamble.

⁶⁸ FNSCORR, ss. 1(d)(i)(ii).

⁶⁹ Bharadia 1999, 29.

⁷⁰ Bharadia 1999.

⁷¹ Bharadia 1999.

⁷² Bharadia 1999.

⁷³ FNSCORR, ss. 1(e)(i)(iii).

⁷⁴ Blackfoot First Nations Sacred Ceremonial Objects Repatriation Regulation, AB Reg 96/2004 (Blackfoot Regulations); see also Ives 2015, 225.

of a SCO to be incorporated under the Societies Act.⁷⁵ This requirement provides for the creation of societies for benevolent, charitable, and educational purposes.⁷⁶ Bharadia notes that one example of such a society is the Mookaakin Cultural and Heritage Society (MCHS), which has the following objectives: (1) “promote and preserve the spiritual doctrines and observances of the Blood/Kainai people ... by providing and organizing instruction ... by Blood/Kainai spiritual practitioners”; (2) encourage and actively pursue the repatriation of the objects and articles that facilitate the spiritual doctrines and observances of the Blood/Kainai people by establishing and maintaining facilities for Blood/Kainai spiritual observances; and (3) foster the preservation, protection, and enhancement of Blood/Kainai customs, traditions, and beliefs by establishing and maintaining a facility to preserve the date, objects, and articles of the Blood/Kainai peoples.⁷⁷

Bharadia also reports that most of the members of MCHS “are actively involved in continuing the spiritual ways of their ancestors through their membership in sacred societies and continuing their traditional spiritual way of life.”⁷⁸ The Blood Chief and Council as well as members of the community selected the MCHS to store and manage the repatriated SCOs. The two other nations in the Blackfoot Confederacy that have requested repatriation of their SCOs have selected the Peigan Historical Society and the Siksika Nation Museum as their recipient institutions. The Blackfoot regulations provide for each interested community to select and name a society to represent them.

Other related issues to be clarified were the appropriate party or entity to transfer the SCOs for ongoing use, storage, and management in future ceremonies. The FNSCOR provides that the First Nation holds repatriated objects on behalf of members of that First Nation, thereby eliminating any misunderstandings regarding ownership.⁷⁹ After consultation with different members of the Blackfoot Confederacy, the FNSCOR provides that those bona fide institutions created by interested First Nations under the Alberta Societies Act must be designated by the First Nation that has requested repatriation of the SCOs to hold and manage the objects on behalf of its members.⁸⁰ Rather than relying on different ad hoc museum policies, the FNSCOR provides for a uniform repatriation process in Alberta with much more certainty for both the interested First Nations and the museums with SCOs in their collections. Pursuant to the FNSCOR, the requirement for consultation with First Nations is stipulated, the party representing a First Nation for repatriation of the object is identified, and regulations are prescribed that provide details on the object title transfer process.⁸¹

Section 2(1) of the FNSCOR provides that any First Nation may apply for the repatriation of a SCO “in accordance with the regulations.”⁸² To avoid misunderstandings, the FNSCOR requires discussions and meetings between the relevant government minister and interested First Nations regarding the repatriation process to be followed.⁸³ Repatriation is provided for through the execution of repatriation agreements between the Alberta government and interested First Nations who have requested the repatriation of SCOs.⁸⁴ Section 1(a)(ii) of the Act defines existing agreements as the “Blackfoot agreement,” entered

⁷⁵ RSA 2000, c. S-14 (Societies Act).

⁷⁶ Societies Act, s. 3(2).

⁷⁷ Bharadia 1999, 4.

⁷⁸ Bharadia 1999, 5.

⁷⁹ FNSCOR, s. 3.

⁸⁰ Blackfoot Regulations.

⁸¹ FNSCOR, s. 2(3), 3, 5; see also Blackfoot Regulations.

⁸² Blackfoot Regulations.

⁸³ FNSCOR, s. 2(1)-(3).

⁸⁴ FNSCOR, s. 1; Blackfoot Regulations, s. 6

into between the Alberta government and the chief and councilors as representatives of those First Nations. To date, three distinct groups in the Blackfoot Confederacy – the Blood Tribe, Peigan Nation, and Siksika Nation – have opted to engage in the repatriation process.⁸⁵ A list of the different agreements is contained in schedules at the end of the FNSCORA.⁸⁶

Even though only First Nations within the Blackfoot Confederacy have participated in the FNSCORA repatriation process, there is nothing preventing any other interested First Nation from doing so as well. However, different Indigenous groups have different types of ceremonies in which SCOs may or may not be used. The government has left it up to each First Nation to ascertain whether SCOs relevant to their spiritual beliefs may be in the Glenbow Museum and/or the Royal Alberta Museum collections and, if so, whether or not repatriation of SCOs is a desirable process in which to engage. As the jurisdiction of the Alberta government is limited only to objects within the designated museums under the control of the provincial government, the FNSCORA has no legal force or effect on SCOs located in museums outside of the province. Therefore, the Act is not binding on museums located in the jurisdictions of other provinces or countries and therefore is of no assistance to First Nations interested in repatriating sacred objects elsewhere.

The impact of the FNSCORA on public museums in Alberta

The experience of the Glenbow Museum with the repatriation of SCOs and the Blackfoot Confederacy suggests that the legislation has been beneficial to both parties.⁸⁷ The FNSCORA and the accompanying Blackfoot Regulations have facilitated an environment that is conducive to addressing the issue of repatriation in Alberta. In 2005, one year after the adoption of the Blackfoot Regulations, a sacred ceremonial bundle was repatriated from the Glenbow Museum. Commenting on this initial repatriation, the then director of the museum, Michael Robinson, noted: “After [that] repatriation, the Blackfoot Confederacy members came back to us and said, ‘Now we want to work with you to tell our story, in our words, in your museum.’”⁸⁸ Regarding the return of sacred objects more generally, Robinson further noted: “If it’s a sacred and ceremonial object for which there is a real need in the community – for the religious observance or practice – of course, you should give it back.”⁸⁹

Ten years later, John Copley in the *Alberta Native News*, reported in his commentary on some of the repatriated objects: “These objects sold to colonizers in times of great strife, landed in museums where they often languished in storage. Now in the hands of the Blackfoot, these very same objects have revitalized traditional ceremonies and helped communities heal.”⁹⁰ The experience at the Glenbow Museum is an example of the power of legislation to propel cultural cooperation and support for museum exhibitions. Considering the historical experiences of First Nations people in Canada, it would be justifiable for Indigenous groups to avert further interaction with the museums after repatriating their SCOs.⁹¹ However, this has not been the case. The Blackfoot First Nation supports the display

⁸⁵ FNSCORA, Schedule, Parts 1, 2, 3.

⁸⁶ FNSCORA, s. 6, Schedule, Parts 1, 2, 3.

⁸⁷ Walton, “Sacred Bundles.”

⁸⁸ “Glenbow Repatriates Blackfoot Nation Artifacts,” *CBC News* (archived), 30 June 2004, https://h2g2.com/edited_entry/A1076861/conversation/view/F127415/T442917/page/last.

⁸⁹ “Glenbow Repatriates.”

⁹⁰ John Copley, “Book Celebrates the Journey of Repatriating Sacred and Cultural Items,” *Alberta Native News*, 16 May 2015, <https://www.albertanativenews.com/book-celebrates-the-journey-of-repatriating-sacred-and-cultural-items/>.

⁹¹ The degradation of Indigenous peoples leading to the Truth and Reconciliation Commission.

of its cultural heritage in public museums.⁹² By doing so, the Blackfoot assert that such action has reinvigorated their cultural identity.

The recognition of the importance of negotiating repatriation in the FNSCORAs explains why there has been no litigation regarding the repatriation of SCOs reported in Alberta. As Elizabeth Koehler rightly observes, the participatory approach to the repatriation of cultural property ensures that First Nations' cultural concerns are appropriately considered throughout the return process.⁹³ According to Koehler, the emphasis on negotiation explains the paucity of repatriation litigation in the broader Canadian context: "Canada's reliance on negotiation and voluntary agreements on an ad hoc basis ... possibly engenders a more cooperative atmosphere, in which '[h]uman remains have not proven such a contentious issue' and where 'most institutions follow the Task Force recommendations and return such materials upon request.'"⁹⁴

After two decades of positive experience with the FNSCORAs, other governments interested in supporting increased spiritual development and cultural awareness should consider the benefits of adopting similar legislation. The emphasis on consultation and negotiation in the Alberta repatriation process has eliminated the consequences that result from an adversarial process, such as substantial litigation costs, uncertainty, and hard feelings. This is because the FNSCORAs has facilitated cooperation among government, public museums, and the First Nations. Notwithstanding that it took four years to create the new regulatory process for repatriating sacred objects, the certainty provided under the FNSCORAs (for the Blackfoot at least), compared to more uncertain, ad hoc negotiation-based policies in other provinces, has created a level of satisfaction that has avoided lawsuits demanding the return of these special objects.

The South African approach to restitution of SCOs: a review of existing law and policy frameworks

The constitutionalizing of a cultural community's right to enjoy their culture⁹⁵ ensures that cultural property is a variable that must be considered when protecting cultural heritage in South Africa. It is worth noting that the right to culture in its original form denotes intellectual or artistic endeavor and so implies freedom, such as the freedom of expression, to perform or practice the arts and sciences.⁹⁶

Apartheid cultural heritage legal framework

In the twentieth century, South African society was characterized by segregation on the grounds of color and race.⁹⁷ In addition to this, the cultural heritage of marginalized African cultural groups was consistently undermined and significantly underrepresented and

⁹² Glenbow Museum, "Glenbow Has a Special Relationship with the Niitsitapi Blackfoot Community in Treaty 7," 2022, <https://www.glenbow.org/indigenous-resources/blackfoot-culture-and-history/>.

⁹³ Koehler 2007, 125.

⁹⁴ Koehler 2007, quoting Mac Swackhammer, "Repatriation in Canada and United States Museums," *Smithsonian Center for Education and Museum Studies Fellowships in Museum Practice Program*, 1997.

⁹⁵ See 1996 Constitution, s. 31(1). This right is contained in the Bill of Rights. S. 31(2) expressly prohibits the exercise of cultural rights in any manner that is inconsistent with any other provision of the Bill of Rights. See *Prince v. President, Cape Law Society*, 2002 2 SA 794 (CC), where the court prohibited the use of cannabis for religious or cultural purposes.

⁹⁶ See ICCPR, arts. 15(1)(a) and (c).

⁹⁷ The legislation segregated the South African community into separate White, Black, Coloured, and Indian communities.

misrepresented.⁹⁸ For example, legislation such as the Bushmen Relics Protection Act,⁹⁹ the National and Historical Monuments Act,¹⁰⁰ the Natural and Historical Monuments, Relics and Antiques Act,¹⁰¹ and the National Monuments Act (NMA)¹⁰² existed incidentally. This is because the provision in these Acts protected human remains and cultural heritage for future colonial (white) use such as unethical human remains research and display in elitist museums that were not accessible to the original owners of these cultural objects and human remains. Thus, African, and other Indigenous cultural heritage was limited or excluded from formal policies around conservation and protection.¹⁰³

Similar to colonial collecting in North America and elsewhere, heritage objects of South Africa's Indigenous communities have been extensively expropriated without compensation by museums and public institutions, which are enabled by national legislation.¹⁰⁴ During the apartheid era, the expropriation of African cultural heritage objects was facilitated by enacting the NMA. The National Monuments Council (NMC) of South Africa served as the NMA's central regulatory body. The role of the NMC was to promote the protection of historical and cultural heritage and to coordinate activities concerning the protection thereof.¹⁰⁵ In furtherance of this objective, the NMC adopted a regulatory policy concerning the exportation of cultural heritage objects. A permit system was designed to preclude damage to cultural objects while creating a system for the declaration of objects as national monuments or cultural treasures. Through its policies, the NMC systematically controlled the heritage objects declared under the Act by acquiring the rights to moveable and immovable African heritage property.¹⁰⁶ The NMC was further authorized to acquire limited real rights in people's cultural property.¹⁰⁷ These acquired rights were then transferred to museums or public institutions. Subsequently, the NMC and other public institutions held preemptive rights or options that resulted in restrictions on the fundamental descendant communities' rights to their cultural property.¹⁰⁸ This broad discretion of the NMC inevitably led to the expropriation of heritage objects by museums and public institutions, which did not necessarily affect the heritage objects of the governing minority. Instead, other communities had their proprietary rights limited or their cultural heritage properties expropriated.¹⁰⁹

Post-apartheid legal framework for the protection of heritage objects

The political state in South Africa changed significantly after the abolition of the separationist governance in 1994 and the institutionalization of constitutional democracy. The government led by the African National Congress mobilized the concept of heritage as a

⁹⁸ For example, Bushmen Relics Protection Act, No. 22, 1911; National and Historical Monuments Act, No. 6, 1923; Natural and Historical Monuments, Relics and Antiques Act, No. 4, 1934; National Monuments Act, No. 28, 1969 (NMA). The provisions of these pieces of legislation focused on the preservation of the cultural heritage of the white minority ruling class.

⁹⁹ Bushmen Relics Protection Act.

¹⁰⁰ National and Historical Monuments Act.

¹⁰¹ Natural and Historical Monuments, Relics and Antiques Act.

¹⁰² NMA.

¹⁰³ Kotze and Jansen Van Rensburg 2003, 141.

¹⁰⁴ Kotze and Jansen Van Rensburg 2003.

¹⁰⁵ NMA, s. 2.

¹⁰⁶ NMA, 5(1)(e).

¹⁰⁷ NMA, s13; the holders of these rights mostly comprised of members of the indigenous community – those the apartheid laws had already excluded from cultural development.

¹⁰⁸ Bharadia 1999, 4.

¹⁰⁹ Ndlovu 2011, 37.

mechanism for reframing the past and ushering in a new, inclusive nation.¹¹⁰ Specific provisions of the Bill of Rights are a testament to the government's resolve to promote Indigenous African culture and heritage. For example, section 6(2) and (5) of the 1996 Constitution acknowledges Indigenous people's cultural rights by guaranteeing participation in cultural activity. Theoretically, this right includes the protection, conservation, and preservation of heritage objects used in such activities. Subsequently, the NHRA was enacted to replace the NMA as legislation to ensure the management of the country's heritage resources as a national estate.¹¹¹

"National estate" refers to the total sum of heritage resources that are worthy of preservation, including places and objects with specific significance within the people's oral traditions or those associated with living heritage, such as objects of historical and cultural significance and objects associated with their leaders. Others include historical settlements, landscapes and natural features of cultural significance, archaeological and paleontological sites, graves, and burial grounds, including ancestral and royal graves, graves of traditional leaders, and graves of victims of conflict as well as sites relating to the history of slavery in South Africa.¹¹² The NHRA established the South African Heritage Resources Agency (SAHRA) to replace the NMC.¹¹³

In the next section, we analyze how the existing legislative frameworks for heritage protection such as the 1996 Constitution and the NHRA¹¹⁴ have addressed the restitution of SCOs, heritage objects, or cultural properties within the broad framework of heritage resources protection. Then, we briefly examine the policies that address the restitution of heritage, sacred, and ceremonial objects such as the 2021 National Policy on the Repatriation and Restitution of Human Remains and Heritage Objects (2021 National Policy), which was ratified by Cabinet on 16 March 2021,¹¹⁵ and the 2014 Draft National Museums Policy developed, which was developed by the Department of Arts and Culture.¹¹⁶ Even though these policies may not be externally applicable, they are relevant for instructing and

¹¹⁰ Jethro 2018, 259.

¹¹¹ National estate is defined in the NHRA, s. 3.

¹¹² "Heritage Objects," *South African Heritage Resources Agency*, <https://sahris.sahra.org.za/about/heritage-objects>.

¹¹³ The South African Heritage Resources Agency (SAHRA) is mandated to declare an object or site as a national heritage resource on the national level, thus making it part of the national estate, whereas the same mandate is given to Provincial Heritage Resources Authority at the provincial level. See NHRA, s. 2 (xviii).

¹¹⁴ Some legislations that relate to heritage resources management includes, but is not limited to, National Heritage Council Act, No. 11, 1999; Cultural Institutions Act, No. 119, 1998; South African Geographical Names Council Act, No. 118, 1998; National Library of South Africa Act, No. 92, 1998; South African Library for the Blind Act, No. 91, 1998; National Film and Video Foundation Act, No. 73, 1997. Others include National Arts Council Act, No. 56, 1997; Legal Deposit Act, No. 54, 1997; National Archives and Record Service of South Africa Act, No. 43, 1996; Pan South African Language Board Act, No. 59, 1995; Culture Promotion Act, No. 35, 1983; Heraldry Act, No. 18, 1962; South African World Heritage Convention Act, No. 49, 1999; National Environmental Management Act, No. 107, 1998. Other relevant legislations and guiding documents include Public Finance Management Act, No. 1, 1999; Annual Division of Revenue Acts, Basic Conditions of Employment Act, No. 75, 1997 (as amended); Employment Equity Act, No. 55, 1998; Labour Relations Act, No. 66, 1995; Skills Development Act, No. 37, 2008; Government Immovable Asset Management Act, No. 19, 2007; Revised White Paper on Arts, Culture, and Heritage, version 2, 4 June 2013 (references will be made to these pieces of legislation where applicable in relation to the restitution of heritage objects).

¹¹⁵ 2021 National Policy; Parliamentary Monitoring Group, *Repatriation and Restitution Policy of Human Remains and Heritage Objects; Covid-19 Relief Fund 3rd phase; with Minister*, 16 March 2021, <https://pmg.org.za/committee-meeting/33319/>.

¹¹⁶ A government department whose mandate is to preserve, develop, protect, and promote the cultural heritage and legacy of South Africa. See Department of Sports, Arts and Culture, <http://www.dac.gov.za>.

steering the law and policy landscape to reconstitute sacred and ceremonial objects in South Africa.¹¹⁷

The 1996 Constitution

As noted above, the 1996 Constitution of South Africa recognizes the right to enjoy culture.¹¹⁸ Thus, several provisions are relevant to the conservation of cultural heritage. Even though the Constitution does not include a precise definition of culture, its use of the word signifies a concept that fosters unity.¹¹⁹ Therefore, the various contexts in which culture is used in the Constitution include the objects, actions, products, and conditions of conduct.¹²⁰ For example, Ifeoma Laura Owosuyi opines that, amongst other definitions, the Constitution adopts culture as a collective term for the cultural expression and way of life of a specific community, and it is in this context that culture incorporates cultural heritage.¹²¹ Sections 30 and 31 of the Constitution collectively provide that everyone has the right to participate in the cultural life of their choice and that people who belong to a cultural, religious, or linguistic community may not be denied the right to enjoy their culture, practice their religion, or use their language, provided that it does not contravene any of the provisions of the Bill of Rights. These rights provide a platform for cultural communities to revive their culture to the extent that it does not impede other legitimate human rights expectations contained in the Constitution.

From a theoretical perspective, the enjoyment of cultural heritage encompasses the restitution of all heritage objects, including SCOs belonging to communities native to South Africa that were expropriated during the apartheid era due to the provisions of the NMA. However, Christa Roodt warns that, although restitution is central to the revitalization of communities in South Africa through cultural renaissance and nation building, there is no presumptive right of restitution.¹²² Furthermore, South Africa is a signatory to the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), having signed and ratified the declaration.¹²³ Thus, they have international obligations to honor these instruments by incorporating the international norms contained therein into its national laws.¹²⁴ While there is currently no national law incorporating the provisions of the UNDRIP, South Africa has made significant progress in protecting certain aspects of Indigenous rights, such as Indigenous knowledge systems, as seen in the Indigenous Knowledge Systems Policy, which was adopted in 2004.¹²⁵ The policy recognizes and protects Indigenous knowledge, providing for the recognition, affirmation, development, and promotion

¹¹⁷ Fuo provides a valuable review of the potential role of “policy” as an instrument in the governance of relatable issues in Fuo 2013, 2–44.

¹¹⁸ See 1996 Constitution, ss. 6, 30, 31.

¹¹⁹ Venter 1998, 438–39. According to Kotze, the term “culture” used in the context of cultural heritage to serve legal discourse may be defined as an all-determining concept consisting of texts, images, talk, codes of behaviour, narrative structures, law, and legal science that is created within an ethical context to ensure survival, adaptation, and development. See Kotze and Jansen Van Rensburg 2003, 131.

¹²⁰ Bharadia 1999, 131.

¹²¹ Ifeoma Laura Owosuyi explores the definition of culture in the 1996 Constitution in relation to heritage and sustainable development. For example, see Owosuyi 2019, 261–64.

¹²² Roodt 2013, 305.

¹²³ UNDRIP.

¹²⁴ 1996 Constitution, s. 39, states that the courts, and other legal bodies, when interpreting the Bill of Rights, must consider international law and may consider foreign law.

¹²⁵ The Indigenous Knowledge Systems Policy is an enabling framework designed to stimulate and strengthen the contribution of indigenous knowledge to social and economic development in South Africa. See also the Indigenous Knowledge Act, No. 6, 2019.

thereof. However, there seems to be less enthusiasm with the protection of cultural rights to cultural objects in order to facilitate their repatriation to Indigenous communities, such as the Khoisan, for example.

Since the ownership of cultural objects, according to the NMC, has been transferred to the museums, we question if the constitutional property clause in section 25 of the 1996 Constitution can be applied to support the restitution of such objects. Section 25(1) of the 1996 Constitution provides that no one may be deprived of any property except in terms of a law of general application (for example, the NHRA).

NHRA and related policies on the restitution of heritage objects

According to section 25(4) of the 1996 Constitution, property is not limited to land but, rather, includes other real rights such as servitudes and customary or communal property rights. This broad conception of property justifies cultural heritage resources as cultural property, as defined in section 3 of the NHRA. Section 3 of the NHRA contains an extensive list of items grouped as the “national estate.” This list identifies “objects to which oral traditions are attached or which are associated with living heritage and objects with cultural significance due to its strong or special association with a particular community or cultural group for social, cultural, or spiritual reason.”¹²⁶ One can safely argue that SCOs, albeit not being specifically identified in the Act, can be grouped under section 3 of the NHRA as part of the national estate. Thus, they qualify as heritage property to which the provisions of sections 46(1)–46(3) of the NHRA should apply. These sections empower the minister responsible for sports, arts, and culture to acquire or expropriate cultural properties for conservation or any other purpose.

The NMA previously expropriated heritage objects from the non-white population, including SCOs. The NHRA’s language does not explicitly define “sacred ceremonial objects” as a distinct heritage object subtype. Instead, the NHRA classifies and recognizes valuable heritage objects with cultural significance to local communities in South Africa. In effecting the constitutionally recognized right to culture, and the value of heritage to the cultural renaissance of previously undermined communities,¹²⁷ the restitution of previously expropriated SCOs of African communities under the NMA is a valid pursuit to which the minister might apply the powers in sections 46(1)–46(3) of the NHRA. Heritage resource management principles should apply to all forms of heritage as well as intangible forms of property both moveable and immovable (which heritage objects or cultural properties belong to). These principles apply at the national, provincial, and local levels of heritage management when implementing the NHRA and executing their management duties. These principles include the following:

- heritage resources have lasting value in their own right and provide evidence of the origins of South African society;
- heritage resources are valuable, finite, non-renewable, and irreplaceable and should be managed accordingly to ensure their survival;¹²⁸
- every generation has the moral obligation to function as trustees of the national heritage;
- heritage resources should be managed in the interest of all South Africans;¹²⁹

¹²⁶ NHRA, s. 3(2)(i)(ii) and (3)(g) read together.

¹²⁷ In the words of the NHRA, preamble: “Heritage ... helps us to define our cultural identity and therefore lies at the heart of our spiritual well-being.”

¹²⁸ NHRA, s. 5(1)(a).

¹²⁹ NHRA, s. 5(1)(b).

- heritage resources can promote reconciliation, understanding, and respect and contribute to the development of a unifying South African identity;¹³⁰
- heritage resources form an essential part of the history and beliefs of communities and must be managed in a way that acknowledges the right of affected communities to be consulted and to participate in their management;¹³¹
- heritage resources contribute significantly to research, education, and tourism and should therefore be developed and presented in a way that ensures respect and dignity for cultural values;¹³²
- the identification, assessment, and management of heritage resources must take account of all relevant cultural values and Indigenous knowledge systems;¹³³
- the management of cultural heritage should contribute to socioeconomic development;¹³⁴ and
- the management should safeguard the options of present and future generations.¹³⁵

These principles intend to give effect to the provisions of the NHRA and the constitutionally entrenched rights to have cultural heritage protected. In this respect, it is safe to assert that the NHRA has a potentially indispensable legal framework for executing the restitution of heritage objects, like SCOs. However, since these heritage objects are under the NMA in the museums' possession, the pertinent question is whether the NHRA allows for the restitution of such heritage objects from the museums to local communities that may demand them. This question becomes relevant where human remains have been reduced to objects by the NHRA, a politically and emotionally insensitive byproduct of the Act.¹³⁶

The South African government's efforts through the 2021 National Policy¹³⁷ aim to provide an inclusive framework within which repatriation of human remains and restitution of heritage objects must take place. However, according to Wendy Black and Keely McCavitt, this national policy has been met with delayed processes and a lack of consensus within and between communities, academics, and government.¹³⁸ The NHRA is at present the only legislative framework within which ancestral remains are managed. The status of the NHRA with respect to ancestral remains is especially crucial given the legislation's mandate: to provide oversight over the management and preservation of the country's federal estate, which comprises heritage objects. The NHRA sets out procedures for the restitution of heritage objects in sections 41 and 42, while the SAHRA handles compliance monitoring of immovable cultural heritage such as archaeological collections and the deaccession of objects as well as ancestral remains, sites, and buildings. Presently, there is no national agency responsible for the supervision of movable cultural heritage, such as heritage objects or museum collections. This makes the 2014 Draft National Museums Policy essential as it aims to "transform the management and operation of South African museums in terms of access, redress, equity, social cohesion, and nation-building to enable the sector to efficiently preserve our national heritage while contributing effectively to national development."¹³⁹

¹³⁰ NHRA, s. 5(1)(c).

¹³¹ NHRA, s. 5(4).

¹³² NHRA, s. 5(5).

¹³³ NHRA, s. 5(7)(a).

¹³⁴ NHRA, s. 5(7)(d).

¹³⁵ NHRA, s. 5(7)(e).

¹³⁶ Black and McCavitt 2021, 120.

¹³⁷ 2021 National Policy.

¹³⁸ Black and McCavitt 2021, 120.

¹³⁹ Draft National Museums Policy, Western Cape Province, 2014, https://www.westerncape.gov.za/assets/departments/cultural-affairs-sport/draft_national_museum_policy.pdf (2014 Draft National Museums Policy).

The 2014 Draft National Museums Policy has also proposed guidelines for the restitution of heritage objects, and it is consistent with the NHRA in recognizing the SAHRA as the government agency responsible for mediating between parties in restitution claims.¹⁴⁰ When a museum agrees to return an object, it must obtain permission from the arts and culture minister under the 1998 Cultural Institutions Act.¹⁴¹ Cultural and heritage objects are considered to have been acquired inappropriately when obtained:

- without the free and informed consent of the custodian of the time;
- in contravention of tradition and custom;
- through a person legally or culturally unauthorized to dispose of them; or
- through an act of war or aggression.

The 2014 Draft National Museums Policy proposes that such heritage objects with historical, traditional, or cultural significance to their places of origin or that are central to the cultural life and continuance of the cultural practices of a cultural group must be restituted, whether the community they belong claims them. The issue of claims is pertinent to the successful restitution of heritage objects, which the legal framework has proven is possible through the relevant government structures. According to the department of sport, arts, and culture, the recorded number of claims for the repatriation of human remains in South Africa outweighs those for the restitution of heritage objects.¹⁴² The 2021 National Policy further states that the return of heritage objects is controversial and challenging.¹⁴³ It shows that the balance between scientific interests, ethical considerations, and communities' interests is complicated. This situation proffers a solution to the return of heritage objects to the communities they belong to.¹⁴⁴

As the principal national heritage legislation, the NHRA does not explicitly recognize "sacred ceremonial objects" as a distinct form of heritage object or cultural property. Although the existing framework in the legislation (the NHRA and related legislation) covers the protection of moveable heritage objects, not much attention has been given to the return of SCOs. This is mainly attributed to the fact that the process outlined by the NHRA is cumbersome and lends itself to bureaucratic bottlenecks that reduce the effectiveness of the process for local communities or persons seeking restitution. On the other hand, the 2014 Draft National Museums Policy acknowledges that the provisions of the NHRA are not sufficient in themselves to stimulate discussion surrounding the return of heritage objects ranging from national museums such as the Iziko museums¹⁴⁵ to source communities. Simultaneously, the 2017 Draft National Policy on the Repatriation and Restitution of Human Remains and Heritage Objects proposes that distinct regulations should guide restitutions.¹⁴⁶ This approach provides impetus to recognizing sacred and funerary objects as a distinct class of heritage objects in South Africa. Based on these initial findings, the following section presents a critical assessment of the legal framework for the restitution

¹⁴⁰ 2014 Draft National Museums Policy, para. 3.5.2.

¹⁴¹ Cultural Institutions Act.

¹⁴² This was noted by the department of sport, arts, and culture in the Draft National Policy on the Repatriation and Restitution of Human Remains and Heritage Objects, 2017, <https://www.westerncape.gov.za/general-publication/repatriation-and-restitution-human-remains-and-heritage-objects-draft-national-policy> (2017 National Policy).

¹⁴³ 2021 National Policy, 3.

¹⁴⁴ 2021 National Policy, 4.

¹⁴⁵ "African Art," *Iziko Museums*, <http://www.iziko.org.za/>.

¹⁴⁶ 2017 National Policy.

and repatriation¹⁴⁷ of SCOs in Canada and South Africa, with lessons extrapolated for South Africa.

Critical assessment

This article has established that the restitution or repatriation of heritage objects and especially SCOs is instrumental for revitalizing communities. Restitution and repatriation recognize past transgressions and are instrumental to the revitalization of communities. It also recognizes past transgressions and seeks to institute collective healing and reconstitutes identity.¹⁴⁸ More importantly, restitution and repatriation exemplifies a cogent step toward the reconciliation process between Indigenous peoples and the federal and provincial governments of Canada and the socio-political transformation agenda in South Africa.¹⁴⁹

The FNSCORA's success in Alberta, Canada, is attributed to its utilization of two primary approaches. First, the legislation identifies SCOs as a distinct classification of heritage objects, unique and separate from other types of heritage objects, such as human remains. The second reason for the successful repatriation of SCOs in Canada concerns the Alberta government's participatory and inclusive approach to drafting, and the subsequent implementation of, the FNSCORA. Past projects between the provincial government, public museums, and the Blackfoot peoples depict the success of using a collaborative approach to address the cultural needs of Indigenous peoples for the return of SCOs for the effective revitalization of their cultural heritage. Inefficient and less effective case-by-case negotiations to repatriate these special ceremonial objects prompted the creation of legislation and regulations that have enabled an improved repatriation process. The Albertan experience demonstrates that the appropriate legislative framework to enable repatriation requires the active involvement of the Indigenous communities to steer the process in the right direction.

The legal framework for the restitution of specialized types of heritage objects such as SCOs is fraught with complexities. For example, in terms of community involvement and participation, a vast chasm exists between the South African experience (under the NHRA) and the Alberta experience (under the FNSCORA). Structurally, according to the three-tier system for heritage resources management promulgated by the NHRA in South Africa, it mandates that provinces in South Africa enact their heritage legislation and establish fully functional provincial heritage acts (PHRAs).¹⁵⁰ Under this system, the SAHRA remains the overseer of sites classified as Grade I heritage resources, Grade II heritage resources are the responsibilities of the PHRAs, while the local municipalities supervise sites of local

¹⁴⁷ In the language of South African and Canadian legal landscapes respectively. Their meanings are the same for the purposes of the restoration of heritage objects or property to cultural communities, First Nations, or Indigenous people who have been inappropriately dispossessed of such items.

¹⁴⁸ Roodt 2013, 304.

¹⁴⁹ A socio-political transformation agenda that respects the right of all individuals to practice their culture as elucidated in sections 6.2 and 6.5 of the 1996 Constitution; Bharadia 1999, 33.

¹⁵⁰ NHRA, s. 23 (xxxiv). Of the nine provinces in the country, only two have established fully functional provincial heritage acts, as mandated by s. 23 (xxxiv) – namely, Amafa aKwaZulu-Natali and Heritage Western Cape. Amafa aKwaZulu-Natali was formed under the KwaZulu-Natal Provincial Heritage Act, No. 10, 1997 following the amalgamation of the KwaZulu-Natal office of the National Monuments Council and KwaZulu Monuments Council in 1997 two years before the NHRA was promulgated. The Provincial Heritage Act, which is the only provincial heritage legislation in the country, will not be discussed in any detail in this article because its provisions are similar those of the NHRA. Bharadia 1999, 36.

significance and ungraded heritage sites.¹⁵¹ The three-tier system's primary objective is to enlist the participation of communities in the management of cultural resources at the local level.¹⁵² Despite its functionality as a heritage resources management system, the NHRA holds little value for heritage objects as the classification only applies to immovable heritage, and community involvement is limited to such heritage resources. Moreover, there are no mechanisms for community involvement in managing moveable heritage objects of cultural property locally. This lack of community involvement contributes to the drawbacks of the NHRA in such issues as restitution.

Furthermore, we criticize the NHRA's inability to distinguish human remains from other heritage objects, especially SCOs.¹⁵³ It is only in the 2021 National Policy that the government has sought to acknowledge the existence of "sacred and funerary objects" as a distinct class of heritage objects. As noted above, this policy has been ratified and is set for implementation in 2022. However, at the time of the research conducted for this article, the implementation phase is experiencing funding issues.¹⁵⁴ Arguably, the sparse number of requests for the restitution of such heritage objects observed by the Department of Sports, Arts and Culture could be attributed to the paucity of efficient mechanisms for determining which SCOs belong to different cultural groups such as the Khoisan. However, it is possible to conclude that, regardless of the vagueness in the provisions for restitution in the NHRA, the policy directives in the 2021 National Policy present a significant contribution in the right direction for the efficient restitution of sacred, ceremonial, or funerary objects in South Africa's cultural revival. Finally, the key recommendation drawn from our examination of the FNSCORA legislation in Alberta, Canada, would be to incorporate a system of community consultation and collaboration into the principles of heritage resource management set out in sections 5 and 6 of the NHRA in South Africa. Doing so would advance a negotiation system that would, in turn, propel the identification and restitution of sacred ceremonial or funerary heritage objects from museums to cultural communities.

Conclusion

Across the world, Indigenous people of former colonies like Canada and South Africa share a history of the systematic violation and erosion of their social and cultural systems. In Canada, a system of assimilation, with residential schools, Indian agents, and reservations, nearly led to the disappearance of several First Nations' cultures. However, a recent wave of cultural revitalization has prompted Canadian First Nations groups to assert their new independence; thus, some communities have initiated a cultural revival. At the crux of this cultural revival are objects of cultural and social significance, including sacred ceremonial property. While many of these objects have found their way into museums and personal collections in the wake of the cultural breakdown of First Nations groups, they remain important to the diverse cultures of First Nations and other Indigenous communities in North America. This has prompted these groups to seek their return.

¹⁵¹ Kotze and Jansen Van Rensburg 2003, 16. NHRA, s. 7 supports the system of grading such that Grade 1 heritage resources are described as resources with qualities so exceptional that they are of national significance. Grade 2 heritage resources are defined as heritage resources that form part of the national estate and are considered to have spectacular qualities that make them significant within the context of a province or region. Grade 3 heritage resources refer to other heritage resources worthy of conservation. National, provincial and local heritage resource agencies will oversee the management of Grade 1, 2 and 3 heritage resources respectively (ss. 8(2) and 8(3)).

¹⁵² The inclusion of a community participation element is novel in the NHRA as it was completely absent in the apartheid legal framework for heritage resource management.

¹⁵³ Nduyakhe Ndlovu (2011) also criticizes the legislation for defining heritage in narrow ways. Bharadia 1999, 32.

¹⁵⁴ 2021 National Policy.

Since the Lubicon Cree boycotted displays of their cultural objects at the 1988 Winter Olympics, there have been ongoing concerted efforts by Alberta museums to expedite the return of SCOs to First Nations groups on a permanent or long-term loan basis. From a legal standpoint, in 2000, the Alberta government passed the FNSCOR, under which a certain and formal process has been established that has likewise successfully facilitated the return of numerous SCOs to Indigenous peoples. For instance, the implementation of the Blackfoot Regulations in 2004 has resulted in the compulsory return of Blackfoot cultural objects to the Blackfoot peoples, which has fostered improved relations between the First Nations and public museums. The success of the FNSCOR suggests that other governments interested in fostering the repatriation of sacred heritage objects should consider adopting similar legislation.

Legislation, such as the FNSCOR, that facilitates the return of SCOs and contributes to rebuilding community beliefs and values has been beneficial to all provincial residents and complements the more recent national initiative spearheaded by the Canadian federal government to promote reconciliation with more than 600 diverse Indigenous communities spread throughout a country that covers the second largest geographic area in the world. Two decades after the adoption of the FNSCOR, due to renewed interest in their spiritual traditions, First Nations within the Blackfoot Confederacy are experiencing an increase in their spirituality and cultural strength. Members of these First Nations are to be admired for their patience and persistence and congratulated for their success in securing the return of their SCOs, along with the enlightened premier and museums that provided strong leadership in bridging the gap between museums and Indigenous peoples in Alberta.

The approach employed under the FNSCOR can contribute immensely to cultural revival in other nations interested in promoting reconciliation with Indigenous peoples. As Indigenous communities worldwide continue to demand full recognition and respect for their cultures, more governments in Canada and other nations can benefit from a process of cultural revival through a law that provides for and facilitates the return of SCOs. Such action by governments can engender healthier and more vibrant communities.

South Africa has also come a long way in redressing the injustices of the past. The recognition of people's cultural needs aligns with the constitutionally entrenched right to culture. To further effectuate the right to culture, a new heritage management legislation was enacted to replace the Eurocentric and colonial legislation of the past that derogated and undermined other cultural communities' cultural heritage. The NHRA is the principal legislation in democratic South Africa, which focuses on managing heritage resources at the national, provincial, and local levels. However, this Act is not adequately equipped to deal with the restitution of SCOs as a distinct type of moveable heritage object. The restitution of these objects requires a systematic mechanism founded on established policy guidelines and principles.

The key to South Africa's success in the quest for cultural and heritage revitalization lies in recognizing that a blanket national heritage resource legislation cannot efficiently meet the cultural needs of its diverse cultural communities and is especially inapplicable to moveable heritage resources that are of cultural, traditional, or historical significance. More worrisome is that the marginalized cultural communities to whom the revival and preservation of their cultural life are pertinent are yet to demand the restitution of their heritage objects, including sacred ceremonial or funerary objects. This failure is attributable to the lack of knowledge about such objects despite heritage management that seemingly prioritizes Indigenous knowledge.

Based on these critical considerations, we strongly recommend that the provincial and local levels of heritage resources management should practically incorporate the management and restitution of heritage objects at these levels. This is achievable by (1) encouraging community involvement in the restitution process and (2) encouraging more provinces to

enact provincial heritage resources legislation that will be both participatory and inclusive. The incorporation of these measures will ensure that Indigenous knowledge is integrated into the identification and determination of a system of demanding the restitution of sacred ceremonial or funerary objects stored in museums globally and in South Africa. The numerous existing international precedents and policies notwithstanding, South Africa must take its history and culture into consideration and design legislative mechanisms that are inclusive, accommodating, and effective.

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