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Res Extra Commercium and the Barriers Faced When Seeking the Repatriation and Return of Potent Cultural Objects: A Transsystemic Critical Post-Colonial Approach

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RES EXTRA COMMERCIUM AND THE BARRIERS FACED WHEN SEEKING THE REPATRIATION AND RETURN OF POTENT CULTURAL OBJECTS

Sara Gwendolyn Ross*

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INTRODUCTION

The repatriation and return¹ of objects of cultural value are often linked to decolonization projects and efforts to repair past wrongs suffered as a result of colonialism.² Yet, significant barriers hinder these efforts. These barriers primarily take the shape of time limitations; diverging conceptions of property and ownership; the high costs involved; and the domestic export and cultural heritage laws (of both the source country and the destination country). This Article argues that these barriers are relics of colonialism that replicate and perpetuate the continued imposition of Eurocentric and

¹ The term "repatriation" is used to refer to the restoration of cultural objects within a state, such as from Canada to its domestic indigenous groups or communities. The term "return," however, is used to describe the restoration of cultural objects that were removed from the territorial borders of a state, usually during colonial occupation, or illegally exported from a state. *See, e.g.*, CRAIG FORREST, *INTERNATIONAL LAW AND THE PROTECTION OF CULTURAL HERITAGE* 142–45 (Routledge 2010).

² *See, e.g.*, DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES, G.A. Res. 61/295, U.N. Doc. A/RES/66/142 (Sept. 13, 2007) [hereinafter UNDRIP], http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf; Catherine Bell, *Repatriation of Cultural Material to First Nations in Canada: Legal and Ethical Justifications* in *CULTURAL HERITAGE ISSUES: THE LEGACY OF CONQUEST, COLONIZATION, AND COMMERCE* 81, 87 (James A. R. Nafziger & Ann M. Nicgorski eds., Brill Academic Publishers, Inc. 2009) [hereinafter Bell, *Justifications*].

Western³ legal notions, as well as, values on subaltern source countries and source indigenous groups.⁴ In order to truly move beyond the remaining relics of colonialism into a context where the culture and values of all groups are accorded equal respect, it is important that these barriers be removed.

A critical postcolonial lens will be used to explore these barriers within international and domestic (primarily Canadian) legal frameworks.⁵ This Article considers potential methods and mechanisms for overcoming these barriers/colonial relics and asks whether these potential solutions are themselves only an extension of colonialism. This can be seen since these solutions engage with and replicate Eurocentric and Western legal notions and values

³ The author uses both terms to account for the different challenges, views, approaches, and legal frameworks existing in Europe and the "West," respectively. The two can be mutually exclusive. *See, e.g.*, JOHN M. HOBSON, *THE EUROCENTRIC CONCEPTION OF WORLD POLITICS: WESTERN INTERNATIONAL THEORY, 1760-2010* at 234 (Cambridge Univ. Press 2012).

⁴ For the present purpose, the author will view both indigenous groups and source countries as subaltern in comparison to the loci where repatriation and return is sought and where mechanisms for repatriation and return are developed and subsequently imposed upon the subaltern. The particular scope of my discussion of sources groups and countries versus destinations, leads to a binary where non-Western/non-Eurocentric state legal systems as well as non-Western/non-Eurocentric non-state centered legal orders are often simultaneously marginalized in comparison to Western/Eurocentric frameworks. As such, my discussion of the subalternity prevalent *within* many traditional source groups and source states of cultural objects is limited. *See generally* Gayatri Chakravorty Spivak, *Can the Subaltern Speak*, in *MARXISM AND THE INTERPRETATION OF CULTURE* 271 (Cary Nelson & Lawrence Grossberg, eds., Macmillan, 1988); JOANNE SHARP, *GEOGRAPHIES OF POSTCOLONIALISM: SPACES OF POWER AND REPRESENTATION* ch. 6 (SAGE 2009) (discussing the subaltern). *See, e.g.*, Val Napoleon, *Thinking About Indigenous Legal Orders*, in *DIALOGUES ON HUMAN RIGHTS AND LEGAL PLURALISM* 229, 243–44 (René Provost & Colleen Sheppard, eds., Springer, 2013) (referencing the Canadian Aboriginal context and internal oppression and power imbalances). The author also draws on the permutation of subaltern studies seen in the work of Boaventura de Sousa Santos and subaltern cosmopolitanism. *See, e.g.*, *TOWARD A NEW LEGAL COMMON SENSE* (Butterworths LexisNexis, 2d ed. 2002).

⁵ Due to the author's focus on the international context as well as the Canadian domestic context, the author will largely avoid undertaking an in-depth analysis of the situation in the United States since the existence of the North American Graves Protection and Repatriation Act (NAGPRA) imports many nuances that are distinct from Canada and beyond the scope of the present project. *But see* the Native American Graves and Repatriation Act, Pub L No 101-601 (1990) (codified as 25 U.S.C. § 3001) [hereinafter NAGPRA].

rather than stepping outside of the hegemonic structure in order to incorporate alternative legal and cultural norms, notions, and values.

This Article draws on a transsystemic methodology⁶ in order to seek out alternative solutions, underlie commonalities, and strip away the colonial gaze.⁷ This Article refers to Peter H. Welsh's notion of the potent object,⁸ in order to remove Eurocentric and Western-based definitions of what constitutes a cultural object for which repatriation or return may be claimed.⁹ The Article turns to Roman law, Quebec civil law, and legislative interpretation in Quebec case law in order to excavate a legal-pluralistic application of *res extra commercium*, and specifically, *res divini juris* and *res sacrae*, to the repatriation and return of potent cultural objects to source states and indigenous groups that demand their return.¹⁰

Finally, this Article suggests that through greater international recognition and a more complete application of the *res extra commercium* status of potent cultural objects, pervasive Western and Eurocentric commodification of these objects can be removed. By removing this commodification, hegemonic barriers enforced by Western and Eurocentric notions of value, ownership, and legal frameworks, in order to approach claims for return and repatriation in a non-colonial fashion, can be achieved.¹¹

⁶ A transsystemic approach excavates existing legal frameworks in order to look at what is underneath—it seeks a step beyond legal pluralism. See *infra* Part I.A; see *infra* notes 16–18.

⁷ See EDWARD W. SAID, *ORIENTALISM* (Vintage Books 1979); FRANTZ FANON, *BLACK SKIN, WHITE MASKS* (Charles Lam Markmann, trans., Grove Press 1991).

⁸ Welsh, *infra* note 36 and accompanying text.

⁹ An example of this would be the pervasive reference to the “sacred” which is a simplistic view of objects of extreme cultural importance to claimant groups.

¹⁰ For Roman terminology, see Sohm, *infra* note 304 and accompanying text.

¹¹ In discussing legal orders, systems, and frameworks, the author uses the term “legal framework” in the spirit of the transsystemic methodology the author seeks to apply. *Infra* notes 16–18. The author’s intention is to utilize a neutral term that refers to both state-centered legal systems as well as non-state centered legal orders. Certain scholars, such as Val Napoleon have distinguished between legal systems and legal orders so as to avoid the imposition of Western and Eurocentric legal notions onto non-Western, non-Eurocentric, and specifically, indigenous societies. The author notes the merits of this approach but wishes to circumvent both terms in order to avoid a separation that may enable their respective placement in a hierarchy of valuation where one category may be allotted more importance or legitimacy than the other. The author will instead simply preface “framework” with “non-Western/non-Eurocentric” and “Western/Eurocentric.”

This work proceeds in eleven parts. Part I provides an introduction to the theory and methodology utilized in the foregoing analysis and briefly situates the discussion within the related academic dialogue. Part II undertakes an orienting discussion of the topic to introduce the notion of the potent cultural object and the actors involved in claims for the repatriation and return of these objects. Part III turns to the reasons that motivate claims for the repatriation and return of potent cultural objects and also briefly explains the reasons behind counter opinions that reject the legitimacy of these claims. Part IV then assesses the current legal frameworks—both international as well as domestic—that are available and must be utilized in formulating a claim for the repatriation or return of potent cultural objects. This part additionally touches on the non-legal (or soft law) mechanisms available for these purposes. Part V distills the ever-present colonial element embodied by the barriers—both internationally and domestically—to claims for repatriation and return within current frameworks available for repatriation and return. This part examines the barriers in order to explain why and how they maintain colonial domination over groups and individuals formulating claims for repatriation and return. Part VI then turns to current legal and extralegal strategies that are available and may be used in order to circumvent the barriers to claims for repatriation and return. This part, however, concludes that these strategies ultimately maintain and even further entrench the colonial element rather than removing it. Part VII therefore suggests an alternative. This part proposes the removal of commodification from objects. Commodification is discussed and a transsystemic approach is introduced as means by which commodification may be removed through the application of *res extra commercium*. Part VIII discusses the limited appearance of *res extra commercium* within existing Eurocentric and Western legal frameworks—both in the context of civil law jurisdictions and common law jurisdictions. This is done in order to recognize that a notion such as *res extra commercium*, which describes the invaluable nature that potent cultural objects carry for claimant groups and individuals, can also be recognized within dominant legal frameworks that currently only germinate barriers to claims for repatriation and return. Part IX presents a case study of a situation where a dominant legal framework—as applied by the Quebec

Superior Court and Quebec Court of Appeal—permitted the return of potent cultural objects to the claimant party, the Roman Catholic Church. Part X uses the case study of *l'Ange-Gardien* in Quebec, Canada to demonstrate a real-world scenario of how, through a legal pluralistic application of the laws of the Roman Catholic Church (that define that which constitutes a potent cultural object within its governing framework), the market value of the element was simply nullified and returned to the claimant party even where the possessing parties suffered a monetary loss. This Article concludes by acknowledging some of the realities pertaining to application and enforcement and, finally, concludes with a word of caution, which is included as a pre-emptory note here. What follows is a radical departure from existing options for claims for repatriation and return by subaltern groups and countries. It stems from a critical analysis meant to explore a mechanism to thoroughly challenge current perceptions and insist on the serious barriers that continue to populate the status quo within existing options for claims for repatriation and return.

It is important to note that the intention of this Article is not to impose Roman law concepts or other Eurocentric or Western legal notions upon source nations or indigenous groups. Instead, it articulates a view of how dominant legal infrastructures can and should deal with situations where domestic indigenous groups or source nations/groups request the return of potent cultural objects. It is about how the Western or Eurocentric legal infrastructures deal with their part in these scenarios, not about how foreign groups must acquiesce to the laws of nations or peoples in possession of removed objects.

I. THEORY AND METHODOLOGY

In applying post-colonial theory, the Article draws on the notion of the colonizer's gaze.¹² The barriers to the repatriation and return of cultural objects are colonial relics as they force the “colonized,”

¹² SAID, *supra* note 7. While Said may have fallen out of favor with some modern postcolonial theorists (see, e.g., MARK GIBSON, CULTURE AND POWER: A HISTORY OF CULTURAL STUDIES 190 (Berg 2007)) and that his notion of orientalism is characterized by a binary structure that does not take into account subaltern groups within the “colonized,” the colonizer's gaze is useful in illustrating the barriers to the repatriation and return of cultural objects. See also, FANON, *supra* note 7.

non-Western, and non-Eurocentric into the “colonizer’s” Western and Eurocentric notions of cultural value and legal frameworks of ownership and property. This in turn forces the colonized to voice their claims for repatriation and return within the parameters set out by the colonizer in order to regain their cultural objects. In this vein, the Article also employs Antonio Gramsci’s theory of cultural hegemony. As Douglas Litowitz wrote:

In a hegemonic regime, an unjust social arrangement is internalized and endlessly reinforced in schools, churches, institutions, scholarly exchanges, museums, and popular culture. Gramsci’s work on hegemony provides a useful starting point for legal scholars who understand that domination is often subtle, invisible, and consensual.¹³

A Gramscian assessment is an appropriate starting point when questioning the status quo where the current dominance of Western and Eurocentric frameworks and perceptions must be faced in claims for repatriation and return. It additionally furnishes the critical component in the application of post-colonial theory that enables a deconstruction of hegemonic structures and the means by which to step outside of them, in order to investigate alternative frameworks.¹⁴ Reference to cultural hegemony also accounts for Western and Eurocentric predispositions to reify the Universalist value of cultural objects and “museumification” of the colonized subaltern that remains.¹⁵

In using a transsystemic methodology,¹⁶ the Article seeks to look “underneath” current legal frameworks in order to consider “law which is more deeply rooted or profound than the law of legal

¹³ Douglas Litowitz, *Gramsci, Hegemony, and the Law*, 2000 BYU L. REV. 515, 519 (2000).

¹⁴ *Id.* at 515–16.

¹⁵ See, e.g., David Fleming, *Positioning the Museum for Social Inclusion*, in MUSEUMS, SOCIETY, INEQUALITY 213, 215–16 (Richard Sandell, ed., Routledge 2002); John Henry Merryman, *The Public Interest in Cultural Property*, 77 CALIF. L. REV. 339 (1989) [hereinafter Merryman, *Public Interest*].

¹⁶ For a general discussion of transsystemia, see Peter L. Strauss, *Transsystemia—Are We Approaching a New Langdellian Moment?—Is McGill Leading the Way?*, 24 PENN ST. INT’L L. REV. 763 (2006).

systems, that which pervades all of them”¹⁷ and to move beyond a comparative approach.¹⁸

While a legal pluralist approach incorporating the laws of source indigenous groups or countries may provide some resolution in addressing claims for repatriation and return, its focus on: 1) the “legal;” 2) the conceptualization of “law;” and 3) the ambiguities of the terms “legal” and “pluralism,” can limit the ability to inclusively address the often nuanced claims of source indigenous groups and states for the repatriation and return of potent cultural objects.¹⁹ Legal pluralism may intensify disputes while exacerbating uncertainty. As Brian Tamanaha explained:

Legal disputes usually center on which party has the better case under the law; disputes in contexts of legal pluralism present an additional layer of questions about which law controls when two or more contrasting legal regimes point toward different outcomes. This puts at issue the respective authority and power of the competing legal systems themselves.²⁰

Vulnerability subsequent to a successful claim may also arise in the context of a challenge based within the competing legal framework.²¹

A transsystemic approach would ideally seek to “deconflictualize” claims for repatriation and return by lessening the

¹⁷ H. Patrick Glenn, *Doin' the Transsystemic: Legal Systems and Legal Traditions*, 50 MCGILL L.J. 863, 867 (2005) [hereinafter Glenn, *Transsystemic*].

¹⁸ See Richard Janda, *Toward Cosmopolitan Law*, 50 MCGILL L.J. 967, 981 (2005). For a discussion of transsystemic law as a method of deconstruction and of engaging with the work of Jacques Derrida, see generally *id.* and especially *id.* at 976.

¹⁹ See William Twining, *Legal Pluralism 101*, in LEGAL PLURALISM AND DEVELOPMENT: SCHOLARS AND PRACTITIONERS IN DIALOGUE 112, 115, 122–23 (Brian Tamanaha, Caroline Sage & Michael Woolcock, eds., Cambridge Univ. Press 2012) [hereinafter Twining, *Legal Pluralism*].

²⁰ Brian Z. Tamanaha, *The Rule of Law and Legal Pluralism in Development*, in LEGAL PLURALISM AND DEVELOPMENT: SCHOLARS AND PRACTITIONERS IN DIALOGUE 34, 47 (Brian Tamanaha, Caroline Sage & Michael Woolcock, eds., Cambridge U. Press 2012).

²¹ *Id.*

focus on “underlying conflict and the constant need for win/lose decisions.”²² Moreover, the approach would seek out meta-notions—or meta-rules—by examining “legal concepts or instruments that facilitate the relations between different legal orders or traditions”²³ to establish what has been referred to as a “sustainable diversity in law.” Thus, the approach focuses on the accommodation of “diverse legal unities” while attempting to sidestep the potential pitfalls and clashes involved in the binary exercise of accommodating difference.²⁴

A transsystemic approach would also seek to reach beyond the legal pluralist approach to control the complex realities faced by claimants. For example, claimants may face a lack of any identifiable legal or normative expression of an object’s potency within the legal systems, networks, or orders with which they identify. This can remove their ability to justify the repatriation or return of the object when facing the possessing entity’s identified legal framework if that framework presents conflicting property and ownership laws that shield the possessor. Where a legal pluralist approach may not account for “internal variations within what may be claimed to be a single law,” a transsystemic approach would seek to address the lack of homogeneity within groups or categories of the population. This approach can better treat the claims of subaltern groups that remain unacknowledged or have no standing within the larger cultural group with which they identify or with which the cultural object is identified.²⁵ A transsystemic approach deemphasizes the clash and divergences between different legal frameworks and excavates the underlying commonalities that may

²² H. Patrick Glenn, *Sustainable Diversity in Law*, in LEGAL PLURALISM AND DEVELOPMENT: SCHOLARS AND PRACTITIONERS IN DIALOGUE 95, 105 (Brian Tamanaha, Caroline Sage & Michael Woolcock, eds., Cambridge U. Press 2012) [hereinafter Glenn, *Sustainable Diversity*].

²³ *Id.* at 102.

²⁴ *See, e.g., id.* at 104–07. *See generally* H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD: SUSTAINABLE DIVERSITY IN LAW (Oxford U. Press, 5th ed., 2014).

²⁵ Gordon R. Woodman, *The Development “Problem” of Legal Pluralism: An Analysis and Steps toward Solutions*, in LEGAL PLURALISM AND DEVELOPMENT: SCHOLARS AND PRACTITIONERS IN DIALOGUE 129, 141 (Brian Tamanaha, Caroline Sage & Michael Woolcock, eds., Cambridge Univ. Press 2012).

reveal possibilities for collaboration amongst these frameworks.²⁶ The intention of this archaeology of legal frameworks is to: 1) focus on the underlying fluidity beneath different legal and non-legal orders rather than a potentially disjunctive or combative combination; 2) remove the categorization and separation of different legal frameworks that enables the potentiality of hierarchical ordering and valuation of certain frameworks over others with a view to disempowering the powerful and neutralizing the dominant;²⁷ and 3) avoid a further entrenching of hegemonic injustice and domination, with the goal of greater respect for traditionally marginalized non-Western and non-Eurocentric legal frameworks.

As Sally Engle Merry suggests, “Understanding law in contemporary post-colonial societies requires an archaeology of law: a historical unpacking of this complexity.”²⁸ Looking “under” the law, and past the borders of particular jurisdictions or legal traditions leads to the discussion of a concept that appears in Roman law: *res extra commercium*. *Res extra commercium* removes an object from the possibility of sale, renders it unmerchtable, inalienable, and outside of the reaches of the market due to the object’s potent characteristics.²⁹

This Article considers Roman law (*res divini juris* and *res extra commercium*) and the appearance of similar notions in modern civilian legal frameworks and international law, especially in the Province of Quebec, Canada. While recognizing that a legal pluralist approach is no cure-all and may suffer from the faults referred to above,³⁰ it nonetheless provides an important element in the

²⁶ For an excellent discussion pertaining to the connectors across legal traditions, notably within Canada, see JOHN BORROWS, CANADA’S INDIGENOUS CONSTITUTION 118–24 (Univ. of Toronto Press 2010).

²⁷ For a discussion of the hierarchies of legal systems in Canada, see *id.* at 12–22.

²⁸ Sally Engle Merry, *Legal Pluralism and Legal Culture: Mapping the Terrain*, in LEGAL PLURALISM AND DEVELOPMENT: SCHOLARS AND PRACTITIONERS IN DIALOGUE 66, 68 (Brian Tamanaha, Caroline Sage & Michael Woolcock, eds., Cambridge Univ. Press 2012).

²⁹ See, e.g., CULTURAL LAW: INTERNATIONAL, COMPARATIVE, AND INDIGENOUS 536–37 (James A. R. Nafziger, Robert Kirkwood Paterson & Alison Dundes Renteln, eds., Cambridge Univ. Press 2010).

³⁰ See, e.g., Boaventura de Sousa Santos’ often-quoted statement referring to some of the inadequacies of the notion of legal pluralism: “To my mind there is

application of a transsystemic methodology. As such, legal pluralism is referred to make sense of the method used in Quebec civil law to apply *res extra commercium* to the repatriation of cultural objects claimed as sacred under canon law.

Quebec is an example to draw on as it presents a jurisdiction already ripe with legal pluralism due to the interaction of the province's civil law framework, based on the *Civil Code of Quebec*, and Canada's federal common law framework—especially where the remainder of Canadian provincial (or territorial) legal frameworks are structured according to common law principles. Additionally, with reference to the case of *l'Ange-Gardien*, there is an example of the acknowledgment of an underlying unifying notion—*res extra commercium*—between Quebec civil law and canon law.³¹ This “meta-notion” is uncovered in the very particular context of a state's legal treatment of the claims for the return of potent cultural objects by an institution (the Catholic Church) that has been strongly associated with past colonization and is not traditionally linked to subalternity or marginalization. Quebec also provides an interesting example of the documented coexistence of both state law pluralism as well as what Gordon Woodman describes

nothing inherently good, progressive, or emancipatory about ‘legal pluralism.’” (TOWARD A NEW LEGAL COMMON SENSE: LAW, GLOBALIZATION, AND EMANCIPATION 114 (Butterworths LexisNexis, 2d ed., 2002). Instead, Santos “prefer[s] to speak of a plurality of legal orders.” *Id.* Santos introduces the notion of “interlegalities,” which more effectively addresses “the conception of different legal spaces *superimposed*, interpenetrated, and mixed in our minds, as much as our actions.” *Id.* at 472–73 (emphasis added). As opposed to the more traditional notion of legal pluralism that focuses the coexistence of separate legal systems, networks or orders in the same geographical space and period of time. *See, e.g.*, WILLIAM TWINING, GLOBALISATION AND LEGAL THEORY 83 (Northwestern Univ. Press 2001) [hereinafter TWINING, GLOBALISATION]. However, for the present scope the author will refer generally to legal pluralism as the interaction and incorporation of a plurality of legal orders that coexist in the same time and space, and interact and are (ideally) accepted and acknowledged by the dominant framework within which claims for repatriation and return must often be filtered. In addition, Brian Tamanaha provides helpful guidance for a progressive discussion and application of the notion of legal pluralism today with a list of six groupings of “systems of normative ordering in social arenas. Brian Z. Tamanaha, *Understanding Legal Pluralism: Past to Present, Local to Global* (2008) 30 SYDNEY L. REV. 375 [hereinafter Tamanaha, *Understanding*]. *See also* Woodman, *supra* note 25 at 133–38.

³¹ *L'Ange-Gardien (Paroisse) c. Québec (Procureur Général)* (1987), 8 Q.A.C. 1 (Can.).

as “deep legal pluralism” (in which state law coexists with non-state laws).³²

While reference to Roman law may seem paradoxical to a post-colonial approach, due to its grounding importance to many colonial legal orders, it may be investigated transsystemically in order to seek out “meta-notions” that are understandable across legal traditions, such as *res extra commercium*. These can then enable a node of agreement, or a bridge, between traditions in order to achieve a sustainable diversity in law that may provide recourse to claimants where a clash between legal frameworks and values cannot be effectively negotiated—notably where claimants are in highly subaltern situations.³³ “Meta-notions” that are understandable, acceptable, or recognized by both dominant segments of society and marginalized segments of society, but which are also favorable to the interests of marginalized groups, may ultimately be more easily implemented. But where no node of agreement can be established, legal pluralism remains a helpful default approach.

It is additionally worth noting that legal pluralism itself may face a similar critique of its paradoxical application in the post-colonial context where “[t]o a large extent the roots of contemporary legal pluralities of global law are buried in the colonial era.”³⁴ But, legal pluralism remains valuable as a tool when approached as a fluid concept addressing both the factual reality of plural legal orders (or, the “social fact” of legal pluralism)³⁵ and the theoretical tools it may provide, rather than defining legal pluralism according to the by-products of its prior instances.

Turning to the cultural objects in question, Welsh’s term “potent object” is used for a non-secular and neutral understanding of cultural objects that moves beyond Western and Eurocentric imposition of limiting terms such as “sacred.” The “potent object”

³² Woodman, *supra* note 25, at 132.

³³ Glenn, *Sustainable Diversity*, *supra* note 22 at 104–05. Cf. BOAVENTURA DE SOUSA SANTOS, TOWARD A NEW LEGAL COMMON SENSE (Butterworths LexisNexis, 2d ed., 2002) (notion of a non-hegemonic use of hegemonic legal tools).

³⁴ Merry, *supra* note 28, at 67. See also TWINING, GLOBALISATION, *supra* note 30, at 224.

³⁵ See, e.g., Twining, *Legal Pluralism*, *supra* note 19, at 120–22.

also enables a better representation of a cultural object's importance within political, moral, economic, and religious domains.³⁶

Finally, commodification of culture and cultural objects is referred to, as well as, the alternative conception of "ownership as belonging" rather than "ownership as property."³⁷ This allows for the argument that the *res extra commercium* status of potent objects, combined with a legal-pluralistic approach, deferring to the claimant group's demonstration of an object's potency to their culture established according to their internal norms and frameworks, will lead to the decommodification of potent cultural objects and removal from the market.³⁸ This will, in turn, enable a neutralization of the hegemony of Western and Eurocentric conceptions of the market value of cultural objects that ultimately creates an overarching barrier within the legal frameworks for repatriation and return.

A. Engaging with the Literature Gap

There is a dearth of material dealing with the repatriation and return of cultural objects on four fronts. First, there is a lack of

³⁶ Peter H. Welsh, *Repatriation and Cultural Preservation: Potent Objects, Potent Past*, 25 U. MICH. J.L. REFORM 837, 857–58 (1992).

³⁷ On the commodification of culture, *see generally*, THE SOCIAL LIFE OF THINGS: COMMODITIES IN CULTURAL PERSPECTIVE (Arjun Appadurai, ed., Cambridge Univ. Press 1986); RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE 137 (Martha M. Ertman & Joan C. Williams, eds., New York Univ. Press 2005). *See also* Rosemary J. Coombe & Joseph F. Turcotte, *Indigenous Cultural Heritage in Development and Trade: Perspectives from the Dynamics of Cultural Heritage Law and Policy*, in INTERNATIONAL TRADE IN INDIGENOUS CULTURAL HERITAGE: LEGAL AND POLICY ISSUES 221 (Christopher Beat Graber, Karolina Kuprecht & Jessica Christine Lai, eds., Edward Elgar 2012); Rosemary J. Coombe, *Legal Claims to Culture in and Against the Market: Neoliberalism and the Global Proliferation of Meaningful Difference*, 11 L. CULTURE AND THE HUMANITIES 32 (2005) [hereinafter Coombe, *Legal Claims*]. *See also* Francesca Fiorentini, *The Trade of Cultural Property: Legal Pluralism in an Age of Global Institutions*, in LA CONVENCION DE LA UNESCO DE 1970 SUS NUEVOS DESAFIOS (Jorge A. Sánchez Cordero, ed., Univ. Autónoma de México 2013). On "ownership as belonging" versus "ownership as property," *see* Brian Noble, *Owning as Belonging/Owning as Property: The Crisis of Power and Respect in First Nations Heritage Transactions with Canada*, in FIRST NATIONS CULTURAL HERITAGE AND LAW: CASE STUDIES, VOICES, AND PERSPECTIVES 465 (Catherine Bell & Val Napoleon, eds., UBC Press 2008).

³⁸ *See* Oliver Metzger, *Making the Doctrine of Res Extra Commercium Visible in United States Law*, 74 TEX. L. REV. 615, 641 (1996).

literature dealing specifically with the *barriers* to repatriation and return, and why these barriers exist. While some of the more thorough orienting studies on the subject contain sections that briefly mention the barriers to repatriation and return, finding a solution requires an in-depth analysis.³⁹ Second, the in-depth analysis needed requires both a practical assessment of the material and legal reality as to why these barriers exist as well as a rigorous theoretical assessment. Third, for this theoretical assessment to find potential application, a methodology is required—a methodology through transsystemia as well as through legal pluralism. Fourth, while *res extra commercium* appears in various discussions related to cultural property, primarily in terms of civil law jurisdictions, there has not been an exploration of the *complete* application of the notion across legal traditions through the use of legal pluralism that would ultimately lead to decommodification of potent cultural objects in the context of repatriation and return.⁴⁰

II. THE “CULTURAL OBJECT”

A cultural object forms part of the generally defined cultural heritage and property of a particular cultural group.⁴¹ The definition of a cultural object within the international legal framework appears in Articles 1, 4, and 13(d) of the 1970 UNESCO *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* (“1970 UNESCO Convention”).⁴² According to these provisions, states are at liberty

³⁹ See, e.g., FORREST, *supra* note 1; IRINA A. STAMATOUDI, CULTURAL PROPERTY LAW: A COMMENTARY TO INTERNATIONAL CONVENTIONS AND EUROPEAN UNION LAW (Edward Elgar 2011).

⁴⁰ See, e.g., Keith Siehr, *The Protection of Cultural Heritage and International Commerce*, 6 INT’L J. CULTURAL PROPERTY 304, 306 (1997); Metzger, *supra* note 38; Alessandra Lanciotti, *The Dilemma of the Right to Ownership of Underwater Cultural Heritage: The Case of the ‘Getty Bronze*, in CULTURAL HERITAGE, CULTURAL RIGHTS, CULTURAL DIVERSITY: NEW DEVELOPMENTS IN INTERNATIONAL LAW 30 (Silvia Borelli & Federico Lenzerini, eds., Martinus Nijhoff 2012); FORREST, *supra* note 1; STAMATOUDI, *supra* note 39.

⁴¹ Controversy exists concerning whether the correct way of viewing this material should be through the lens of cultural property or cultural heritage. Much has been written on this debate and is not within the scope of the present Article. See, e.g., Derek Fincham, *The Distinctiveness of Property and Heritage*, 115 PENN. ST. L. REV. 641 (2011).

⁴² International Labour Organisation [ILO], *Convention Concerning Indigenous and Tribal Peoples in Independent Countries*, 72 ILO Official Bull. 59 (June 27,

to delineate the parameters of their cultural property as long as the property in question: 1) is of importance in terms of archaeology, prehistory, history, literature, art, and science; and 2) belongs to one of the categories appearing in Article 1 of the 1970 UNESCO Convention.⁴³ However, the 1995 *UNIDROIT Convention On*

1989) (entered into force Sept. 5, 1991). UNESCO is the acronym for the United Nations Educational, Scientific, and Cultural Organisation. According to Article 1 of its Constitution, UNESCO is tasked with assuring "the conservation and protection of the world's inheritance of works of art and monuments of history and science" and is thus authorized under Article 2(a) and (c) to "recommend such international agreements as may be necessary." Constitution of the United Nations Educational, Scientific and Cultural Organization, 4 U.N.T.S. 275, art. IX (Nov. 16, 1945) (entered into force Apr. 7, 1948). Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Oct. 12–Nov. 14, 1970, 823 U.N.T.S. 231 [hereinafter 1970 UNESCO Convention].

⁴³ See also FORREST, *supra* note 1, at 36–37. 1970 UNESCO Convention, *supra* note 42; The categories are:

- (a) Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest;
- (b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artist and to events of national importance;
- (c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries;
- (d) elements of artistic or historical monuments or archaeological sites which have been dismembered;
- (e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals;
- (f) objects of ethnological interest;
- (g) property of artistic interest, such as:
 - (i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand);
 - (ii) original works of statuary art and sculpture in any material;
 - (iii) original engravings, prints and lithographs;
 - (iv) original artistic assemblages and montages in any material;
- (h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections;
- (i) postage, revenue and similar stamps, singly or in collections;
- (j) archives, including sound, photographic and cinematographic archives;

Stolen or Illegally Exported Objects ("1995 UNIDROIT Convention")⁴⁴ specifically introduced the notion of a "cultural object."⁴⁵ These conventions provide sterilized definitions of objects

(k) articles of furniture more than one hundred years old and old musical instruments.

⁴⁴ International Institute for the Unification of Private Law, *Convention on Stolen or Illegally Exported Cultural Objects*, 34 I.L.M. 1322, art. 2, annex (June 24, 1995) [hereinafter 1995 UNIDROIT Convention]. UNIDROIT is the acronym for the International Institute for the Unification of Private Law, an independent intergovernmental organization situated in Rome and established in 1926.

⁴⁵ The definition of a "cultural object" is the product of a compromise between the desire for a general definition, which some feared was too expansive, and an enumerative definition, which some feared was too restrictive. The result of this contested issue is the appearance of (1) a general definition for "cultural object" in Article 2 of the 1995 UNIDROIT Convention. *Id.* at art. 2, *available at* <http://www.unidroit.org/instruments/cultural-property/1995-convention> (An object that "on religious or secular grounds, [is] of importance for archaeology, prehistory, history, literature, art or science."); which must then also belong to one of the categories listed in a separate annex at the end of the Convention:

- (a) Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest;
- (b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance;
- (c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries;
- (d) elements of artistic or historical monuments or archaeological sites which have been dismembered;
- (e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals;
- (f) objects of ethnological interest;
- (g) property of artistic interest, such as:
 - (i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand);
 - (ii) original works of statuary art and sculpture in any material;
 - (iii) original engravings, prints and lithographs;
 - (iv) original artistic assemblages and montages in any material;
- (h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections;
- (i) postage, revenue and similar stamps, singly or in collections;
- (j) archives, including sound, photographic and cinematographic archives;

that hold great meaning to the source states and indigenous groups, and the contexts where they originated. This sterilization reveals part of why existing frameworks for cultural property and heritage law are problematic for source countries and indigenous groups in demonstrating the importance that an object carries to them.⁴⁶

A. The Potent Object

Welsh describes the “potent object” as follows: “Humans saturate tangible objects—whether sacred or not—with a quality we can call ‘potency’: that is, an individual object has the potential to embody and project simultaneously a multitude of meanings and interpretations.”⁴⁷ Welsh chooses the term “potent” in place of words such as “religious” or “sacred” because the “potent object” encompasses not only the often-sacred characteristics of these objects, but it extends beyond the sacred to refer to objects that derive importance from the centrality to a claimant state or group’s political, economic, moral, and religious domains.⁴⁸ This is much broader than the sectarian connotations of terms such as “sacred” or “ceremonial,” yet also more neutral and fluid in allowing for the way in which an object’s potency may shift and evolve over time.⁴⁹ To that end, potency is less mired in Western and Eurocentric notions of what constitutes the delimited “sacred” object. Potency better expresses the invaluable, nuanced, and priceless nature of cultural objects and acknowledges the facet of political reasons for repatriation and return.⁵⁰ Welsh suggests that to call an object potent is equivalent to identifying it, in Western and Eurocentric terminology, as scientifically significant where the way in which an object is scientifically significant, or potent, may shift over time.⁵¹

(k) articles of furniture more than one hundred years old and old musical instruments.

See also STAMATOUDI, *supra* note 39, at 72.

⁴⁶ See, e.g., Sarah Harding, *Value, Obligation and Cultural Heritage*, 31 ARIZ. ST. L.J. 291, 297–304 (1999) [hereinafter Harding, *Value*]; Michael E. Harkin, *Object Lessons: The Question of Cultural Property in the Age of Repatriation* 91 J. de la Société des Américanistes 9, 15–17 (2005).

⁴⁷ Welsh, *supra* note 36, at 856.

⁴⁸ *Id.* at 857–58.

⁴⁹ *Id.* at 858.

⁵⁰ *Id.* at 862–63.

⁵¹ *Id.* at 858.

B. The Actors

The actors in projects of repatriation and return can be broadly separated into: 1) the sources from whom cultural objects were removed; and 2) the destinations where these cultural objects are now located.

Within the category of source countries, claims are often instituted by a state or by indigenous groups found within a state's territory. Indigenous groups seeking the return of cultural objects currently located outside of the territory of the state will sometimes have their interests represented internationally by the state or will act as their own representatives.⁵² An additional dimension that must be dealt with is whether the cultural object in the destination state is owned or possessed by a public government controlled agency, such as a museum, or whether it is in the hands of an individual collector or private gallery.⁵³

III. REASONS FOR SEEKING THE REPATRIATION AND RETURN OF POTENT CULTURAL OBJECTS

A. *Conflicting Perceptions of Value: Cultural Internationalism Versus Cultural Nationalism*

The importance that repatriation carries to source groups and countries is recognized in key international documents such as the United Nations' *Declaration on the Rights of Indigenous Peoples* (UNDRIP).⁵⁴ The repatriation of cultural objects is sought due to

⁵² FORREST, *supra* note 1, at 148.

⁵³ Catherine Bell, *Restructuring the Relationship: Domestic Repatriation and Canadian Law Reform*, in PROTECTION OF FIRST NATIONS CULTURAL HERITAGE: LAWS, POLICY, AND REFORM 15, 57 (Catherine Bell & Robert K. Paterson, eds., UBC Press 2009) [hereinafter Bell, *Restructuring*]; Catherine Bell & Robert K. Paterson, *International Movement of First Nations Cultural Heritage in Canadian Law*, in PROTECTION OF FIRST NATIONS CULTURAL HERITAGE: LAWS, POLICY, AND REFORM 78, 90 (Catherine Bell & Robert K. Paterson, eds., UBC Press 2009) [hereinafter Bell & Paterson, *International Movement*].

⁵⁴ UNDRIP, *supra* note 2:

Article 11

1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and

their inherent value,⁵⁵ which John Henry Merryman famously divided into two binary perspectives:⁵⁶ 1) cultural internationalism, or the Universalist perspective, where cultural objects carry a universal value for all humankind;⁵⁷ and 2) cultural nationalism, which views the value of a cultural object as derived from its originating context.⁵⁸

The first perspective places greater importance on universal access to the cultural object and views cultural heritage as belonging to all of mankind. As a result, the importance of international research and scholarship are viewed as paramount and the return of objects to claimants may be resisted where claimants are seen as lacking proper academic training to maximize the research and educational potential of the object.

Within this perspective, cultural objects are tied to their market value and viewed as valuable resources to be exported and best managed through free market principles—the party who is willing to invest the most in purchasing a cultural object will be the most

historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 12

1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.

2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

⁵⁵ Harding, *Value*, *supra* note 46, at 316; FORREST, *supra* note 1, at 3–7.

⁵⁶ John Henry Merryman, *Two Ways of Thinking about Cultural Property*, 80 AM. J INT'L L. 831 (1986).

⁵⁷ See, e.g., The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 249 U.N.T.S. 240, art. I (May 14, 1954); FORREST, *supra* note 1, at 11–13. Merryman is a proponent of this view. See, e.g., Merryman, *Public Interest*, *supra* note 15.

⁵⁸ FORREST, *supra* note 1, at 5.

likely to properly preserve it.⁵⁹ Since cultural internationalism is highly concerned with the proper preservation of cultural objects, the fact that claimants may not have proper museum facilities within which to house the objects,⁶⁰ or that claimants may intend to use the returned cultural objects for ceremonial, sacred, or other purposes, can be a terrifying prospect for proponents of this worldview. This is especially the case for those who have spent much of their careers carefully watching over the precise humidity and temperature levels surrounding the cultural object in question. It is these types of concerns that can sometimes lead cultural internationalists to argue against the repatriation and return of cultural objects and to argue that everyone—including museums, dealers, and collectors—should have a say in decisions involving potent cultural objects, rather than allowing the voices of the claimants of the objects to take precedence.⁶¹

The second perspective focuses on the repatriation of the cultural object to its place and culture of origin in order to enable a thick and contextual understanding of the object and its value.⁶² This perspective is also concerned with the reality that many cultural objects held by institutions for the “universal” benefit often do not display all items and keep many of these meaningful cultural objects in storage, thus leaving them inaccessible to the public for many years.⁶³ In addition, the cultural nationalist perspective may, not unlike the Universalists, insist on the importance of housing returned objects in facilities that optimize physical preservation as well as ongoing research involving the objects.⁶⁴ Proponents of this

⁵⁹ Coombe & Turcotte, *supra* note 37, at 261.

⁶⁰ Bell & Paterson, *International Movement*, *supra* note 53, at 97.

⁶¹ STAMATOUDI, *supra* note 39, at 21; Coombe & Turcotte, *supra* note 37, at 261.

⁶² See, e.g., ANTONIO GRAMSCI, PRISON NOTEBOOKS, Vol. 1 at 187 (Joseph A. Buttigieg, ed., Joseph A. Buttigieg & Antonio Callari, trans., Columbia Univ. Press 1992).

⁶³ Bell & Paterson, *International Movement*, *supra* note 53, at 97.

⁶⁴ *Id.* See also Catherine Bell et al., *Recovering from Colonization: Perspectives of Community Members on Protection and Repatriation of Kwakwaka'wakwa Cultural Heritage*, in FIRST NATIONS CULTURAL HERITAGE AND LAW: CASE STUDIES, VOICES, AND PERSPECTIVES 33, 75 (Catherine Bell & Val Napoleon, eds., UBC Press 2008) [hereinafter Bell et al., *Recovering*]. Situated in Alert Bay, British Columbia, the U'mista Cultural Center operates a cultural education museum-calibre facility for housing and preserving cultural objects and

view argue against housing an object in its place of origin because this fails to maximize the object's research and education potential.

In a certain sense, interlaced within both of these perspectives are concerns with the preservation of the cultural object as something of invaluable worth.⁶⁵ While cultural internationalism favors care of the cultural object to be placed with institutions such as the "universal museum,"⁶⁶ cultural nationalism asks that the cultural object be placed with those who have the greatest potential understanding, connection, and contextual appreciation of the object.⁶⁷ Additionally, a removed cultural object may in fact satisfy the goals of both perspectives in terms of access, understanding, and context if it is returned to its place and landscape of origin.⁶⁸

Since preservation places value on a lack of change over flexibility, it is important to question *who* truly values this stagnation, museumification, and freezing of a cultural object as a relic of past peoples, and the past "Other."⁶⁹ Placing greater importance on a lack of potential change for these important cultural objects ignores the ongoing and dynamic potent nature they carry for today's people. As Welsh succinctly notes, "[p]reserving one's

information for the future by trained individuals. Associated ongoing research is also conducted by the U'mista. *See also* U'MISTA CULTURAL SOCIETY, <http://www.umista.org> (last visited May 16, 2016).

⁶⁵ FORREST, *supra* note 1, at 14–18.

⁶⁶ The notion of the "universal museum" arose as a reaction by numerous leading museums (including but not limited to the British Museum, the Musée du Louvre, the Museo Nacional del Prado, the Solomon R Guggenheim Museum, and the Metropolitan Museum of Art) to increasing demands for repatriation and return of cultural objects to source countries and source indigenous groups; the result of which was the 2002 *Declaration on the Importance and Value of Universal Museums*. The universal museum is seen as an institution that promotes cultural diversity and cultural exchange by keeping, showing, and studying the cultural heritage and cultural objects of source countries and source indigenous groups. *See* FORREST, *supra* note 1, at 164–65; WITNESSES TO HISTORY: A COMPENDIUM OF DOCUMENTS AND WRITINGS ON THE RETURN OF CULTURAL OBJECTS 116–18 (Lyndel V. Prott, ed., UNESCO 2009), http://icom.museum/fileadmin/user_upload/pdf/ICOM_News/2004-1/ENG/p4_2004-1.pdf. The declaration is from the perspective that "[t]he diminishing collection such as these would be a great loss to the world's cultural heritage." *Id.* at 118.

⁶⁷ FORREST, *supra* note 1, at 15.

⁶⁸ This argument is often advanced in relation to the Elgin Marbles. Bell & Paterson, *International Movement*, *supra* note 53, at 97–98; *see also* STAMATOUDI, *supra* note 39, at 30.

⁶⁹ Welsh, *supra* note 36, at 838.

own culture and preserving another's culture are two very different things. Preserving one's own culture is an expression of human rights, while working to preserve someone else's culture without their input or participation is, at best, paternalism."⁷⁰ And as Welsh warns, "In its most insidious form, cultural preservation can freeze people in an ahistorical moment. Such an approach to cultural preservation raises visions of dusty shelves filled with murky jars of pickled things. Cultures cannot be preserved that way."⁷¹

B. The Potent Object and Identity

The importance of a cultural object is inextricably linked to identity⁷²—whether this is a national identity, a subaltern or cultural group identity, or otherwise. Cultural objects provide a cultural context through which the individual and community interact and differentiate themselves, leading to identity formation. Cultural objects are deeply connected to the cultural, spiritual, and political lives of individuals and groups and physically define the output of the group's cultural and creative generative process.⁷³ Catherine Bell notes that it is for this reason that the control, removal, and destruction of potent cultural objects remains such a powerful means of domination.⁷⁴

C. The Potent Object and Knowledge Retention, Creation, and Revival

The value of a cultural object to the identity of a group is connected to its role in maintaining a state or indigenous group's knowledge of its culture, traditions, and history. Indigenous groups are often apprehensive about dissipating cultural knowledge, and the return and repatriation of cultural objects is viewed as invaluable due to the educational potential of the objects and the cultural

⁷⁰ *Id.* at 839.

⁷¹ *Id.* at 840.

⁷² Bell, *Justifications*, *supra* note 2, at 89–90; STAMATOUDI, *supra* note 39, at 217; Elizabeth M. Koehler, *Repatriation of Cultural Objects to Indigenous Peoples: A Comparative Analysis of US and Canadian Law*, 41 INT'L LAW. 103, 106 (2007).

⁷³ Bell, *Restructuring*, *supra* note 53, at 23; Harding, *Value*, *supra* note 46, at 335.

⁷⁴ Bell, *Restructuring*, *supra* note 53, at 23; Harding, *Value*, *supra* note 46, at 335.

knowledge they embody.⁷⁵ The creation of future knowledge and traditions is seen as connected to the presence of these important cultural items in their context of origin.⁷⁶

D. Economic Dimension

An economic dimension may also play a role in the desire to have potent cultural objects repatriated or returned. A source state or source indigenous group may profit from tourism and employment opportunities generated from the repatriation and return of their cultural objects.⁷⁷ In some cases, this may result in a transfer of the profit-generating potential of a cultural object from the hands of the destination state or institution from where it is being repatriated or returned, to the source state or indigenous group.

E. Decolonization, Self-Determination, and Reparation

The repatriation and return of cultural objects are often sought in decolonization efforts and as a means of reparation for the past injustices of colonization.⁷⁸ The value of cultural objects in this context is linked to self-determination and the ability of source states and source indigenous groups to control the potency of the object and the depiction, viewing, and access to images and information related to their histories and cultures.⁷⁹ The potent nature of the object in question may dictate that it only be displayed or used in certain manners and context that are not understood or adhered to in the object's removed location.⁸⁰

⁷⁵ Bell, *Justifications*, *supra* note 2, at 90, 92–93.

⁷⁶ FORREST, *supra* note 1, at 15.

⁷⁷ Bell, *Justifications*, *supra* note 2, at 90; Bell, *Restructuring*, *supra* note 53, at 24; P.J. O'Keefe, *Repatriation of Sacred Objects*, in WITNESSES TO HISTORY: A COMPENDIUM OF DOCUMENTS AND WRITINGS ON THE RETURN OF CULTURAL OBJECTS 225, 226 (Lyndel V. Prott, ed., UNESCO 2009) [hereinafter O'Keefe, *Repatriation*]; Kathryn Lafrenz Samuels, *Material Heritage and Poverty Reduction*, in HERITAGE AND GLOBALISATION 203 (Sophia Labadi & Colin Long, eds., Routledge 2010).

⁷⁸ Bell, *Justifications*, *supra* note 2, at 87; Bell & Paterson, *International Movement*, *supra* note 53, at 93; Bell, *Restructuring*, *supra* note 53, at 19.

⁷⁹ Bell, *Justifications*, *supra* note 2, at 93; Bell, *Restructuring*, *supra* note 53, at 24–25. See also JENNIFER KRAMER, SWITCHBACKS: ART, OWNERSHIP, AND NUXALK NATIONAL IDENTITY 90 (UBC Press 2006); Welsh, *supra* note 36, at 857–58.

⁸⁰ For example, Hopi kachina masks are not to be put on exhibit as they are considered to be disembodied parts of kachinas. Welsh, *supra* note 36, at 860.

IV. THE CURRENT LEGAL FRAMEWORKS FOR THE REPATRIATION AND RETURN OF CULTURAL OBJECTS

A. International

1. The 1970 UNESCO Convention and the 1995 UNIDROIT Convention

While legal frameworks for the repatriation of cultural objects have existed internationally for some time and provide a basic mechanism for repatriation, the reality is that no *effective* international mechanism exists that requires destination states to act in response to appeals by source states or groups for the return of potent cultural objects.⁸¹ Currently, the two primary conventions are the 1970 UNESCO Convention and the 1995 UNIDROIT Convention.

The aims of the 1970 UNESCO Convention sought an international, uniform, base level of protection against the illicit trafficking of cultural objects.⁸² As a public law instrument, it applies to relations between states that are party to the Convention but provides no rights or recourse to private parties.⁸³ Article 7(b)(ii) of the 1970 UNESCO Convention specifically addresses the return of cultural objects to source states where destination states are instructed:

[A]t the request of the State Party of origin, to take appropriate steps to recover and return any such cultural property imported after the entry into force of this Convention in both States concerned,

Yet this has often been completely disregarded by non-Hopi in the public and private displays of kachina masks that were removed from the Hopi in the past. It is these same potent cultural objects that the Hopi were recently unable to reclaim and were unsuccessful in having their sale delayed from Drouot auction house in France. *See infra* Part VI.B.1; Associated Press, *Auction House Ignores Pleas to Delay Sale of Hopi Masks: Auction Makes \$1.6 million US*, CBC NEWS (Dec. 9, 2013), <http://www.cbc.ca/news/arts/auction-house-ignores-pleas-to-delay-sale-of-hopi-masks-1.2456664>. Bell & Paterson, *International Movement*, *supra* note 53, at 93.

⁸¹ *See also id.* at 102.

⁸² STAMATOUDI, *supra* note 39, at 33.

⁸³ *Id.* at 33.

provided, however, that the requesting State shall pay just compensation to an innocent purchaser or to a person who has valid title to that property. Requests for recovery and return shall be made through diplomatic offices. The requesting Party shall furnish, at its expense, the documentation and other evidence necessary to establish its claim for recovery and return. The Parties shall impose no customs duties or other charges upon cultural property returned pursuant to this Article. All expenses incident to the return and delivery of the cultural property shall be borne by the requesting Party.⁸⁴

The 1995 UNIDROIT Convention sought to fill gaps identified in the 1970 UNESCO Convention, notably with regard to private law concerns, and also as a “follow-up” to the 1970 UNESCO Convention.⁸⁵ It regulates private law issues in terms of the *bona fide* possessor and applies to both states as well as private parties.⁸⁶ It is based on Article 7(b)(ii) of the 1970 UNESCO Convention.⁸⁷

The objectives of the 1995 UNIDROIT Convention were both to contribute to the fight against the illicit international trade of cultural objects as well as to establish a uniform set of minimum legal rules pertaining to the restitution and return of cultural objects between states that are party to the Convention.⁸⁸ It did not apply to domestic claims of theft or for the domestic repatriation of a cultural object.⁸⁹ The convention is characterized by two different regimes in dealing with return (and restitution) of cultural objects. The first deals with “restitution of stolen objects,” and the second deals with “the return of illegally exported objects.”⁹⁰ The 1995 UNIDROIT

⁸⁴ 1970 UNESCO Convention, *supra* note 42, at art. 7(b)(ii).

⁸⁵ Patrick O’Keefe, *Using UNIDROIT to Avoid Cultural Heritage Disputes: Limitation Periods*, in CULTURAL HERITAGE ISSUES: THE LEGACY OF CONQUEST, COLONIZATION, AND COMMERCE 389, 390 (James A.R. Nafziger & Ann M. Nicgorski, eds., Martinus Nijhoff, 2009) [hereinafter O’Keefe, *UNIDROIT*]; STAMATOUDI, *supra* note 39, at 67.

⁸⁶ STAMATOUDI, *supra* note 39, at 33.

⁸⁷ *Id.*

⁸⁸ 1995 UNIDROIT Convention, *supra* note 44, Preamble.

⁸⁹ See also STAMATOUDI, *supra* note 39, at 69.

⁹⁰ 1995 UNIDROIT Convention, *supra* note 44. See also Barbara T. Hoffman, *Introduction to Parts II and III: Cultural Rights, Cultural Property, and*

Convention's role is significant in both avoiding and resolving cultural heritage disputes.⁹¹

The 1970 UNESCO Convention and the 1995 UNIDROIT Convention are complimentary in their goals but are characterized by a difference in their means.⁹² They both also suffer from a number of problems, including their lack of ratification by certain key countries and enforcement difficulties. For example, Canada has signed and ratified the 1970 UNESCO Convention but has not signed the 1995 UNIDROIT Convention. A number of barriers (explored in the sections below) have prevented its widespread adoption.

These international frameworks have limited utility in the context of repatriation and return since they deal primarily with the illegal removal or theft of cultural objects that have been removed *after* the convention in question has entered into force.⁹³ This is highly problematic in dealing with the context of colonial wrongs due to the chronological reality of the time period within which many of these claimed cultural objects were removed. In addition, these international frameworks cannot be directly accessed by most source groups since the groups themselves are not parties to the conventions—even though the states within which they find themselves may be.

2. Other International Mechanisms

In terms of “soft law,” there are a number of international bodies that have developed regulations dealing with cultural property—consisting primarily of professional codes of ethics. The majority are limited to the regulation of particular professions that interact with art, collection, and museology. The contributions of these mechanisms, while not legally binding, consolidate and promote trends and “best practices” within these industries.⁹⁴

International Trade, in ART AND CULTURAL HERITAGE: LAW, POLICY, AND PRACTICE 89, 90–91 (Barbara T. Hoffman, ed., Cambridge Univ. Press 2006).

⁹¹ O’Keefe, *UNIDROIT*, *supra* note 85, at 390.

⁹² STAMATOUDI, *supra* note 39, at 33.

⁹³ See, e.g., 1995 UNIDROIT Convention, *supra* note 44, at art 10. See also STAMATOUDI, *supra* note 39, at 106. The non-retroactivity of a convention is a standard rule within international law. See, e.g., Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331., art 28.

⁹⁴ STAMATOUDI, *supra* note 39, at 159–64.

An example of this type of organization is The International Council of Museums (ICOM), which is committed to the protection, conservation, promotion, and continuation of the world's natural and cultural heritage. ICOM is a non-profit, non-governmental, international organization of museums and museum professionals. ICOM's primary focus is the fight against illicit trade in cultural property (it partners with UNESCO in this struggle), with a focus on prevention.⁹⁵ It produces a number of awareness-raising publications, but its most significant document is its code of professional ethics: the ICOM Code of Ethics for Museums ("ICOM Code").⁹⁶ Much of the ICOM Code deals with the acquisition of cultural objects, but it also provides for the return of objects.⁹⁷ In doing so, the ICOM Code refers to the 1970 UNESCO Convention and the 1995 UNIDROIT Convention, but also contains the reservation that museums must only cooperate if they are legally able to—which has allowed some museums to evade claims for return by referring to their statutes of operation that disallow them from divesting portions of their collection.⁹⁸

B. Domestic: The Canadian Context

1. Federal

On a federal level, Canada deals with cultural objects through the Cultural Property Export and Import Act (CPEIA).⁹⁹ This Act applies to the export and import of cultural property but does not address the repatriation of cultural objects. In contrast to the Native American Graves Protection and Repatriation Act (NAGPRA) passed by the United States Congress in October 1990, Canada does not have federal repatriation legislation.¹⁰⁰ Nonetheless, repatriation

⁹⁵ *Id.* at 180–82.

⁹⁶ International Council of Museums [ICM], *ICOM Code of Ethics for Museums* (2004) [hereinafter ICOM Code].

⁹⁷ *See id.* at rules 6.2–6.4.

⁹⁸ *See, e.g.,* STAMATOUDI, *supra* note 39, at 173.

⁹⁹ Cultural Property Export and Import Act, R.S.C. 1985, c. C-5.1 (Can.).

¹⁰⁰ NAGPRA, *supra* note 5. *See also* Catherine E. Bell & Robert K. Paterson, *Aboriginal Rights to Cultural Property in Canada*, 8 INTERNATIONAL JOURNAL OF CULTURAL PROPERTY 167 (1999) [hereinafter Bell & Paterson, *Aboriginal Rights*]; Bell, *Restructuring*, *supra* note 53, at 36.

claims within Canada may be addressed by policies put in place by government agencies such as Parks Canada.¹⁰¹

In terms of legislation that specifically addresses Aboriginal cultural property, Section 91 of the Indian Act refers to a limited number of cultural objects for which the transfer of title and removal from the reserve is prohibited “without the written consent of the Minister.”¹⁰²

2. Provincial

Certain provinces have developed and utilized their own repatriation legislation in addressing the repatriation claims of indigenous groups in Canada.¹⁰³ Provinces vary widely in the level of protection availed to cultural property. For the most part, provinces do not have sufficiently effective legislation to deal with repatriation claims.¹⁰⁴ Alberta, however, has a comparably higher level of protection where, according to the First Nations Sacred Ceremonial Objects Repatriation Act, “The Minister must agree to the repatriation of a sacred ceremonial object unless, in the Minister’s opinion, repatriation would not be appropriate.”¹⁰⁵ Nonetheless, a “sacred ceremonial object” is delimited to objects that are “vital to the practice of the First Nation’s sacred ceremonial traditions.”¹⁰⁶

¹⁰¹ Bell, *Restructuring*, *supra* note 53, at 36. *See also* TASK FORCE, REPORT ON MUSEUMS AND FIRST PEOPLES, TURNING THE PAGE: FORGING NEW PARTNERSHIPS BETWEEN MUSEUMS AND FIRST PEOPLES (3d ed. 1992) [TASK FORCE].

¹⁰² Indian Act, R.S.C. 1985, c. I-5, s. 91 (Can.). The enumerated objects include only: Indian grave houses, carved grave poles, totem poles, carved house posts, and rocks embellished with paintings or carvings. The enumerated objects must be located on the reserve for this protection to apply.

¹⁰³ *See e.g.*, First Nations Sacred and Ceremonial Objects Repatriation Act, R.S.A. 2000, c. F-14 (Can. Alta.); Glenbow-Alberta Institute Act, R.S.A. 2000, c. G-6 (Can. Alta.); Museum Act, S.B.C. 2003, c. 12 (Can. B.C.). *See also* Bell, *Restructuring*, *supra* note 53, at 28–43.

¹⁰⁴ *See also* Tamara Kagan, *Recovering Aboriginal Cultural Property at Common Law: A Contextual Approach*, 63 U. TORONTO FAC. L. REV. 1, 11 (2005).

¹⁰⁵ First Nations Sacred and Ceremonial Objects Repatriation Act, R.S.A. 2000, c. F-14, s. 2(2) (Can. Alta.); *Cf.* Heritage Conservation Act, R.S.B.C. 1996, c. 187 (Can. B.C.); Ontario Heritage Act, R.S.O. 1990, c. O-18 (Can. Ont.)

¹⁰⁶ First Nations Sacred and Ceremonial Objects Repatriation Act, R.S.A. 2000, c. F-14, s. 1(e)(iii) (Can. Alta.).

3. Other

In addition to the federal and provincial contexts, other repatriation provisions can be found contained within treaties. An example of this scenario is the Nisga'a Treaty.¹⁰⁷ Further, many Canadian museums have developed repatriation policies to deal with cultural objects and have generally sought to improve their relationships with First Nations.¹⁰⁸ A number of these policies arose subsequent to the debates and recommendations of the Task Force on Museums and First Peoples ("Task Force").¹⁰⁹ The Task Force addresses the repatriation of sacred objects and cultural patrimony and notes the importance of involving First Nations in the management of museum collections as well as acknowledging internal Aboriginal processes and ownership frameworks and systems. For example, the Task Force states:

Even in cases where materials have been obtained legally, museums should consider . . . [the] transfer

¹⁰⁷ Chapter 17 of the treaty was the first time the repatriation of cultural objects from a Canadian government institution (notably, the Canadian Museum of Civilizations—now known as the Canadian Museum of History—and the Royal British Columbia Museum) was specifically dealt with by a Canadian First Nation treaty; see Nisga'a Final Agreement Act, S.B.C. 1999, c. 2 (Can. B.C.) (enacted provincially in British Columbia); Nisga'a Final Agreement Act, S.C. 2000, c. 7 (Can.) [hereinafter Nisga'a Treaty] (enacted federally). Catherine E. Bell et al., *First Nations Cultural Heritage: A Selected Survey of Issues and Initiatives*, in FIRST NATIONS CULTURAL HERITAGE AND LAW: CASE STUDIES, VOICES, AND PERSPECTIVES 367, 368–86 (Catherine E. Bell & Val Napoleon, eds., UBC Press 2008) [hereinafter Bell et al., *Selected Survey*].

¹⁰⁸ *Selected Survey*, *supra* note 107, at 369, 373 (For a more extensive discussion of particular Canadian museums and their repatriation policies.).

¹⁰⁹ TASK FORCE, *supra* note 101. In particular, the Lubicon Lake First Nation's 1988 boycott of "The Spirit Sings" exhibit at Calgary, Alberta's Glenbow Museum. This exhibit was hosted as part of the Olympic Art Festival and connected to the 1988 Calgary Winter Olympic Games. Briefly, masks lent by other museums and institutions were displayed alongside a Mohawk False Face mask lent by the Royal Ontario Museum. This mask was at the center of the controversy since some of these masks used in Mohawk healing ceremonies are regarded as highly sacred and are not to be viewed by non-Aboriginals. Not only was the return of the mask sought, but the statement of claim additionally asked for an injunction to stop the display of the False Face mask. Catherine E. Bell, Graham Statt & the Mookakin Cultural Society, *Repatriation and Heritage Protection: Reflections on the Kainai Experience*, in FIRST NATIONS CULTURAL HERITAGE AND LAW: CASE STUDIES, VOICES, AND PERSPECTIVES 203, 212 (Catherine Bell & Val Napoleon, eds., UBC Press 2008); Bell et al., *Selected Survey*, *supra* note 107, at 368–69).

of title of sacred and ceremonial objects and of other objects that have ongoing historical, traditional or cultural importance to an Aboriginal community or culture. This involves case-by-case negotiation with the appropriate communities based on moral and ethical factors above and beyond legal consideration.¹¹⁰

However, there is no national organization in place to monitor the implementation of the Task Force recommendations.¹¹¹

V. BARRIERS TO REPATRIATION AND RETURN: RELICS OF COLONIAL DOMINATION

The removal, control, and destruction of the cultural objects of indigenous groups were tools of domination deployed during colonization periods.¹¹² Yet, even after decolonization, efforts towards repatriation and return are plagued with barriers that are a hegemonic reproduction of colonial wrongs and antithetical to efforts to remedy these wrongs.¹¹³ Examining the barriers in a post-colonial context reveals that they constitute colonial relics of continued domination of source countries and indigenous groups by destination countries. Further, these barriers force non-Western and non-Eurocentric norms and values into Western and Eurocentric frameworks of legal norms and values.¹¹⁴ This obliges non-dominant source countries and subaltern, often indigenous, groups to speak and act according to the languages and laws of the dominant destination countries in articulating claims for repatriation and return.¹¹⁵

¹¹⁰ TASK FORCE, *supra* note 101, at 9.

¹¹¹ Bell et al., *Selected Survey*, *supra* note 107, at 373.

¹¹² Bell, *Restructuring*, *supra* note 53, at 23 (citing Harding *Value*, *supra* note 46, at 335).

¹¹³ See, e.g., Bell, *Justifications*, *supra* note 2, at 87. See also Litowitz, *supra* note 13, at 519.

¹¹⁴ Amanda Pask, *Making Connections: Intellectual Property, Cultural Property, and Sovereignty in the Debates Concerning the Appropriation of Native Cultures in Canada*, 8 INTELL. PROP. J. 82 (1993); Rosemary J. Coombe, *The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy*, 6 CAN. J.L. & JUR. 249 (1993); Noble, *supra* note 37.

¹¹⁵ Sharp, *supra* note 4 at 110-11, referring to Spivak, *supra* note 4; Noble, *supra* note 37.

These barriers are divided into four main categories: 1) time; 2) notions of ownership and property; 3) the domestic laws of source and destination countries; and 4) costs. These are largely artificial divisions since the four are intimately interrelated. When a claim is blocked by a limitation period, this is often also linked to diverging notions of ownership and property reflected in domestic laws. And these three interrelated barriers all carry costly ramifications for claimants—whether due to the costs of the ensuing litigation, the time, travel, and personal investment required by interested parties, the monetary investment required to contravene barriers through repurchasing objects, the funds required to successfully meet conditions imposed on claimants in most successful repatriation claims (such as, “proper” venues to house the object in question), and so on.

While the barriers explored below exist at both the international and national level, the challenges they pose are magnified at the international level.¹¹⁶

A. Time

The period of time that has elapsed since the removal of a cultural object from its source can pose problems in its repatriation, and this is often perceived as the most significant barrier. While time limitations are intended to further justice rather than injustice,¹¹⁷ or at least where “[c]ontemporary limitations statutes seek to balance protection of the defendant with fairness to the plaintiff,”¹¹⁸ it is clear that the claiming group or country is at a disadvantage when negotiating the legal barriers created by the passage of time. The legal permutations of the passage of time are inextricably linked to Western and Eurocentric legal frameworks within which source groups and countries are forced to formulate their claims. Since their claims do not easily fit within the available frameworks, the initial

¹¹⁶ Bell & Paterson, *International Movement*, *supra* note 53, at 99. For example, issues such as language barriers, movement across international borders, increased costs due to distance, and unfamiliar laws, policies, and traditions exacerbate the existing challenges to return at an international level. *Id.*

¹¹⁷ Bell, *Restructuring*, *supra* note 53, at 33.

¹¹⁸ *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, para. 141 (Can.) (referring to *Novak v. Bond* (1999), 1 S.C.R. 808, para. 66 (Can.)).

colonial wrongs that took place when culturally potent objects were removed are maintained.

Time limitations exist for a number of purposes. In terms of private property, they can ensure fairness by protecting the reasonable expectations of innocent good faith purchasers and they allow for certainty of title in the market.¹¹⁹ Time limitations also address logistical issues that become problematic with the passage of time, such as evidentiary problems arising from interpreting past or present documents or actions by standards not applicable at the relevant time, or the death of key actors or witnesses.¹²⁰

Countries vary in their treatment of the passage of time and its legal results on claims for repatriation and return.¹²¹ In common law jurisdictions, time limitations, estoppel, laches, or prescription must be considered in formulating and treating claims while, within civil law jurisdictions, acquisitive prescription (*usucapio*) and statutory limitations generally apply to the treatment of time.¹²² Nuances exist within each country's legal frameworks that are beyond the scope of this project. For the present purposes, this Article provides a general overview of relevant time limitations, but with specific reference to Canada's limitations legislation.¹²³

Broadly, according to the rules of the discoverability principle, a limitation period begins to run as soon as the claiming party becomes aware (or could be reasonably expected to have become aware) of the material facts that form the basis of their claim.¹²⁴ Time limitations can be used both as a sword and a shield.¹²⁵ A current possessor of an object may claim to have become the owner through the passage of time, thus using the passage of time as a sword. Or, the current possessor may use the passage of time as a shield by asserting that the claiming party has not brought their claim within the applicable time limit.¹²⁶

¹¹⁹ Bell, *Restructuring*, *supra* note 53, at 33; Catherine Bell, *Limitations, Legislation and Domestic Repatriation*, 38 U.B.C. L. REV. 149, 151; Kagan, *supra* note 104, at 26.

¹²⁰ Bell, *Restructuring*, *supra* note 54, at 33.

¹²¹ Siehr, *supra* note 40, at 306.

¹²² STAMATOUDI, *supra* note 39, ch. 2 n.137; Siehr, *supra* note 40, at 305–07.

¹²³ *But see, e.g.*, Bell, *Restructuring*, *supra* note 53, at 33–35.

¹²⁴ *Id.* at 33.

¹²⁵ Siehr, *supra* note 40, at 306.

¹²⁶ *Id.*

Briefly, a variety of reasons exist for the passage of time between the removal of an object and the eventual claim for its return. This includes the lack of knowledge of a source group or country as to the location of a removed object,¹²⁷ as well the difficulties in tracing cultural objects in the context of international borderless trade and the potential housing of an object in a little-known location.¹²⁸ The difficulty in tracing objects may also be exacerbated by the purposeful hiding of objects. In addition, it simply takes time for groups and source states to organize their claims for repatriation or return as they begin the slow process of recovery from colonization and the mass removal of cultural objects from within their borders.

1. Time Internationally

Internationally, the 1970 UNESCO Convention bears no reference to time limitations.¹²⁹ As a result, parties to the 1970 UNESCO Convention can apply their respective domestic rules for time limitations.¹³⁰ During the drafting of the 1995 UNIDROIT Convention, however, time limitations became a contentious issue,¹³¹ and, limitation periods remain the greatest barrier to the widespread adoption of the 1995 UNIDROIT Convention.¹³²

During the drafting process for the 1995 UNIDROIT Convention, two divergent perspectives on time limitations clashed.¹³³ On one side, states generally classified as destinations for cultural objects were predominantly in favor of short time limits due primarily to a concern for stability in the marketplace. Many of these countries had legal systems based on the common law tradition where statutes of limitations govern restitution claims once a certain period of time passes subsequent to the claimant becoming aware of

¹²⁷ See, e.g., Bell, *Restructuring*, *supra* note 53, at 57.

¹²⁸ STAMATOUDI, *supra* note 39, at 82.

¹²⁹ See art. 4 of the 1970 UNESCO Convention, *supra* note 42. See also Stamatoudi, *supra* note 6 at 40.

¹³⁰ O'Keefe, *UNIDROIT*, *supra* note 85 at 390.

¹³¹ Stamatoudi, *supra* note 39 at 63.

¹³² The UK, for example, identifies limitation barriers as the most significant obstacle to their adoption of the 1995 UNIDROIT Convention (O'Keefe, *UNIDROIT*, *supra* note 85 at 390).

¹³³ Forrest, *supra* note 1 at 204-206; O'Keefe, *UNIDROIT*, *supra* note 86.

possessor's identity.¹³⁴ The other side was against any time limits at all, largely influenced by concerns with morality and justice as well as efficient transactions.¹³⁵ Many of the countries with this other perspective had legal systems based on the civil law tradition where certain property is deemed inalienable and time limitations do not apply, even if the cultural object is attained by a *bona fide* purchaser.¹³⁶ This clash in perspectives ultimately resulted in the need for compromise where certain states insisted on including the principle of inalienability¹³⁷ while others refused to accept a convention that included this concept.¹³⁸ And yet other countries were constrained by constitutional reasons that would disallow them from implementing a regime without limitation periods.¹³⁹

The result of all of this has been the inclusion of a median view of time limitations that represents no particular state legal system in treating dispossessed owners.¹⁴⁰ Generally, the claimant is provided a three-year period to make their claim from the time they become aware of the location of the cultural object and the identity of the possessor, or, a fifty-year period will be in effect.¹⁴¹ Logistically, three years does not provide much time for claimants to decide to pursue and organize a claim, especially where the removal of an object occurred a long time ago, or if internal conflicts exist within the source group regarding what action to take after the loss of an object is discovered.¹⁴²

The fifty-year period is also problematic due to the practical effect of the passage of time on evidence that is needed to prove the circumstances of the removal, as well as the provenance of the

¹³⁴ Stamatoudi, *supra* note 39, at 79.

¹³⁵ *Id.*

¹³⁶ FORREST, *supra* note 1, at 204–05. See also O'Keefe, *UNIDROIT*, *supra* note 85, at 395.

¹³⁷ For example, France. See FORREST, *supra* note 1, at 205. See also O'Keefe, *UNIDROIT*, *supra* note 85, at 393, 395.

¹³⁸ For example, the UK, Netherlands, and Switzerland. FORREST, *supra* note 1, at 205.

¹³⁹ Austria, for example. *Id.*

¹⁴⁰ STAMATOUDI, *supra* note 39, at 80.

¹⁴¹ See 1995 UNIDROIT Convention, *supra* note 44, art. 3, para. 3, and art. 5, para. 5. This three year period is substantially similar to the discoverability principle applied in Canada.

¹⁴² O'Keefe, *UNIDROIT*, *supra* note 85, at 391.

object.¹⁴³ The fifty-year period does not account for the reality of objects removed in the context of colonialism—where source groups and states may take longer than fifty years to mobilize to bring a claim, in addition to the logistical time required to trace and locate objects. Further, the inability to bring a claim due to, for example, *force majeure*, is not explicitly accounted for.¹⁴⁴

However, pursuant to Article 3(4), the 1995 UNIDROIT Convention does allow for an exception to the fifty-year limitation period (only the three-year limitation period will apply) where the object in question forms “an integral part of an identified monument or archaeological site, or belong[s] to a public collection,”¹⁴⁵ or if, pursuant to Article 3(8) the claim pertains to “a sacred or communally important cultural object belonging to and used by a tribal community in a Contracting State as part of that community’s traditional or ritual use.”¹⁴⁶ This extended time limitation was essentially intended to incorporate the principle of inalienability in order to speak to the position of a number of countries that apply this principle to particular classes of property.¹⁴⁷ But the removal of the fifty-year overall time limitation is not absolute since, pursuant to Article 3(5), the parties to the 1995 UNIDROIT Convention are able to limit this period to seventy-five years “or such longer period as is provided in its law.”¹⁴⁸

Regardless of the compromise represented by the language and legal concepts that appear in the 1995 UNIDROIT Convention, and in addition to the practical problems arising from the three-year and fifty-year limitation periods respectively, the wording of the provisions that attempt to address inalienability are severely limiting for source groups and countries that seek the repatriation of cultural objects removed. For example, for an object to be “an integral part of an identified monument or archaeological site,” the monument must be recorded; however, few monuments have such records.¹⁴⁹ The same applies to archaeological sites where many sites have not

¹⁴³ *Id.* at 392.

¹⁴⁴ See also STAMATOUDI, *supra* note 39, at 81–82.

¹⁴⁵ 1995 UNIDROIT Convention, *supra* note 44, art. 3, para. 4.

¹⁴⁶ *Id.*, art. 3, para. 8.

¹⁴⁷ France, for example. See FORREST, *supra* note 1, at 205.

¹⁴⁸ 1995 UNIDROIT Convention, *supra* note 3, art. 3(5)–(6), art. 9(1).

¹⁴⁹ O’Keefe, *UNIDROIT*, *supra* note 85, at 396.

been officially “discovered” or documented, such as those pillaged by “huaqueros” (those who illicitly excavate archaeological sites and/or remove objects from these sites) in parts of Mexico and South America. There and elsewhere, archaeological sites have been and continue to be frequent targets of illegal excavations, leading to many unrecorded objects.¹⁵⁰

In addition, the use of the word “integral” in Article 3(4) of the 1995 UNIDROIT Convention is vulnerable to subjectivity and may result in a difficult burden in proving an object’s “integral” nature.

The third category of potentially exempt objects includes those that belong to a “public collection.” Since this is not a term of art, the 1995 UNIDROIT Convention provides a definition in Article 3(7). A “public collection” is “a group of inventoried or otherwise identified cultural objects” that must be owned by either a: 1) contracting state; 2) regional or local authority of a contracting state; 3) religious institution in a contracting state; or 4) institution that is established for an essentially cultural, educational, or scientific purpose in a contracting state and must be recognized in the state in question as serving the public interest.¹⁵¹

There are a host of difficulties with this definition. According to Article 3(7), cultural objects must consist of more than one object in order to form the requisite “group.” But there is no requirement for this group of two or more objects to have any sort of unifying characteristic or theme. The result, as Patrick O’Keefe suggests, is that a public collection is defined by its owner.¹⁵² Next, the cultural objects must be “inventoried or otherwise identified” by one of the enumerated owning entities. O’Keefe criticizes this requirement due to the well-known inaccuracies of most inventories, which limits the ability to fully claim all of the cultural objects that would otherwise form part of the public collection.¹⁵³ The stipulation that the category of potential owners must serve the “public interest” is also vulnerable to subjectivity. O’Keefe points out that the collections of religious institutions receive special treatment as they receive their

¹⁵⁰ See, e.g., *id.*

¹⁵¹ 1995 UNIDROIT Convention, *supra* note 44, art. 3(7).

¹⁵² O’Keefe, *UNIDROIT*, *supra* note 85, at 397.

¹⁵³ *Id.* at 397.

own category of potential owners.¹⁵⁴ Yet it is difficult to define and demarcate what a religious institution consists of and may not account for particular spiritual movements.¹⁵⁵

The fourth category of cultural objects that may be exempt from the three-year or fifty-year limitation periods is dedicated to stolen objects that are identified as “a sacred or communally important cultural object belonging to and used by a tribal or indigenous community in a [c]ontracting [s]tate.”¹⁵⁶ The time limitations applied here are the same as those applied to public collections. If the cultural object is not “sacred,” then it must be “communally important.” But this standard would have to be proven by the claiming group in the state where they are making the claim¹⁵⁷—and this may be difficult to demonstrate where notions of “communally important” are not identical across all groups, countries, and people. But once “sacred” or “communally important” is proven, the claiming party must then show that the cultural object is used “as part of that community’s traditional or ritual use.”¹⁵⁸ Where the cultural object is not for ritual use, then it must be for traditional use. Traditional use can be more difficult to establish than ritual use because the object *must not only* be for traditional use, it must *also* be “communally important.” As O’Keefe notes, this may be highly problematic for cultural objects used every day by a particular family rather than by the community.¹⁵⁹ These highly specific definitions exemplify the international legal frameworks that maintain the logic of the colonizer but within which source groups and states must navigate and fit their claims.

In other contexts, the use of term “culturally significant” to designate which cultural objects are fair game for claims for repatriation or return present the same uncomfortable reality. Between possessing institutions and individuals there is a vast difference of opinion regarding what is “culturally significant.”¹⁶⁰ In the context of the 1995 UNIDROIT Convention, there are no

¹⁵⁴ *Id.* at 398.

¹⁵⁵ *Id.*

¹⁵⁶ 1995 UNIDROIT Convention, *supra* note 44, art. 3, para. 8.

¹⁵⁷ O’Keefe, *UNIDROIT*, *supra* note 85, at 399.

¹⁵⁸ 1995 UNIDROIT Convention, *supra* note 44, art. 3(8).

¹⁵⁹ O’Keefe, *UNIDROIT*, *supra* note 85, at 400.

¹⁶⁰ Bell & Paterson, *International Movement*, *supra* note 53, at 96.

provisions that provide for the competence of the claimant state to identify the cultural objects or property that are “culturally significant” to it. Instead, the court that assesses a claim is left with a margin of discretion that may be problematic where the court in question (or the state within which the claim is brought) does not view the object as culturally significant or views it simply as a commodity to be freely traded on the market.¹⁶¹

Peru’s claim against Yale for the return of artifacts from Machu Picchu is one example of the barriers encountered due to the imposition of limitation periods. Since Peru had already made a formal demand for the return of these objects in the 1920s, which Yale had refused, it became apparent that the seventy-year time period that had elapsed since the initial demand and the recent claim for the return of these objects would be problematic due to the three-year statute of limitations applicable to replevin actions.¹⁶² In order to overcome these barriers—as will be discussed subsequently in a later section—extralegal strategies including international awareness-raising and public shaming were employed.¹⁶³

2. Time Domestically: Canada

Canada’s heritage conservation legislation largely falls within the jurisdiction of the provinces and thus differs from province to province—the same applies to provincial legislation regarding limitation of actions legislation.¹⁶⁴ As discussed above in relation to limitation periods in most common law jurisdictions, limitation periods usually begin at the date of wrongful removal of the cultural object. Again, the general principle of fairness is applied in order to safeguard possessors of an object from a perpetual threat of being sued for the object in question.

¹⁶¹ STAMATOUDI, *supra* note 39, at 95.

¹⁶² Complaint, Republic of Peru v. Yale University, No. 1:08-CV-02109 (D.D.C. Dec. 5, 2008). *See also* Kimberley Alderman, *Yale Agrees to Return Machu Picchu Artifacts to Peru: Ethics-Based Repatriation Efforts Gain Steam*, CULTURAL HERITAGE & ARTS REV. 3, 3 (Fall/Winter 2010).

¹⁶³ Alderman, *supra* note 162, at 3–4. *See also infra* Part VI.B.1.

¹⁶⁴ Bell & Paterson, *Aboriginal Rights*, *supra* note 10, at 195. *See also* Catherine Bell, *Aboriginal Claims to Cultural Property in Canada: A Comparative Legal Analysis of the Repatriation Debate*, 17 AM. INDIAN L. REV. 457, 476–77, 481–501 (1992) [Bell, *Aboriginal Claims*].

The same justifications exist at the provincial level for the imposition of time limitations: certainty of title, timely settlement of disputes, and the protection of good-faith innocent purchasers.¹⁶⁵ Some exceptions exist in repatriation claims in order to account for the fraudulent concealment of a cause of action such that the limitation period will not begin until the date upon which the fraud was discovered or ought to have been discovered. But this does not fully account for changes in Aboriginal rights law and the ability to effectively determine when Aboriginal claimants knew or reasonably ought to have known about their ownership rights over a particular object.¹⁶⁶ When a limitation period runs out and does not fall under an exception, the claimant(s) will have their right to ownership extinguished—which, in some cases, may ultimately indirectly extinguish a common law Aboriginal right to cultural property.¹⁶⁷

B. Ownership and Property

Even if the barriers posed by limitation periods are overcome, claims to ownership and possession remain a barrier for a number of reasons that largely arise from differing perceptions or understanding of ownership and property.¹⁶⁸

1. Identifying Origins and Owners

As time passes, ownership and the provenance of a removed cultural object become increasingly difficult to trace. The chain of title is obscured as the object is traded from party to party.¹⁶⁹ The evidence needed to demonstrate provenance may not be sufficient in proceedings before the courts in the jurisdiction where the object

¹⁶⁵ Bell & Paterson, *Aboriginal Rights*, *supra* note 100, at 195.

¹⁶⁶ *Id.* at 195.

¹⁶⁷ *Id.* at 181–91, 195.

¹⁶⁸ Bell, *Aboriginal Claims*, *supra* note 164, at 481. See also Rebecca Tsosie, *Who Controls Native Cultural Heritage?: “Art,” “Artifacts,” and the Right to Cultural Survival*, in *CULTURAL HERITAGE ISSUES: THE LEGACY OF CONQUEST, COLONIZATION, AND COMMERCE* 3, 31–32 (James A. R. Nafziger & Ann M. Nicgorski eds., Brill Academic Publishers, Inc. 2009).

¹⁶⁹ FORREST, *supra* note 1, at 145.

is currently held and may ultimately make the return of objects impossible.¹⁷⁰

In a dispute for the return of pre-Columbian artifacts seized by United States Customs from a private individual, the Government of Peru had to prove that it was the legal owner of the claimed objects *at the time* that the objects were removed.¹⁷¹ Since Peru could only prove national ownership of cultural property from 1929 forward, their claim was unsuccessful.¹⁷²

The claimant must be able to show a past-present continuity, on a balance of probabilities, which may be straightforward where claims are made for objects from a well-documented or well-known period of time.¹⁷³ However, this is not the case with many claims, and as time passes it becomes increasingly difficult to establish, beyond a reasonable doubt, a past-present continuity.¹⁷⁴

A dearth of evidence is also problematic for claims for objects that were exported illegally or secretly, as it is difficult to have sufficient evidence to prove ownership and the provenance of these illegally exported objects.¹⁷⁵

Additionally, the group that initially created the cultural object, or the culture that the object can be sourced to, may no longer remain as a recognizable entity—thus breaking the continuity of title. An example of this is the Nok civilization and Nok art.¹⁷⁶ The Nigerian government lays claim to these cultural items because the Nok civilization once existed within what is now Nigeria.

The claim for objects that embody a particular culture carries additional unique challenges related to the movable nature of the

¹⁷⁰ Liv. Nilsson Stutz, *Claims to the Past. A Critical View of Arguments Driving Repatriation of Cultural Heritage and their Role in Contemporary Identity Politics*, 7 J. INTERVENTION & STATEBUILDING 170, 181 (2013).

¹⁷¹ *Peru v. Johnson*, 720 F. Supp. 810 (C.D. Cal 1989), *aff'd mem.* *Peru v. Wendt*, 933 F.2d 1013 (9th Cir. 1991). Alderman, *supra* note 162, at 3.

¹⁷² Alderman, *supra* note 162, at 3.

¹⁷³ Stutz, *supra* note 170, at 181; FORREST, *supra* note 1, at 146.

¹⁷⁴ Stutz, *supra* note 171, at 181.

¹⁷⁵ FORREST, *supra* note 1, at 146. See also *R v. Heller* (1983), 27 Alta. L.R. 2d 346 (Can. Alta.).

¹⁷⁶ *Heller* 27 Alta. L.R.; Kwame Anthony Appiah, *Whose Culture is it, Anyway?*, in CULTURAL HERITAGE ISSUES: THE LEGACY OF CONQUEST, COLONIZATION, AND COMMERCE 209, 213–16 (James A. R. Nafziger & Ann M. Nicgorski eds., Brill Academic Publishers, Inc. 2009); FORREST, *supra* note 1, at 146.

cultural objects in question. Determining which culture an object embodies can be problematic since the object could quite easily have been transferred between groups or have been left behind and appropriated by incoming conquering or occupying groups.

2. Differing Concepts of Ownership and Property

Beginning with Aboriginal property, concepts of property differ from mainstream Western and Eurocentric notions of private property where, at base, there exists the assumption that all property may be owned by an individual.¹⁷⁷ As Brian Tamanaha describes, property ownership is a common space of legal pluralistic clashes between Western and Eurocentric norms, on the one hand, and non-Western and non-Eurocentric, on the other.¹⁷⁸ Other ways of envisioning property—such as communal ownership or collective ownership—create problems in claims for repatriation and return as they make it more difficult to frame a claim within the available legal frameworks that import basic assumptions regarding what is acceptable evidence of ownership, chain of title, and possession.

Collective ownership, for example, focuses on the interests of the community, and the community that owns property, rather than the individual. However, within the collective, particular individuals may benefit from more extensive rights or responsibilities for portions of the property that are otherwise held collectively. An example would be religious leaders within the collectivity.¹⁷⁹ Communal ownership is much the same as collective ownership, but lacks the possibility for particular individuals to benefit from the superior right outlined above.¹⁸⁰

In addition, the buying and selling of property—which is such an assumed reality within Western and Eurocentric property norms—do not necessarily carry an equivalent notion or importance within customary normative systems.¹⁸¹ This can make it difficult when entering into litigation that requires conventional evidence of ownership as well as market values.

¹⁷⁷ See, e.g., Bell, *Aboriginal Claims*, *supra* note 164, at 460.

¹⁷⁸ Tamanaha, *Understanding*, *supra* note 30, at 408.

¹⁷⁹ Bell, *Aboriginal Claims*, *supra* note 164, at 461.

¹⁸⁰ *Id.*

¹⁸¹ Tamanaha, *Understanding*, *supra* note 30, at 408.

Property and ownership analogies may certainly be drawn with concepts not unfamiliar to those within dominant legal frameworks,¹⁸² but whether or not the analogies are sufficient to communicate alternate conceptions, we are still left with simply another means of forcing Aboriginal concepts of property into Western and Eurocentric legal frameworks.¹⁸³

Domestic repatriation claims are the most palpable examples of the problems that arise when subaltern source groups have conceptions of ownership that differ from the dominant notions of ownership and property of the formal legal frameworks of the country in which these groups find themselves.¹⁸⁴ In Canada, a good example of the incongruence between ownership as structured within Western legal frameworks and non-Western perspectives is the Echo Mask—the return of which was claimed by the Nuxalk Nation.¹⁸⁵ According to the laws of the Nuxalk Nation, the mask “belongs to the family which has the custody of it and the culture of the mask belongs to the Nation. A person in the family holds the mask for the family and all people [and is the keeper] of it.”¹⁸⁶ The two do not fit together when this description of “ownership” forms

¹⁸² In Canadian law, an example here would be making an analogy to joint tenancy where members of the collective or communal group all have an undivided interest in the property in question and every member owns the whole of the property. See Bell, *Aboriginal Claims*, *supra* note 165, at 462. Bell, however, points out that the analogy to joint tenancy in this matter fails to wholly capture the true essence of collective and communal ownership. Again in the Canadian context, regarding the inability of analogies to truly capture concepts such as Aboriginal title, see the Supreme Court of Canada’s statements in *Delgamuukw v. British Columbia* [1997], 3 S.C.R. 1010, para. 190. More recently, in *Tsilhqot’in Nation v. British Columbia*, 2014 SCC 44, para. 72.

¹⁸³ See also Bell, *Aboriginal Claims*, *supra* note 164, at 462–63.

¹⁸⁴ There are numerous discussions on this topic. See, e.g., Harding, *Value*, *supra* note 46, at 305–09; Catherine Bell & Val Napoleon, *Introduction, Methodology, and Thematic Overview*, in *FIRST NATIONS CULTURAL HERITAGE AND LAW: CASE STUDIES, VOICES, AND PERSPECTIVES* 1, 6 (Catherine Bell & Val Napoleon, eds., UBC Press 2008); Noble, *supra* note 37.

¹⁸⁵ For more on the story of the Echo Mask, see Kramer, *supra* note 79. Regarding the layers of ownership surrounding the Echo Mask and the Nuxalk, see *id.* at 87, 92.

¹⁸⁶ Bell & Paterson, *International Movement*, *supra* note 53, at 79 (referring to the Statement of Claim, Affidavit of Andy Siwallace filed in Reg. No. 962676, B.C. Sup. Ct. (Vic.), paras. 12–14, 20).

part of a claim for repatriation structured within Western legal frameworks and notions of ownership.¹⁸⁷

Canada, and the United States, have mechanisms that can be described as a “blended approach” in accounting for the legal pluralistic aspect of repatriation claims from Aboriginal groups within state borders.¹⁸⁸ Due to the *sui generis* (unique or “of its own kind”) status of Aboriginal rights in Canada, repatriation claims in Canadian courts consider Aboriginal perspectives on ownership and property along with the common-law principles of property law and contract law that characterize the Canadian formal legal framework.¹⁸⁹ Where the common law principle of *nemo dat quod non habet* (an individual cannot transfer more rights in property beyond what the individual has) operates by limiting the transfer or sale of an object over which the transferor has not acquired good title, Canadian courts determine the acquisition of good title and legitimate transfer of property according to Aboriginal laws and customs.¹⁹⁰ It bears noting that even with acknowledgement of Aboriginal laws and customs, there are certain legislated exceptions to the *nemo dat* rule—such as those arising from limitations periods in dealing with the purchase and sale of objects in an open market.¹⁹¹

Internationally, there are also differences between civil and common law jurisdictions where conflict of law issues arise related to the ability to acquire good title to a stolen object. In common law jurisdictions like Canada, the United States, England, Australia, and so on, a thief cannot acquire good title and is not able to pass good title to a purchaser even if the purchase is done in good faith (*nemo dat quod non habet*). But, in contrast, in civil law jurisdictions such as France, Italy, and Spain, a *bona fide* purchaser can acquire good title—although the conditions for this will vary between jurisdictions.¹⁹²

¹⁸⁷ For more on the story of the Echo Mask, see Kramer, *supra* note 79.

Regarding the layers of ownership surrounding the Echo Mask and the Nuxalk, see *id.* at 87, 92.

¹⁸⁸ Bell & Paterson, *Aboriginal Rights*, *supra* note 100, at 180–81.

¹⁸⁹ *Id.* at 180.

¹⁹⁰ *Id.* at 180–81.

¹⁹¹ *Id.* at 181. See also FORREST, *supra* note 1, at 204.

¹⁹² FORREST, *supra* note 1, at 148.

In a cross-border context, the laws that will apply in a claim for the return of an object may not be the laws of the court where the claim is being heard—which may lead to the clash between different conceptions of ownership and title. For example, where a court applies the *lex rei sitae* to a claim for the return of an object, determining the law of the place where the object was located when good title was acquired will depend on perceptions of how and when good title can in fact be acquired.¹⁹³ This will ultimately affect the success of a claim for the return of an object. Both source groups and source states face this barrier.

C. The Domestic Laws of Source and Destination Countries

Repatriation and return mechanisms usually refer to the export and cultural heritage laws in place in the country of origin at the time of the alleged removal of the cultural object and the agreements in place between the countries in question when the object was removed. This is problematic on a number of fronts. In the context of colonization, the formal laws of a source country are often based on Western or Eurocentric models and often do not effectively account for divergent notions of property and ownership of subaltern groups within the state's borders. But at an even more basic level, in dealing with the laws in place at the time of the object's removal, a source country's export or cultural heritage laws frequently pose a barrier in formulating a claim for an object's return since the source state may not have had applicable laws dealing with the export of cultural objects—whether this is because the state was not a state at the time of the object's removal or whether these laws were not yet created. Or, if the state was in existence at the time of removal and even may have had relevant laws in place, it is likely that these laws were inadequate to prevent the export and illicit removal of the object—often due to colonial rule unconcerned with such matters. Further, current agreements in place between the countries in question may not yet have been created and agreed upon at that point in time; or applicable international mechanisms for return and repatriation may not have been in force at the time of the object's removal.

¹⁹³ See, e.g., *id.* at 149.

Peru has faced numerous difficulties in claiming the return of items that were removed before laws relating to cultural heritage were in place as well as difficulties due to the inadequacy of these laws even when they came into effect. In *Peru v. Johnson*, for example, the claimant was unable to successfully prove its ownership of the removed objects under its own heritage laws in place at the time of export, which was exacerbated by the claimant's inability to ascertain the exact date of removal in order to establish the precise laws that would have been applied at the time of the removal of the objects.¹⁹⁴ In penning the decision, Judge Gray notes, with reference to *United States v. McClain*, that while "export restrictions constitute the police power of a state; '[t]hey do not create 'ownership' in the state'."¹⁹⁵ And referring to a further decision in *United States v. McClain*, Judge Gray also finds that even if Peru has considered itself the owner of the cultural objects in question, "It has not expressed that view with sufficient clarity to survive translation into terms understandable by and binding upon American citizens."¹⁹⁶ Ultimately, Peru's claim for the return of the Pre-Columbian artifacts was denied.

In addition, Yale stubbornly resisted Peru's attempts to have the cultural objects returned that were removed from Machu Picchu at various points in time by insisting that its legal title to the objects was based on the version of Peru's civil code in force at the time of removal of the objects.¹⁹⁷ While the objects have now been returned, the reliance on the laws in place in the source country at the time of removal were circumvented through extralegal means, which will be discussed in subsequent sections, rather than rethought.

In dealing with the return of removed cultural material in an international context, source groups and countries are also dependent upon the domestic laws of the destination country regarding private international law or conflict of laws in terms of

¹⁹⁴ *Peru v. Johnson*, 720 F. Supp. 810, 812–14 (C.D. Cal 1989), *aff'd mem.* *Peru v. Wendt*, 933 F.2d 1013 (9th Cir. 1991). See also Lanciotti, *supra* note 40, at 321; John Henry Merryman, *Limits on State Recovery of Stolen Artifacts: Peru v. Johnson*, 1 INT'L J. CULTURAL PROP. 169 (1992).

¹⁹⁵ *Johnson*, 729 F. Supp. at 814–15 (citing *United States v. McClain*, 545 F.2d 988, 1002 (5th Cir. 1977)).

¹⁹⁶ *Id.* (citing *United States v. McClain*, 593 F. 2d 658, 670 (5th Cir. 1979)).

¹⁹⁷ Bell & Paterson, *International Movement*, *supra* note 53, at 96.

which country's laws will ultimately apply to the claim for the returned cultural object.¹⁹⁸ Numerous complicated and seemingly unjust situations may occur through the application of conflict of laws rules. These complications may occur where, for example, a claimant is the victim of the illicit removal of a cultural object to a foreign jurisdiction; and when the object is eventually located and the case is tried in the claimant's local court, the claimant is unable to recover the object in question because the local court applies the law of the foreign jurisdiction, which may protect the rights of a good faith purchaser over those of the claimant.¹⁹⁹

1. Canada's Domestic Laws as Barrier

In Canada, certain categories of cultural property are under the control of the CPEIA, which limits the right to sell and trade cultural property that is privately owned.²⁰⁰ The limit is intended to keep a balance between private interests and the public interest of ensuring nationally important cultural objects remain within Canada's borders.²⁰¹ The Cultural Property Export Control List ("Export Control List") may include objects made by an individual at least fifty years ago, but who is presently no longer alive.²⁰² In order to export objects within this category, an application must be submitted and is subject to the review expert examiners who, according to section 11(1) are to decide:

- (a) whether that object is of outstanding significance by reason of its close association with Canadian history or national life, its aesthetic qualities, or its value in the study of the arts or sciences; and
- (b) whether the object is of such a degree of national importance that its loss to Canada would significantly diminish the national heritage.²⁰³

If the object fits under this category, then the export permit will be denied, though the exporter may still make an appeal to the

¹⁹⁸ *Id.* at 93.

¹⁹⁹ *See, e.g., id.* at 94.

²⁰⁰ Cultural Property Export and Import Act, R.S.C. 1985, c. C-5.1 (Can.).

²⁰¹ Bell & Paterson, *International Movement*, *supra* note 53, at 79.

²⁰² Canadian Cultural Property Export Control List, C.R.C., c. 448 (Can.).

²⁰³ Cultural Property Export and Import Act, c. C-5.1.

Review Board.²⁰⁴ Nonetheless, the Review Board can delay the export of the object for two to six months in order to give Canadian institutions and public authorities—such as museums and galleries—the opportunity to prevent the export of the object through purchase.²⁰⁵ This mechanism has been helpful in the past for First Nations groups to discover and prevent the export of potent cultural objects.²⁰⁶ The CPEIA further provides for loans and grants that can be applied for by Canadian institutions and public authorities in order to aid in the purchase of these objects.²⁰⁷

While the CPEIA may be helpful in preventing further loss of important cultural objects, the past removal of objects—whether they were exported before effective export laws were in place or whether they were removed and still remain in Canada—are generally beyond the non-retroactive scope of the Act. This is the case unless the object in question becomes the object of an application for an export permit or is an illegally exported object from another state that is subsequently imported into Canada.²⁰⁸ But even then, the CPEIA, as well as Canada's cultural heritage laws in general, certainly do not effectively address all situations.

For example, in *R v. Heller*, the government of Nigeria tried to recover a Nok artifact illegally exported from Nigeria that had been imported into Canada.²⁰⁹ Even though the substance of the case was sound and both Nigeria and Canada were parties to the 1970 UNESCO Convention, the case ultimately failed in the Alberta Provincial Court. In applying Article 7 of the 1970 UNESCO Convention as incorporated into Canadian law, Justice Stevenson ruled that Nigeria was unable to secure the return of the object because sufficient evidence could not be adduced to satisfy the requirements of Canadian law to establish that the object had been removed from Nigeria after June 28, 1978—the date upon which Canada and Nigeria became parties to the UNESCO Convention,

²⁰⁴ *Id.* s. 11(2), 29(1).

²⁰⁵ *Id.* s. 29(5)(a).

²⁰⁶ See, e.g., *infra* Part V.D.3 (discussing the case of the U'mista Cultural Society (Kwakwaka'wakw First Nations) and the Nowell blanket, as well as the case of the Nuxalk and the Echo Mask).

²⁰⁷ Cultural Property Export and Import Act, c. C-5.1, at s. 35.

²⁰⁸ See also Bell & Paterson, *International Movement*, *supra* note 54, at 92.

²⁰⁹ *R v. Heller* (1983), 27 Alta. L.R. 2d 346 (Can. Alta.).

thus entering into the applied cultural property agreement between the two countries.²¹⁰ As a result, the Convention was deemed to be inapplicable.²¹¹

The result had significant cost ramifications for Nigeria and was also costly due to the resources needed to pursue this type of claim in foreign courts.²¹² Whether or not the object was in fact removed before or after June 28, 1978, this case demonstrates the difficulties faced when international claims are made—difficulties that have not, as seen above, been remedied by the 1995 UNIDROIT Convention.

The CPEIA is also subject to misuse and manipulation in a number of ways, such as by those who deal in the market of cultural objects who may be able to artificially inflate the price of the objects within Canada by inventing foreign markets, buyers, or prices, which exacerbates the fact that groups must purchase what was wrongfully removed from them in the first place.²¹³

D. Cost

The costs of repatriation and return are significant. States may be able to absorb the costs involved with repatriation, but these costs may be beyond the means of indigenous groups seeking the repatriation and return of cultural objects.

Costs are manifested in a number of ways, which are magnified in the international context. The sources of these costs, to name just a few, include: the legal costs associated with commencing and maintaining court proceedings in the country where the object is currently found; traveling necessary to visit the sites where the removed objects are located in order to ascertain their origin and identity as well as conduct research; information compiled by

²¹⁰ *Id.*; Article 7 of the 1970 UNESCO Convention provides repeatedly that the provisions of the Convention apply only to objects removed after the entry into force of the Convention in the concerned States. 1970 UNESCO Convention, *supra* note 42.

²¹¹ See also Siehr, *supra* note 40 at 316.

²¹² *R v. Heller* (1983), 27 Alta. L.R. 2d 346 (Can. Alta.). See also Folarin Shyllon, *The Recovery of Cultural Objects by African States through the UNESCO and UNIDROIT Conventions and the Role of Arbitration*, in WITNESSES TO HISTORY: A COMPENDIUM OF DOCUMENTS AND WRITINGS ON THE RETURN OF CULTURAL OBJECTS 219 (Lyndel V. Prott, ed., UNESCO 2009).

²¹³ Bell & Paterson, *International Movement*, *supra* note 54, at 83–84.

researchers and experts, which also often involves the need for translators; and costs resulting from the commodification of potent cultural objects that must be purchased in order to secure their return can be unaffordable.²¹⁴ Moreover, if a claim is successful, the costs of transporting the cultural objects are high and the return of these objects often requires the construction of special facilities.²¹⁵

1. Litigation and Negotiation Costs

International claims for the return of potent cultural objects, especially where international litigation is involved, are inevitably expensive and complex—leading experts to suggest that these sorts of claims be seen as a last recourse.²¹⁶

In Canada, even though negotiation may provide a less costly alternative for Aboriginal groups in resolving repatriation claims than litigation,²¹⁷ its processes can still be unrealistically unaffordable and additionally impracticable where successful negotiation often depends on agreeing to the imposition of costly conditions of return.²¹⁸ Not every claimant group has the financial resources to interact within the legal or business infrastructure expected by the possessor of their potent object.

2. Housing Costs

International negotiations for the return of objects may also impose conditions requiring an environmentally controlled facility (essentially, a museum-like facility) as part of the agreement for the return of the cultural object in question.

For example, housing the G'psglox memorial pole in a properly climate-controlled environment was one of the costly conditions initially imposed upon the Haisla Nation in their claim for its return from the Swedish Museum of Ethnography.²¹⁹ Even though the Haisla claimants were not opposed to the rationale behind the

²¹⁴ *Id.* at 99.

²¹⁵ *Id.*

²¹⁶ *Id.* at 95. See also generally, *id.* at 196–202.

²¹⁷ Bell & Paterson, *Aboriginal Rights*, *supra* note 100, at 195.

²¹⁸ *Id.* at 192.

²¹⁹ Bell & Paterson, *International Movement*, *supra* note 54, at 96. In addition, even though no monetary purchase was required for the return of the pole, the Haisla did send the Swedish museum a carved replica of the pole as part of negotiations leading up to its final return. *Id.*

condition, and the pole was eventually returned while they were still raising funds to create a proper facility,²²⁰ the costs of constructing such facilities are a financial burden faced by many source groups in order to house returned cultural objects illicitly removed from their original source.

Another example is the Nisga'a Foundation's fundraising campaign in order to create the Nisga'a Museum and Cultural Center to house the objects and human remains for which the Nisga'a have successfully negotiated a repatriation agreement with the Canadian Museum of Civilization (now known as the Canadian Museum of History) and the Royal British Columbia Museum.²²¹ While the repatriation agreement imposes no conditions on the Nisga'a, as with the Haisla, the Nisga'a recognize the merits of keeping certain potent cultural objects within a museum-type venue. Nonetheless, this still increases the costs that must be faced in repatriating cultural objects, and imposes the Western and Eurocentric values of preservation demands upon claimant groups.

While the CPEIA may provide grants or loans to aid in the cost of repatriation or return internationally, these grants often have their own cost ramifications. Parallel to the terms imposed by the possessing party in many negotiations for return, CPEIA grants may also contain terms that dictate that the objects in question be kept in a locale that meets preservation specifications as well as public access requirements, which are not usually readily available unless claimants collaborate with museums, galleries, banks, and so on.²²² This was the case with the grant given to the Nuxalk for the return of the Echo Mask.²²³ In order to meet the stipulations that the mask be kept in environmentally controlled case and in a secure but public facility, the Echo Mask remains housed in a bank near the Nuxalk reserve. It will remain there until enough money has been raised to construct and complete a facility on the reserve that meets these stipulations.²²⁴ This is an example of how not every claimant group

²²⁰ *Id.*

²²¹ Bell et al, *Selected Survey*, *supra* note 107, at 385–86. See also *Nisga'a Museum*, NISGA'A LISIMS GOVERNMENT, <http://www.nisgaalisims.ca/nisgaamuseum> (last visited Apr. 12, 2016).

²²² Bell & Paterson, *International Movement*, *supra* note 53, at 84.

²²³ See, e.g., *id.* at 81.

²²⁴ *Id.* See also *Nuxalkmc: the Nuxalk People*, NUXALK SMAYUSTA, <http://www.nuxalk.net> (last visited Apr. 12, 2016).

has the financial resources to replicate the preservation conditions the group that had previously possessed the potent object had instituted (and then imposed upon the claimant group as a part of the grant needed to have the object returned).

3. Cost of Commodification

Cultural objects command a high price on the international art market, which is highly problematic for source groups when they do not have access to extensive funds to repurchase the object.²²⁵ Even where there may be some recourse to the state within which the group is found—such as the loans or grants that can be applied for by Canadian institutions and public authorities in Canada under the CPEIA—or through private philanthropy, these forms of funding for the return of cultural objects are still dependent on the colonizing state.

There are numerous examples of the costly price tags faced in securing the return of potent cultural objects. To name a few, the U'mista Cultural Society (Kwakwaka'wakwa First Nations) faced a price tag of \$30,000 (USD) in exchange for the return of the Nowell blanket from a private gallery in Ontario,²²⁶ and the Nuxalk First Nations faced a price tag of \$200,000 (Can) for the return of the Echo Mask in the possession of an art dealer, even though the mask was not a commodifiable object according to Nuxalk law.²²⁷

The U'mista Cultural Society attempted to prevent the export and secure the return of a blanket belonging to Chief Charles Nowell. The export eventually transpired despite their efforts, and the Nowell blanket went up for auction at Sotheby's in New York.²²⁸ Through CPEIA grants, the U'mista were able to bid a maximum of \$21,500 (USD), but they were outbid by a private gallery in Ontario that bid \$24,500 (USD).²²⁹ Eventually the Ontario gallery sold the

²²⁵ Bell & Paterson, *International Movement*, *supra* note 53, at 102.

²²⁶ See, e.g., *id.* at 81–82. See also Bell et al, *Recovering*, *supra* note 64.

²²⁷ See, e.g., Bell & Paterson, *International Movement*, *supra* note 54, at 78–83.

²²⁸ *Id.* at 82; Bell & Napoleon, *supra* note 184; Bell et al, *Recovering*, *supra* note 64.

²²⁹ Bell et al, *Recovering*, *supra* note 64.

Nowell blanket back to the U'mista for \$30,000 (USD) and turned a \$5,500 (USD) profit on its purchase.²³⁰

Turning to the Nuxalk Echo Mask, “under the laws of the Nuxalk Nation, the [Echo Mask] and the prerogatives associated with it may only be transferred at a potlatch under the witness of the community” and “[t]he mask cannot be sold by an individual and is to stay in the community for use in potlatches.”²³¹ Even though the Echo Mask, according to Nuxalk law, cannot be sold, in the 1980s the elderly woman in possession of the mask was convinced by an art dealer to sell him the mask for \$35,000 (Can).²³² The dealer later applied for an export permit under Canada’s CPEIA but his application for the permit was ultimately delayed after the Nuxalk Nation and other sympathizers were able to secure an injunction.²³³ The return of the mask was eventually negotiated out of court, but the art dealer’s claims of legitimate title to the mask could not be circumvented by the Nuxalk and they ultimately had to face the price tag of \$200,000 (Can) placed on the object by the art dealer.²³⁴

VI. CURRENT LEGAL AND EXTRALEGAL STRATEGIES FOR OVERCOMING BARRIERS: COLONIALISM MAINTAINED AND REPLICATED

The legal and cost barriers demonstrate how international and domestic laws are failing to effectively address legitimate claims for the repatriation and return of cultural objects and have led claimants to turn to extralegal strategies in the hopes of success. Yet even these extralegal strategies operate within Western and Eurocentric frameworks and the overarching problematic attribution of market value to invaluable potent cultural objects through commodification. Commodification is the most significant relic of colonialism faced in claims for repatriation and return since it is present both within

²³⁰ *Id.* at 81–82; Bell & Napoleon, *supra* note 184; Bell et al, *Recovering*, *supra* note 64.

²³¹ Bell & Paterson, *International Movement*, *supra* note 53, at 79.

²³² *Id.*

²³³ *Id.* at 79–81.

²³⁴ *Id.* at 81. Due to grants and loans provided by the Canadian Cultural Property Export and Import Act, the Nuxalk eventually had to raise only thirty percent of the amount—of which the art dealer ultimately donated a portion. Nonetheless, the payment for an object that should not have been commodifiable still took place.

the barriers that exist in formulating claims for repatriation as well as the attempts to overcome these barriers.

Currently, the appeal to "public feeling" is a popular and increasingly successful mechanism used by subaltern cultural groups and source states in order to overcome the barriers to repatriation and return identified above.²³⁵ Cooperation and mediation between museums and those claiming repatriation or return have also been successful.²³⁶ In addition to suggestions to alter aspects of the current legal frameworks, non-legal and soft-law mechanism may additionally aid in mitigating the barriers to repatriation and return.²³⁷

A. Legal Strategies to Circumvent the Barriers

While judicial interpretation that considers the greater social context and merits of a claim may yield positive results in overcoming some of the challenges posed by barriers such as limitations legislation,²³⁸ this does not speak to the removal of continued imposition of Western and Eurocentric legal frameworks on claims for repatriation or return.²³⁹ Simply removing time limitations for reclaiming illicitly removed objects of a particular cultural value and significance is one suggestion provided to break down the time barrier for reclaiming illicitly removed objects of a

²³⁵ This is especially the case at the international level. *See, e.g.*, Bell & Paterson, *Aboriginal Rights*, *supra* note 100, at 98.

²³⁶ Canadian museums and indigenous groups within Canada's borders have used these mechanisms with some success: Koehler, *supra* note 72.

²³⁷ Notably, ICOM, in its code of ethics, provides a set of minimum standards guiding professional practice by which museums and museum staff undertake to adhere by joining the organization. ICOM Code, *supra* note 96. In Canada, museum practice is also guided by the Task Force. *See* TASK FORCE, *supra* note 101.

²³⁸ Kagan, *supra* note 104, at 26; Bell, *Restructuring*, *supra* note 53, at 34. *See, e.g.*, *M(K) v M(H)* [1992], 3 S.C.R. 6, para. 26, 96 D.L.R. 4th 289 (Can.). The Supreme Court of Canada held that it could not "ignore the larger social context" in dealing with limitation periods. *See also* *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, para. 141 (Can.) (stating that the "Aboriginal context" may trump the policy rationales of statutory limitation periods). *But cf. id.* para. 142 (a caveat to this being the acknowledgement that, in this case, "no third party legal interests are at stake").

²³⁹ *See id.* (where third party legal interests remain[ing] as a consideration even where the "Aboriginal context" trumps policy rationales of statutory limitation periods).

particular cultural value and significance.²⁴⁰ But the removal of time limitations is just one piece of the puzzle and does not truly progress beyond a Western and Eurocentric assessment of which objects are qualified as particularly valuable and significant.

Additionally, unless specifically addressed by legislation, even if limitation periods were removed, the application of the doctrine of laches, based in equity, may nonetheless apply.²⁴¹ If a delay in reclaiming is ruled as inexcusable or as due to the acquiescence on the part of the delaying party, the reasonable reliance of the current possessor may be seen as requiring protection.²⁴² But since the doctrine of laches is based in equity, this may control for its unjust application.

Other experts focus on re-conceptualizing ownership and property rights in order to better account for differing iterations of these concepts that are found in source cultural groups and nations.²⁴³ This potential solution, while recognizing the merits of legal pluralism, only seeks to better account for notions of ownership and property rights that “do not fit.”

At least in the domestic Canadian context, the use of customary law can be useful in dealing with repatriation claims in terms of demonstrating Aboriginal ownership or control over cultural objects.²⁴⁴ But the utility of these approaches may be limited to disputes within claimant groups unless they are truly recognized through enabling legislation.²⁴⁵ In addition, the applicability of customary law in dealing with non-Aboriginal non-governmental parties would often still have to be framed through the Western and Eurocentric adversarial model in order to account for the legal

²⁴⁰ STAMATOUDI, *supra* note 39, at 156–57; Bell, *Restructuring*, *supra* note 53, at 35.

²⁴¹ See CULTURAL LAW: INTERNATIONAL, COMPARATIVE, AND INDIGENOUS, *supra* note 29, at 570; Bell, *Restructuring*, *supra* note 53, at 35.

²⁴² Bell, *Restructuring*, *supra* note 53, at 35.

²⁴³ See, e.g., Fincham, *supra* note 41. Noble, *supra* note 37, at 404–06 (notably addressing the Canadian context, suggesting that instead of confining “property” and “ownership” to Western concepts, similar notions might be used that better fit with both Western and First Nations conceptions of property and ownership—such as, for example, “jurisdiction” or “underlying title”).

²⁴⁴ Norman Zlotkin, *From Time Immemorial*, in PROTECTION OF FIRST NATIONS CULTURAL HERITAGE: LAWS, POLICY, AND REFORM 343, 363 (Catherine Bell & Robert K Paterson, eds., Vancouver: UBC Press 2009).

²⁴⁵ See, e.g., *id.* at 366.

traditions of both parties.²⁴⁶ Even if an alternative dispute resolution mechanism were used to better represent the interests of claimant groups, conflicting notions of legal concepts, such as property, would remain between the parties to the dispute.²⁴⁷

Internationally, since Aboriginal groups within a country do not have standing to bring claims internationally, the national government of the state within which the group finds itself must instead present the claim. Although customary law might be referenced by the state in addressing ownership or control of a claimed cultural object, state law will generally prevail.²⁴⁸

B. Extralegal Strategies to Circumvent the Barriers

1. Appeals to "Public Feelings"

Appeals to "public feeling," and the shaming of institutions and states where removed cultural objects are located, are generally accomplished through awareness-raising campaigns. Journalists, international media, and famous or influential individuals then pick up these campaigns. This will ideally lead to pressure on state governments and institutions that face reclamation claims to take action and recognize these claims or remove the barriers blocking claims already in progress. There is also the financial dimension to appeals to public feeling. Benefactors may aid in remedying the cost barrier involved in repatriation and return—whether aiding in the purchase of an object where that is one of the conditions of return, or by becoming the highest bidder at the sale of objects at an auction house and then donating the potent objects in question to the claiming source group.

What has been termed "ethics-based repatriation" is observable in the dispute that continued for years between the Peruvian government and Yale University over the return of cultural objects comprising numerous collections removed from Machu Picchu at different points in time and held at Yale.²⁴⁹ The tides began to finally turn in Peru's favor when the international media took notice after

²⁴⁶ *Id.* at 363. See also FORREST, *supra* note 1, at 148–49.

²⁴⁷ Zlotkin, *supra* note 244, at 366.

²⁴⁸ *Id.* at 363–64.

²⁴⁹ Alderman, *supra* note 162.

Peru mounted an awareness-raising social and political campaign involving demonstrations held in Peru's two largest cities, Lima and Cuzco, and after a formal request by Peru's President to United States President Barack Obama for his help.²⁵⁰ This even led nine Peruvians running in the New York Marathon to don t-shirts in support of Peru's requests for the return of the Machu Picchu artifacts and inspired Yale alumni to take up a letter-writing campaign.²⁵¹ Ultimately, this resulted in the public shaming of Yale and, while Yale first held strong in its refusal to return the objects, eventually ceded to Peru's requests, leading to the return of the entire 1912 and 1916 collections in time for the 100th anniversary of American explorer (and later United States Senator and Governor of Connecticut) Hiram Bingham III's arrival in (or, in colonizing terms, his "discovery of") Machu Picchu.²⁵²

Within Canada's domestic context, the attention paid by journalists and international media to the U'mista Cultural Society (Kwakwaka'wakwa First Nations) claim for the return of a Transformation Mask from the British Museum led to a shift in the uncompromising position of both parties and eventual resolution of the dispute via a long-term loan of the Transformation Mask and its relocation to the U'mista Cultural Center.²⁵³

Where public funding—for example, through the CPEIA—provides a means to waylay some of the costs for claimants to have their potent cultural objects returned to them through purchase, increasingly private philanthropy is providing an alternate means of funding these purchases.²⁵⁴ For example, France's Drouot auction house recently sold dozens of sacred ceremonial masks and hoods in December of 2013, despite the Hopi and San Carlos Apache tribes' attempts in court to block the sale of the masks and the United States Embassy's requests for delaying the sale on behalf of the Hopi and San Carlos Apache so that the tribes could identify whether they

²⁵⁰ *Id.* at 3–4.

²⁵¹ *Id.* at 4; Sarah Nutman, *Returning to Machu Picchu*, YALE DAILY NEWS (Feb. 14, 2011), <http://yaledailynews.com/blog/2011/02/14/returning-to-machu-picchu/> (last visited May 18, 2016).

²⁵² Nutman, *supra* note 251.

²⁵³ Bell & Paterson, *International Movement*, *supra* note, 53 at 98–99. *See also* Bell et al, *Recovering*, *supra* note 64, at 76.

²⁵⁴ Bell & Paterson, *International Movement*, *supra* note 53, at 102.

could formulate a claim pursuant to the 1970 UNESCO Convention.²⁵⁵

Numerous barriers blocked Hopi efforts to reclaim the masks, such as difficulty in proving the “ownership” or provenance of the masks,²⁵⁶ but private philanthropy ultimately enabled a return of some of the masks despite the barriers faced. Even though the masks sold quickly at auction for approximately \$1.6 million (USD) to the dismay of the claimants, it turned out that the Annenberg Foundation had noticed the plight of the Hopi and San Carlos Apache tribes in their struggle to have these potent cultural objects returned, and had secretly bought up many of these important cultural objects in order to return them to their place of origin in Arizona.²⁵⁷

2. The “Caring-and-Sharing,” or Collaborative Approach

The Principles for Cooperation in the Mutual Protection and Transfer of Cultural Material (“Principles”), developed by the International Law Association’s Cultural Heritage Law Committee, are a mechanism specifically targeted at the avoidance and resolution of disputes related to cultural property.²⁵⁸ The International Law Association adopted the Principles in 2006 with the intent of having the Principles as an international minimum standard.²⁵⁹ Their goal is to encourage cooperation, collaboration, and the establishment of a middle ground between parties with competing claims as well as a focus on the sharing of cultural

²⁵⁵ Associated Press, *supra* note 80.

²⁵⁶ *Id.*

²⁵⁷ *Id.*; Felicia Fonseca, *Tribal Objects Shipped Back to Arizona in a Cultural Sensitive Way*, CNS NEWS (Feb. 20, 2014), <http://www.cnsnews.com/news/article/tribal-objects-shipped-back-arizona-culturally-sensitive-way> (last visited May 18, 2016).

²⁵⁸ INTERNATIONAL LAW ASSOCIATION, PRINCIPLES FOR COOPERATION IN THE MUTUAL PROTECTION AND TRANSFER OF CULTURAL MATERIAL (2006) (having been adopted at the 72nd Conference of the International Law Association, held in Toronto, Canada, 2006).

²⁵⁹ Robert K. Paterson, *The “Caring and Sharing” Alternative: Recent Progress, in the International Law Association to Develop Draft Cultural Material Principles*, 12 INT’L J. CULTURAL PROP. 62, 71 (2005) [hereinafter Paterson, *Caring and Sharing*].

heritage objects.²⁶⁰ The emphasis is on the protection and interests of the object itself rather than on the competing claims to the object.²⁶¹ The Principles also address alternatives to the direct return of cultural objects through mechanisms like loaning the object, creating a replica, and sharing in the management and control of the cultural object in question.²⁶²

An example of this collaborative approach is the return of the G'psgolox totem pole from the Museum of Ethnography in Stockholm to the Haisla Nation on the Northern coast of British Columbia.²⁶³ The return of the pole was conditional upon its placement in a state-of-the-art climate controlled facility, which did not exist at the time and was costly to build, but was nonetheless agreed upon. The Haisla also carved a replacement replica pole and, in a gesture of reciprocity, gave it to the Museum of Ethnography as part of the efforts they undertook to repatriate the pole.²⁶⁴ While barriers to the return of the pole initially hindered Haisla efforts, the satisfactory resolution of the conflict over the desired return of the pole was eventually achieved through use of these methods.

The Principles are progressive in their encouragement of institutions to work with and respond to requests for the return of cultural objects from source countries and groups regardless of whether or not the state within which the institution is located supports or acknowledges the request.²⁶⁵ As the Principles clearly target public ownership and collections, they do not address privately owned and collected objects.²⁶⁶ Although no panacea, in working around barriers to repatriation and return, cooperation between interested parties is certainly an accessible and effective tool.

Where it is impossible to overcome barriers, the last recourse, linked to the collaborative approach, may be to arrange a loan where the state or an institution within which a claimant group is located

²⁶⁰ *Id.* at 67–68; See also Bell & Paterson, *International Movement*, *supra* note 53, at 100.

²⁶¹ Paterson, *Caring and Sharing*, *supra* note 259, at 70.

²⁶² Bell & Paterson, *International Movement*, *supra* note 53, at 100.

²⁶³ Paterson, *Caring and Sharing*, *supra* note 259, at 65.

²⁶⁴ *Id.*

²⁶⁵ Bell & Paterson, *International Movement*, *supra* note 53, at 100–01.

²⁶⁶ See also *id.* at 101.

holds the cultural object. This may also be viewed as an interim solution, or even one that is in line with alternative views of ownership. For example, in Canada, if a court finds that a province has a valid legislative objective, and that this objective is enforced in a manner that is consistent with its fiduciary obligation, the direct return of a cultural object to an Aboriginal community may be refused on face value.²⁶⁷ While it would be unfortunate if the interests of Aboriginal communities in their cultural objects were to be placed second to, for example, the interests of the broader Canadian public in the presentation, protection, or display of these cultural objects, a co-management or loan arrangement may be a better alternative than none at all.²⁶⁸

All of these mechanisms, however, are often unpredictable and unreliable, and the alternatives to direct return of the cultural object, such as loans, do not necessarily remove the colonial gaze on an invaluable potent cultural object that must be “borrowed” in order to return to its rightful home.²⁶⁹ Ultimately, these mechanisms are a decent last resort, but source countries and source groups should not be at the mercy of compromise simply because their claims cannot be fit into Western and Eurocentric frameworks, norms, and understandings. The bottom line is that most of the suggested methods of overcoming these barriers to repatriation and return only serve to further reinforce Western and Eurocentric legal frameworks and norms since these potential solutions continue to engage with these same frameworks.²⁷⁰ As such, the most prescient strategy moving forward would be to step outside of existing frameworks; question the entire way in which potent cultural objects are currently perceived through the colonizer’s gaze, and more thoroughly involve a legal pluralistic approach to better account for the laws and traditions of source countries and indigenous groups.

²⁶⁷ See Bell & Paterson, *Aboriginal Rights*, *supra* note 100, at 191–93. See also the Nisg’a example. *Id.* at 204.

²⁶⁸ See Bell & Paterson, *Aboriginal Rights*, *supra* note 100, at 191–93. See also the Nisg’a example. *Id.* at 204.

²⁶⁹ See, e.g., Bell & Paterson, *International Movement*, *supra* note 53, at 101.

²⁷⁰ See, e.g., Bell, *Restructuring*, *supra* note 53, at 60.

VII. REMOVING THE COLONIZER'S GAZE: NEUTRALIZING COMMODIFICATION

The barriers to the repatriation and return of cultural objects, along with current and potential contravening solutions, share a problematic underlying fixation on Western and Eurocentric notions of market value that permit a monetary worth to be placed on cultural objects and leaves them in a commodified state. As noted previously, cultural objects as potent objects are invaluable to source states and indigenous groups. Yet even the arguments in support of repatriation and return are framed within the discourse of value.²⁷¹ In general, civil law frameworks recognize the notion of inalienability while common law systems do not.²⁷² However, even civil law frameworks have not effectively applied this notion to repatriation and return claims,²⁷³ and the notion of the good faith purchaser often nullifies inalienability.

Western and Eurocentric notions of value imposed on potent objects within current frameworks for repatriation and return constitute the colonizer's gaze and a Gramscian imposition of the colonizer's cultural hegemony.²⁷⁴ To respond in a manner more appropriate to true decolonization (and in better accordance with the principles laid out in UNDRIP, especially Articles 11 and 12),²⁷⁵ innovative solutions that move beyond the hegemony of dominant Western and Eurocentric values and legal frameworks must be sought out. To that end, subsequent to the following situating discussion of the colonizer's gaze and commodification, this Article will next turn to the notion of *res extra commercium*.

²⁷¹ FORREST, *supra* note 1, at 205.

²⁷² *Id.* at 173. See also MARIE CORNU, PROTECTION DE LA PROPRIÉTÉ CULTURELLE ET CIRCULATION DES BIENS CULTURELS—ÉTUDE DE DROIT COMPARÉ EUROPE/ASIE (Université de Poitiers, Centre d'études sur la Coopération Juridique Internationale 2008).

²⁷³ See, e.g., France's recent (December 2013) allowance of the legal sale of Hopi masks even when faced with arguments asserting the potency of these objects. Associated Press, *supra* note 80.

²⁷⁴ See, e.g., BILL ASHCROFT & PAL AHLUWALIA, EDWARD SAID 42 (2d ed. 2009). See *supra* note 12. See also SAID, *supra* note 7; Fanon, *supra* note 7.

²⁷⁵ UNDRIP, *supra* note 2.

A. The Commodification of Cultural Objects

The commodification of cultural objects is certainly not a new concept. Once these objects were subsumed under the colonizer's gaze, their commodification quickly occurred as they became highly sought after curiosities coveted by amateur anthropologists, intrepid collectors, and museums. But globalization has further led to the increasing importance of culture as a marketable resource.²⁷⁶

Arjun Appadurai, referring to Igor Kopytoff's general theory of commodity pathways, suggests that all things, at some point in their lives, become commodities.²⁷⁷ Some things, however, such as sacred things, are "enclaved commodities" and may be precluded from commodification.²⁷⁸ Appadurai and Kopytoff refer to these things as "terminal commodities,"²⁷⁹ or "objects which, because of the context, purpose, and meaning of their production, make only one journey from production to consumption."²⁸⁰ Subsequent to this divergence from the path of commodification, which occurs as soon as these objects are produced,²⁸¹ "they are sometimes used in casual domestic ways, [but] they are never permitted to enter the commodity state."²⁸² It is thus impossible for these objects to subsequently become commodities. Appadurai goes on to explain that "[w]hat makes them thus decommodified is a complex understanding of value (in which the aesthetic, the ritual, and the social come together), and a specific ritual biography."²⁸³ This calls to mind Welsh's potent object.²⁸⁴ Appadurai's and Kopytoff's views

²⁷⁶ Coombe, *Legal Claims*, *supra* note 37, at 36. See also GEORGE YUDICE, *THE EXPEDIENCY OF CULTURE: USES OF CULTURE IN THE GLOBAL ERA* (Duke Univ. Press 2003).

²⁷⁷ See Arjun Appadurai, *Introduction: Commodities and the Politics of Value*, in *THE SOCIAL LIFE OF THINGS: COMMODITIES IN CULTURAL PERSPECTIVE* 3, 14 (Arjun Appadurai ed., Cambridge Univ. Press 1986) [hereinafter Appadurai, *Introduction*]; Igor Kopytoff, *The Cultural Biography of Things: Commoditization as a Process*, in *THE SOCIAL LIFE OF THINGS: COMMODITIES IN CULTURAL PERSPECTIVE* 64, 72–73 (Arjun Appadurai ed., Cambridge Univ. Press 1986).

²⁷⁸ Appadurai, *Introduction*, *supra* note 277, at 2.

²⁷⁹ *Id.* at 23; Kopytoff, *supra* note 277, at 73–76.

²⁸⁰ Appadurai, *Introduction* *supra* note 261, at 23.

²⁸¹ "Production" in this sense may also the moment when an object becomes potent. See Kopytoff, *supra* note 277, at 74.

²⁸² Appadurai, *Introduction*, *supra* note 277, at 23.

²⁸³ *Id.*

²⁸⁴ Welsh, *supra* note 36.

on commodification also include the element of legal pluralism required for “terminal commodities” to apply within Western and Eurocentric frameworks—the diversion of a particular object from the path of commodification occurs based on the internal norms and understandings of the particular group within which the object is produced.²⁸⁵

Beyond direct involvement in the commercial exchange of potent cultural objects, Sarah Harding suggests that museums are also involved in the commodification of potent cultural objects through a parallel structure.²⁸⁶ She explains that, even though museums would resist being accused of “merchandizing” potent cultural objects, the very presence of an object in a museum leads to a spike in its market value and “prestige,” and may even generate a market for the object in the first place.²⁸⁷ But perhaps the most inevitable way that museums become involved in the commodification of a potent cultural object is the price they must place on an object for insurance purposes.²⁸⁸

In rejecting the commodification of potent cultural objects, many Aboriginal groups in Canada have argued against the ability for these objects to exist on the market in the first place through the establishment of a complete ban on their sale.²⁸⁹ But current legislative frameworks do not recognize this option and instead remain structured around the notion that these potent cultural objects remain a marketable commodity.²⁹⁰ The imposition of commodification demonstrates the overarching colonial gaze and the Western and Eurocentric norms that pervade current frameworks within which claims for repatriation and return must be made.

²⁸⁵ Appadurai, *Introduction*, *supra* note 277, at 23, 41–56; Kopytoff, *supra* note 277, at 64.

²⁸⁶ Sarah Harding, *Culture, Commodification, and Native American Patrimony*, in *RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE* 137, 146 (Martha M. Ertman & Joan C. Williams, eds., New York Univ. Press 2005) [hereinafter Harding, *Commodification*].

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ Patrick Walker & Clarine Ostrove, *The Aboriginal Right to Cultural Property*, 28 U.B.C. L REV 13, 13–14 (1995). *See also* Bell & Paterson, *International Movement*, *supra* note 53, at 87.

²⁹⁰ Walker & Ostrove, *supra* note 289, at 14; Bell & Paterson, *International Movement*, *supra* note 53, at 87.

Regardless of the laws and traditions of a claimant group, which may dictate that their potent cultural objects do not carry market value and thus cannot be sold, claimants are frequently forced to interact with the commodification of the objects if they wish to have them returned. They often end up purchasing potent cultural objects that are not only invaluable to them, but also belong to them and were wrongfully removed, which many claimants—such as First Nations groups in Canada—understandably find to be offensive.²⁹¹ Nonetheless, the market value that these objects now carry to the purchasing party is an inevitable reality that claims for repatriation and return must deal with as long as these claims must continue to be structured within Western and Eurocentric legal frameworks. Even exercising extralegal strategies does not nullify the commodification that has been applied to potent cultural objects once introduced into Western and Eurocentric conceptions. This is an example of how, in Gramscian terms, “an unjust social arrangement is internalized and endlessly reinforced.”²⁹²

B. Owning as Belonging versus Owning as Property

Brian Noble highlights the difference between practices that center around “owning as property” and “owning as belonging.”²⁹³ This is one of the key elements around which the colonial gaze is maintained over claims for the return or repatriation of potent cultural objects. As Noble explains: “‘Owning as property’ describes a system that emphasizes property as a commodity capable of individual ownership and alienation for the purposes of resource use and wealth maximization.”²⁹⁴ This system characterizes the current legal frameworks that exist for framing claims for repatriation and return, and it is at the heart of most of the barriers described previously. Additionally, extralegal mechanisms

²⁹¹ See, e.g., Bell & Paterson, *International Movement*, *supra* note 53, at 82. Additionally, the case of the Saanich Nation of British Columbia and the Mount Newton Crossroads Stone Bowl where provincial and federal funding enabled the Simon Fraser Museum of Archaeology and Ethnology to purchase the soon-to-be exported bowl. This allowed the Saanich to maintain their position of refusal to purchase the bowl from the dealer who sought to export and sell it. Bell et al, *Selected Surveys*, *supra* note 107, at 382–83.

²⁹² Litowitz, *supra* note 13, at 519.

²⁹³ Noble, *supra* note 37, at 465.

²⁹⁴ *Id.*

and other methods that are used or suggested in order to circumvent these barriers either reinforce the misapplication of commodification to potent cultural objects or must still function within this system.

In contrast, Noble describes “owning as belonging” as a system that views and structures transactions differently. Within this non-Western, non-Eurocentric, and often subaltern system is the assumption that there is an “inextricable connection between people and the material and intangible world.”²⁹⁵ That is, people “*belong* indivisibly to their cultural property.”²⁹⁶ In terms of the “transaction,” there is a palpable sense of non-severability between people and objects, inalienable reciprocity, and an implicit expectation of exchange and return. This is in contrast to the Western perception of the transaction that centers around alienable “property,” trade, and the purchase of consumables with money.²⁹⁷ Within systems that view owning as belonging, transactions involving potent cultural objects seek to build and reinforce “relationships of respect and responsibility between people.”²⁹⁸

C. Gramsci and the Imposition of the Colonizer’s Cultural Hegemony

The notion of hegemony is helpful in addressing the dominant legal frameworks that must be navigated in claims for repatriation or return; “[I]t is a critical tool that generates profound insights about the law’s ability to induce submission to a dominant worldview.”²⁹⁹ In applying this notion to the legal frameworks at play in claims for repatriation and return, it is helpful to follow Douglas Litowitz’s recasting of Gramscian hegemony.³⁰⁰ Litowitz seeks to modernize Gramsci’s initial iteration of hegemony by arguing that hegemony should be perceived as a dominant code or “as a mechanism for the constitution of a dominant rationality that has become so commonsensical that it hardly appears worthy of challenge”—rather than as domination by a particular class.³⁰¹

²⁹⁵ *Id.* at 465–66.

²⁹⁶ *Id.* at 482 (emphasis in original).

²⁹⁷ *Id.* at 467, 476.

²⁹⁸ *Id.* at 465.

²⁹⁹ Litowitz, *supra* note 13, at 516.

³⁰⁰ *Id.*

³⁰¹ *See id.* at 551, 539–45.

In this manner, the way in which Western and Eurocentric principles of property law and notions of ownership exist as unavoidable obstacles for the return and repatriation claims of source groups speaks to the social control embodied by hegemony; “It involves subduing and co-opting dissenting voices through subtle dissemination of the dominant group’s perspective as universal and natural, to the point where the dominant beliefs and practices become an intractable component of common sense.”³⁰²

In order to identify the hegemony operating within claims for the repatriation and return of potent cultural objects, the entire system must be questioned. “[H]egemony is diagnosed through a kind of social criticism where we stand outside of our practices and institutions and see that they are one-sided to an extent that we did not recognize while we were operating within their boundaries.”³⁰³ In particular, where commodification of these potent cultural objects within the current dominant legal framework and free market system proves to be such a central and problematic element, then the commodifying element must be addressed, resisted, and removed. If commodification continues to be accepted in this context, then claims for and disputes over potent cultural objects will continue to be framed “in the dominant language of the legal system at the time, thereby extending the system.”³⁰⁴

D. The Transsystemic Approach as Means of Removing the Colonizer’s Gaze and Addressing Cultural Hegemony

In order to divorce claims for repatriation and return from the hegemony of dominant Western and Eurocentric frameworks, it is necessary to step outside of these frameworks and the “common sense” of the dominant worldview that accepts the commodification of potent cultural objects. This can be done through a transsystemic approach that reaches under the law in order to excavate notions that carry currency across the boundaries of different legal frameworks and disregards any hierarchical ordering or valuation that may be

³⁰² *Id.* at 519.

³⁰³ *Id.* at 541.

³⁰⁴ *Id.* at 547.

accorded to various systems.³⁰⁵ A transsystemic methodology displaces and deconstructs legal traditions in a manner that moves beyond comparative law.³⁰⁶ By examining the foundations that underlie discrete legal frameworks, a more complete understanding of their interrelationship can be gained.³⁰⁷ This is helpful in moving beyond the hegemonic restraints of the dominant legal frameworks at play.

1. Applying Transsystemic: *Res Extra Commercium*, *Res Divini Juris*, and *Res Sacrae*

The transsystemic methodology employed for the present purposes turns to Roman law and the notion of *res extra commercium*. As Rudolph Sohm writes, within the legal framework dealing with “things,” the Roman term “res” refers to anything that could comprise part of an individual’s property and “is a material object which admits of human dominion and has an independent existence as a whole complete in itself.”³⁰⁸ This is then divided into different kinds of “things.” One of these categories, *res extra commercium* (reminiscent of Appadurai’s and Kopytoff’s notion of “terminal commodities”),³⁰⁹ refers to things that “are prevented by a rule of law from being the objects of private rights” and thus are “outside of the commercial world” and not subject to the transfer of private rights in the object from one individual to another—meaning that never within the object’s life can it be legally bought or sold.³¹⁰ In addition, the object accorded *res extra commercium* status escapes acquisitive prescription, laches, and statutes of limitation.³¹¹

The types of objects falling into this category are further divided into three classes: *res divini juris*, *res publicae*, and *res omnium communes*. Of particular relevance for the present discussion is *res*

³⁰⁵ See, e.g., BORROWS, *supra* note 26 at 118–24. See also Glenn, *Transsystemic*, *supra* note 17, at 867.

³⁰⁶ Janda, *supra* note 18, at 976, 981.

³⁰⁷ Glenn, *Transsystemic*, *supra* note 17, at 863.

³⁰⁸ RUDOLPH SOHM, *THE INSTITUTES OF ROMAN LAW* 225 (James Crawford trans., Ledlie Clarendon Press 1892).

³⁰⁹ See *supra* Part VII.A.

³¹⁰ SOHM, *supra* note 308, at 225–26. See also ELIZABETH H DOW, *ARCHIVISTS, COLLECTORS, DEALERS, AND REPLEVIN: CASE STUDIES ON PRIVATE OWNERSHIP OF PUBLIC DOCUMENTS* 66 (Scarecrow Press, Inc. 2012).

³¹¹ Siehr, *supra* note 40, at 318.

divini juris, which is in turn divided into *res sacrae* ("things dedicated to the gods, [i.e.,] temples and altars"), *res sanctae* ("things enjoying the special protection of the gods, [i.e.,] the walls of Rome"), and *res religiosas* ("things dedicated to the dii Manes"—the spirits of the deceased—[i.e.,] burial grounds).³¹² Within this context, turning back to potent cultural object and Noble's description of "ownership as belonging" rather than "ownership as property," a potent cultural object would fall under the classification of one of the three categories of *res divini juris* listed above—a thing that cannot be subject to private rights, and as a result, cannot be subject to the transfer of these rights due to its classification.³¹³

VIII. HINTS OF *RES EXTRA COMMERCIIUM*

A. *Res Extra commercium in the International Context*

Internationally, *res extra commercium* status is often accorded to cultural objects in Europe.³¹⁴ The *res extra commercium* status of *res divini juris* identified "things" can be observed in the notions of imprescriptibility and inalienability of certain objects that are common within the legal frameworks of civil jurisdictions, the 1970 UNESCO Convention, and very stringently in the 1995 UNIDROIT Convention.³¹⁵ Referring to a cultural object as inalienable or imprescriptible indicates that the object is of such great importance that it cannot be transferred. The state that has the imprescriptible or inalienable right over the object cannot be alienated from its rights—no third party, regardless of whether or not they are in good faith, can achieve ownership in any way including short- or long-term possession.³¹⁶

In terms of inalienability provisions, Article 13(d) of the 1970 UNESCO Convention provides:

³¹² SOHM, *supra* note 308, at 226.

³¹³ See *supra* Part VII.B; Noble, *supra* note 37, at 465.

³¹⁴ See, e.g., DOW, *supra* note 310, at 66.

³¹⁵ See, e.g., FORREST, *supra* note 1, at 173 (for civil law systems); 1970 UNESCO Convention, *supra* note 42, art. 13, para. 4; 1995 UNIDROIT Convention, *supra* note 44, art. 3, para. 4.

³¹⁶ See also STAMATOUDI, *supra* note 39, at 40.

The States Parties to this Convention also undertake, consistent with the laws of each State:

....

(d) to recognize the indefeasible right of each State Party to this Convention to classify and declare certain cultural property as inalienable which should therefore *ipso facto* not be exported, and to facilitate recovery of such property by the State concerned in cases where it has been exported.³¹⁷

The 1995 UNIDROIT Convention addresses this same notion in Article 3, and Article 3(4) is the closest the 1995 UNIDROIT Convention comes to a *res extra commercium* regime; but is, as Stamatoudi suggests, “not close enough”³¹⁸:

[A] claim for restitution of a cultural object forming an integral part of an identified monument or archaeological site, or belonging to a public collection, shall not be subject to time limitations other than a period of three years from the time when the claimant knew the location of the cultural object and the identity of its possessor.³¹⁹

The removal of time limitations is subject to the caveat in Article 3(5) that allows for a party to unilaterally impose a seventy-five year time limit from when the claimant became aware of the location.³²⁰ In addition, there is limited acknowledgment of the many objects that a state may consider as potent and wish to have categorized under this protected status.³²¹

With regard to the provisions that deal with the return of illegally exported cultural objects that may fall under protected status, Article 7(1) specifies that these return provisions will not apply where:

(a) the export of a cultural object is no longer illegal at the time at which the return is requested; or

³¹⁷ 1970 UNESCO Convention, *supra* note 42.

³¹⁸ STAMATOUDI, *supra* note 39, at 84.

³¹⁹ 1995 UNIDROIT Convention, *supra* note 44.

³²⁰ *Id.*

³²¹ See also STAMATOUDI, *supra* note 39, at 84.

(b) the object was exported during the lifetime of the person who created it or within a period of fifty years following the death of that person.³²²

But Article 7(2) recognizes the effects of this on indigenous source groups by providing a caveat to the exception:

(2) Notwithstanding the provisions of sub-paragraph (b) of the preceding paragraph, the provisions of this Chapter shall apply where a cultural object was made by a member or members of a tribal or indigenous community for traditional or ritual use by that community and the object will be returned to that community.³²³

Here the terms “traditional” and “ritual” will not necessarily encompass all claims, as they maintain the logic of the colonizer and do not account for internal group norms and definitions of what constitutes an object that should fall under this status. Ultimately, the designation of traditional or ritual will be at the discretion of the court before which a claim is brought.³²⁴

More importantly, these remain incomplete applications of *res extra commercium* since the element of assigned market value to cultural objects remains, and the interests of the good faith purchaser is paramount. For example, 1970 UNESCO Convention allows for the compensation of purchasers in good faith at Article 7(b)(ii):

[A]t the request of the State Party of origin, to take appropriate steps to recover and return any such cultural property imported after the entry into force of this Convention in both States concerned, provided, however, that *the requesting State shall pay just compensation to an innocent purchaser or to a person who has valid title to that property*. Requests for recovery and return shall be made through diplomatic offices. The requesting Party shall furnish, *at its expense*, the documentation and other evidence necessary to establish its claim for

³²² 1995 UNIDROIT Convention, *supra* note 44.

³²³ *Id.*

³²⁴ See also STAMATOUDI, *supra* note 39, at 95.

recovery and return. The Parties shall impose no customs duties or other charges upon cultural property returned pursuant to this Article. All expenses incident to the return and delivery of the cultural property shall be borne by the requesting Party.³²⁵

The 1995 UNIDROIT Convention also suffers from an incomplete application of *res extra commercium*. For example, even though it acknowledges the “sacred or communally important cultural object” and the importance of “traditional and ritual use,” it still applies a time limitation to claims for the return of the object—although the time limitation is extended for this category of objects.³²⁶ Additionally, the good faith purchaser remains protected.³²⁷

B. Res Extra Commercium in Civil Law Jurisdictions

Turning to civil law jurisdictions, several countries acknowledge a *res extra commercium* regime. The French civil code provides that a good faith purchaser may have to return cultural objects purchased without receiving compensation if a dispossessed owner acts quickly enough in reclaiming the objects in question.³²⁸ While Greek law allows for a good faith purchaser to become the owner after the passage of time subsequent to ordinary acquisition by possession,³²⁹ a limited application of *res extra commercium* nonetheless appears in Article 21(1) of Law 3028/2202: “Movable ancient monuments dating up to 1453 belong to the State in terms of ownership and *possession*, are imprescriptible and *extra commercium* according to Article 966 of the Civil Code.”³³⁰ German

³²⁵ 1970 UNESCO Convention, *supra* note 42, art. 7(b)(ii) (emphasis added).

³²⁶ 1995 UNIDROIT Convention, *supra* note 44, arts 3, paras. 2, 3(d), 5, 7, 8.

³²⁷ *See id.* arts. 4, 6.

³²⁸ CODE CIVIL [C. CIV.] art. 2279, 2280 (Fr.); *See also* STAMATOUDI, *supra* note 39, at 77, n134.

³²⁹ ASTIKOS KODIKAS [A.K.] [CIVIL CODE] 1041 (Greece).

³³⁰ Law No 3028/2002 on the Protection of Antiquities and Cultural Heritage in General, O.G., A. 153 20020628 (June 28, 2002) (emphasis in original). *See also* STAMATOUDI, *supra* note 39, at 77 n.134.

law also recognizes the concept of *res sacrae* in relation to objects that are used for the purpose of religious worship.³³¹

C. *Res Extra Commercium in Common Law Jurisdictions*

An example of the partial application of *res extra commercium* within a common law jurisdiction is New Zealand's Protected Objects Act of 1975.³³² This Act deals with the market for Maori artifacts within New Zealand and restricts the sale of these objects to registered collectors.³³³ Residents of New Zealand who were already in possession of a Maori cultural object, or numerous objects, before the commencement of the Act have to register as collectors if they wish to acquire more objects.³³⁴ Since the Act is not retrospective, objects within private collections may remain sequestered from claimant communities and it remains possible to apply for an export permit for Maori items (although not many are granted).³³⁵ Nonetheless, the Act generally prevents the sale of Maori cultural objects to parties outside of New Zealand and guards against price inflation that will often result once cultural objects enter the international market.³³⁶

Oliver Metzger notes that numerous jurisdictions within the United States implicitly recognize the doctrine of *res extra commercium* in relation to certain objects through choice-of-law principles following the guidance of the *Restatement (Second) of Conflict of Laws*³³⁷—which, upon application of the *lex situs* doctrine,³³⁸ may lead a local court to apply the law of a foreign jurisdiction that explicitly recognizes the doctrine of *res extra*

³³¹ GERHARD ROBBERS, RELIGION AND LAW IN GERMANY para. 236 (Kluwer Law Int'l 2010). See also STAMATOUDI, *supra* note 39, at 84 n.166, 68 n.110.

³³² Protected Objects Act 1975, 21 (N.Z.). See also Robert Paterson, *Protecting Taonga: The Cultural Heritage of the New Zealand Maori*, 8 INT'L J. CULTURAL PROP. 108 (1999).

³³³ Protected Objects Act, *supra* note 332, art 13.

³³⁴ *Id.* art 14.

³³⁵ Bell & Paterson, *International Movement*, *supra* note 53, at 88–89.

³³⁶ *Id.* at 88. This was seen previously with the U'Mista Cultural Society's (Kwakwaka'wakw First Nations) claim (and purchase) for the return of the Nowell blanket as well as the Nuxalk claim (and purchase) for the return of the Echo Mask.

³³⁷ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).

³³⁸ Lanciotti, *supra* note 40, at 313. *Lex situs*: "[L]aw of the situs where the chattel was located at the time of the transaction."

commercium.³³⁹ The result is that courts in the United States ultimately apply a *de facto* version of *res extra commercium*.³⁴⁰ However, this notion remains virtually unrecognized and invisible within United States law.³⁴¹ Yet, as Metzger suggests, “A *de jure res extra commercium* doctrine would give voice to the common appreciation of the idea that cultures are composed, in part, of symbolic objects and that such objects should not be subjected to the vicissitudes of the marketplace.”³⁴² Additionally, it “would give expression to a common understanding that the buying and selling of certain objects of cultural property leads to injustice.”³⁴³ Metzger also suggests that a *de jure res extra commercium* would result in clearer notice to purchasers of cultural objects as well as a greater legal recognition of the importance of cultural objects that carry a potent status.³⁴⁴

However, in arguing for a *de jure res extra commercium* in the United States, Metzger reifies European legal frameworks. This is problematic because most of the international and European legal frameworks only go so far as to assign inalienability to potent cultural objects rather than truly removing their potential to exist on the marketplace. As noted in previous sections, this is through maintenance of a market value even while the object is defined as unmerchantable. In addition, most civil law jurisdictions—even though they may recognize the doctrine of *res extra commercium*—simultaneously place comparatively greater importance on the good faith purchaser over the owner.³⁴⁵ As such, it follows that *de jure res extra commercium* may logically carry less potential to protect the transfer of a potent cultural object within a civil law jurisdiction than it would if applied in a common law jurisdiction—even though

³³⁹ Metzger, *supra* note 38, at 615–16.

³⁴⁰ *Id.* at 621, 639–42.

³⁴¹ *Id.* at 615–16.

³⁴² *Id.* at 641.

³⁴³ *Id.* at 653.

³⁴⁴ *Id.* at 616, 653.

³⁴⁵ For a discussion of the favourable position enjoyed by the good faith purchaser as compared to the owner, *see e.g.* JOHN HENRY MERRYMAN, THE GOOD FAITH ACQUISITION OF STOLEN ART (Stanford Public Law & Legal Theory Working Paper Series 2007).

common law jurisdictions generally do not recognize *res extra commercium* or the notion of inalienable property.³⁴⁶

Metzger goes on to note that the closest mechanism for protection of potent cultural objects that exists in the United States, and which “reveals a consciousness at the federal level of the significance that some items of cultural property carry,”³⁴⁷ is provided by the Native American Graves Protection and Repatriation Act (“NAGPRA”).³⁴⁸ Referring to the legislative history of NAGPRA, Metzger suggests that NAGPRA “defers to the tribe’s definition of a sacred object” at Section 3001(3)(C), which defines a sacred object as “specific ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents.”³⁴⁹ By defining the objects that fall under the category of “cultural items” and referring to the laws of the claiming Native American group, NAGPRA essentially renders potent cultural objects inalienable “insofar as it returns items to a group of people who are forbidden by their own law to alienate the items.”³⁵⁰ Inalienability, however, does not apply retrospectively and does not apply to the transfer of rights in a potent cultural object after it has been repatriated (its “subsequent alienability”).³⁵¹ Additionally, NAGPRA’s application is limited to only “Indian tribes and Native Hawaiian organizations.”³⁵²

While NAGPRA bears no explicit mention of the decommodification of potent cultural objects, Sarah Harding addresses the question of whether or not NAGPRA’s definition of cultural patrimony as “inalienable” leads to the understanding of repatriation itself as a process of decommodification.³⁵³ While it may be viewed in this manner by some, drawing on Appadurai and Kopytoff,³⁵⁴ where the potent object diverged from the path of commodification upon production, it has never been

³⁴⁶ FORREST, *supra* note 1, at 205.

³⁴⁷ Metzger, *supra* note 38, at 643.

³⁴⁸ NAGPRA, *supra* note 5, §§ 3001–13; Metzger, *supra* note 38, at 642.

³⁴⁹ NAGPRA, *supra* note 5.

³⁵⁰ Metzger, *supra* note 38, at 643.

³⁵¹ *Id.* at 642–43.

³⁵² NAGPRA, *supra* note 5, § 3010. *See also* Metzger, *supra* note 38, at 643.

³⁵³ “Commodification” Kopytoff, *supra* note 273.

³⁵⁴ *See infra* Part VII.A.

commodifiable. Instead, the object has suffered from invalid commodification through the imposition of Western and Eurocentric frameworks. In this sense, “decommodification” is more akin to a “recognition” that these objects do not carry a commodified value and must therefore be removed from the market context.

D. Res Extra Commmercium in Canada

Turning to the domestic context, in Canada, *res extra commercium* appears most clearly in the Civil Code of Quebec (CCQ)—reference to things that are *hors du commerce*.³⁵⁵ Federally, however, it is only loosely linked to the possibility for some objects to be included on the Export Control List,³⁵⁶ which are then subject to export control under the CPEIA.³⁵⁷ But in order for an object to be included on this list, it must meet the criteria under subsection 4(2) of the CPEIA, which reads:

Subject to subsection (3), the Governor in Council may include in the Control List, regardless of their places of origin, any objects or classes of objects hereinafter described in this subsection, the export of which the Governor in Council deems it necessary to control in order to preserve the national heritage in Canada:

- (a) objects of any *value* that are of archaeological, prehistorical, historical, artistic or scientific interest and that have been recovered from the soil of Canada, the territorial sea of Canada or the inland or other internal waters of Canada;
- b) objects that were made by, or objects referred to in paragraph (d) that relate to, the aboriginal peoples of Canada and that have a *fair market value* in Canada of more than five hundred dollars;

³⁵⁵ Arts 913, 2795, 2876 CCQ. See also the Civil Code of Lower Canada, arts 1059, 2217.

³⁵⁶ See generally Canadian Cultural Property Export Control List, C.R.C., c. 448 (Can.).

³⁵⁷ S Cultural Property Export and Import Act, R.S.C. 1985, c. C-5.1 (Can.).

(c) objects of decorative art, hereinafter described in this paragraph that were made in the territory that is now Canada and are more than one hundred years old:

(i) glassware, ceramics, textiles, woodenware and works in base metals that have a *fair market value* in Canada of more than five hundred dollars, and

(ii) furniture, sculptured works in wood, works in precious metals and other objects of decorative art that have a *fair market value* in Canada of more than two thousand dollars;

(d) books, records, documents, photographic positives and negatives, sound recordings, and collections of any of those objects that have a *fair market value* in Canada of more than five hundred dollars;

(e) drawings, engravings, original prints and water-colours that have a *fair market value* in Canada of more than one thousand dollars; and

(f) any other objects that have a *fair market value* in Canada of more than three thousand dollars.³⁵⁸

What is especially notable in the requirements for inclusion on the Export Control List is the pervasive reference to “fair market value” and the monetary quantification that is attributed to these objects, which is contrary to the *res divini juris* and *res extra commercium* categorization to which potent cultural objects may be assigned. In addition, it is still possible to apply for export permit for the objects included on the Export Control List, subject to the examination of expert examiners. In determining whether or not to provide the permit, pursuant to section 11(1) of the Act, the examiners will consider:

(a) whether that object is of outstanding significance by reason of its close association with Canadian

³⁵⁸ *Id.* (emphasis added).

history or national life, its aesthetic qualities, or its value in the study of the arts or sciences; and

(b) whether the object is of such a degree of national importance that its loss to Canada would significantly diminish the national heritage.³⁵⁹

Even if the export permit is refused, the decision is still appealable under section 29 of the CPEIA.³⁶⁰

E. Strict Inalienability versus the Complete Application of Res Extra Commmercium

Extending the possibilities provided by inalienability, John Moustakas argues for the strict inalienability (versus “mere market inalienability”) of cultural objects that qualify as “property for grouphood.”³⁶¹ For the present discussion, “property for grouphood” would be similar to the “potent” cultural object as well as objects falling under Articles 11 and 12 of UNDRIP.³⁶² Moustakas is of the view that, through strict inalienability, “protecting certain types of cultural property ought to be mandatory, transcending the authority of national law to do otherwise.”³⁶³

While Moustakas’ strict inalienability is similar to a complete application of *res extra commercium*, he rejects “market inalienability,” or essentially, the decommmodification of cultural objects. Nonetheless, he agrees that the objects should not be commodified: “Conceiving of personhood or grouphood in market rhetoric by commodifying objects and attributes so essential to personal or group being—treating them as monetizable and alienable from the self or the group violates both our deepest understanding of what it is to be either human or a community.”³⁶⁴

Yet his concern lies with the remaining ability for gratuitous transfer: “In seeking to prevent the evil of commodification, market-

³⁵⁹ *Id.*

³⁶⁰ *Id.*

³⁶¹ John Moustakas, *Group Rights in Cultural Property: Justifying Strict Inalienability*, 74 CORNELL L REV 1179, 1184–86 (1989).

³⁶² See Welsh, *supra* note 36; UNDRIP, *supra* note 2, arts. 11–12.

³⁶³ Moustakas, *supra* note 361, at 1184. See also Coombe & Turcotte, *supra* note 37, at 262.

³⁶⁴ Moustakas, *supra* note 357, at 1206.

inalienability prohibits only sales, not gifts.”³⁶⁵ He views strict inalienability as a better means of protecting cultural objects from *all* potential transfers.³⁶⁶

In this sense, strict inalienability still maintains the colonizer’s gaze and paternalistic element, by prohibiting all transfers of cultural objects. Regardless of the ability to block gratuitous transfers, the ability to request the return of the object free from barriers remains. Under a complete application of *res extra commercium* that removes commodification *and* the transferability of a quantifiable property right in the object, a gratuitous transfer would speak to Noble’s description of the more fluid perception of “ownership as belonging” versus “ownership as property.”³⁶⁷ This is important since gift giving and exchange are not uncommon in the history of potent cultural objects for the purposes of strengthening relationships of respect and responsibility.³⁶⁸ Additionally, due to *res extra commercium* status, the permanent transfer of property rights in such an object would be impossible. Concern lies with the rupture in the fluid exchange embodied by gifting and exchange where the return of the potent cultural object in question is refused, is conditional upon payment, or impeded by other barriers. In that sense, strict inalienability both takes the disallowance of transfer too far while maintaining the hegemony of Western and Eurocentric notions of property law.

1. Determining Potency

Nonetheless, Moustakas’ model of strict inalienability is helpful due to the flexible mechanism he suggests for identifying whether or not a cultural object may qualify as “property for grouphood” in order to be shielded from transfer by strict inalienability. This is very important in addressing one of the fundamental flaws that exists in current partial applications of *res extra commercium*: how to determine what objects qualify for protection under an *extra commercium*-type regime. In order to identify whether or not an object qualifies as “property for grouphood,” Moustakas proposes a

³⁶⁵ *Id.* at 1206.

³⁶⁶ *Id.* at 1209.

³⁶⁷ *See supra* Part VII.B.

³⁶⁸ Noble, *supra* note 37, at 465.

two-pronged test that is fact-sensitive and determined on a case-by-case basis: 1) the cultural object must be “bound up” with a group’s identity;³⁶⁹ and 2) the retention of the object does not constitute “bad object relations.”³⁷⁰ This is in contrast to the balance of international legislation that refers to *res extra commercium* with the imposition of delineated categories, as we have seen previously, where the objects of claimants are potent if the hegemon agrees that they may be classified as such. It is not clear, however, the precise role of legal pluralism in Moustakas’ property for grouphood test and the weight that would be accorded to the group’s own internal norms in defining which objects are bound up with their identity.

In this vein, Canadian courts have been known to refer to Aboriginal customary law and internal norms, and³⁷¹ Quebec courts have exhibited a progressive application of legal pluralism in the identification of a potent cultural object. For the colonizer’s gaze to be removed, the determination of what constitutes a potent object should be determined in this manner.

IX. TOWARDS A COMPLETE APPLICATION OF *RES EXTRA COMMERCIIUM*

Res extra commercium provides a way of perceiving potent cultural objects in a manner removed from the hegemony of Western and Eurocentric frameworks.

In the international context, individual states ultimately oversee the sale and transfer of cultural objects through their domestic laws,

³⁶⁹ Moustakas, *supra* note 361, at 1196–97. Moustakas outlines several elements, such as the length of time of ownership where a group’s connections to “things” increases over time; and historic factors, which imports past political importance as well as artistic elements; group identity and continuity and; the intention of the original creator, maker, or artist to dedicate the object to the purpose of grouphood property. *Id.* at 1197–1201.

³⁷⁰ *Id.* at 1196. “Bad object relations” for Moustakas, are “fetishistic” Moustakas explains that, on the one hand, “[i]n the grouphood context, retention of an object merely to prevent others from possessing it is fetishistic. For example, retention of art already represented in abundance in a source nation is fetishistic. Thus, in the example of restrained cultural property, when objects are used to promote cultural intolerance or unbridled ethnocentricity, or have that effect, their retention is likely to be fetishistic” *Id.* at n.41. Moustakas goes on to note that “[g]ood object relations, on the other hand, are not fetishistic. They occur when the retainers use the property to foster important values including pride, learning, and community.” *Id.*

³⁷¹ See, e.g., *Delgamuukw v. British Columbia* [1997], 3 S.C.R. 1010, para. 190.

their application of private international law, the choice of whether or not to ratify or implement the relevant international conventions, and their perception of the international trade in cultural objects that is contained within the state's legal framework.³⁷² This leads to unpredictability, a lack of uniformity, and often unequitable treatment of subaltern and non-dominant claimants when conflicts or claims pertaining to cultural objects arise. Kurt Siehr highlights the problems of international law in dealing with the international commerce of cultural objects that are present due to diverging national laws related to property and cultural heritage.³⁷³

As explored above, not only do these national legal frameworks create barriers domestically for repatriation claims, but they are magnified at the international level once the diverging legal frameworks interact in claims for the return of cultural objects by source subaltern groups and source states. All of these rules, laws, and policies—even where the doctrine of *res extra commercium* is loosely embodied in the classifications of property as inalienable—still revolve around the market and commodified value of potent cultural objects. Even where restrictions on the sale and transfer and export and import of cultural objects render these transactions illegal, they nonetheless continue to occur. This is possible since cultural objects, regardless of legal rules, are still acceptably assigned a market value that bears worth to the purchaser or acquiring entity outside of the unquantifiable and unmerchtable potent value it carries to source claimants.

International and state removal (or recognition) of the notion that such objects may carry a monetary value will eventually lead to a drying up of the demand for acquisition of the objects where their potent status carries no market worth outside of the potent worth carried by the object for source countries and source states.

A complete application of *res extra commercium* would make potent cultural objects unmerchtable, remove them from the marketplace entirely, and remove the legality of transferring property rights held in these objects—in addition to shielding them from acquisitive prescription, laches, and statutes of limitation.³⁷⁴ This complete application of *res extra commercium* could be used

³⁷² Siehr, *supra* note 40, at 310–11.

³⁷³ *Id.* at 304–07.

³⁷⁴ *See, e.g., id.* at 318.

to create a unified system for dealing with potent cultural objects that would remove many of the barriers to repatriation and return that currently exist. This would also avoid implicating the hegemony of the dominant Western and Eurocentric legal frameworks that remain as colonial relics within which repatriation and return claims must currently navigate.

Similar to Siehr's reference to the universal recognition of stealing as a crime where "the acquisition of title to property by theft is forbidden,"³⁷⁵ the same would apply to the forbidden acquisition of potent cultural objects classified as *res extra commercium*. This approach would address the divergence that Siehr notes in relation to the application of national rules that differ in the treatment of acquisition of stolen property by third party purchasers, and the application of time limitations, and so on. While theft is generally forbidden across jurisdictional divides, the return of the removed property is the site where divergence occurs—such as with the greater relative importance placed on the good faith purchaser in civil law jurisdictions, or the divergence in application of time limitations for reclaiming a removed object, and so on. A complete application of *res extra commercium* speaks to this site of divergence where the unmerchantable status of the object does not permit the transfer of the value of an object to a purchaser—which renders a purchase made in good faith irrelevant as it should simply be impossible to purchase such objects.

Time limitations for reclaiming the object would also be irrelevant since the initial transfer of the object that prefaces reclaim would be impossible. Where purchase does not yield acquisition of a valid title, "then there can be no deprivation."³⁷⁶

Viewing ownership as belonging instead of as property³⁷⁷ also speaks to the irrelevance of the transfer of property rights that ultimately underlies conflicts related to repatriation and return where the object is invaluable and unmerchantable to one party (the source) yet simultaneously carries market value for the purchaser or possessor of the object.

³⁷⁵ *Id.* at 304, 307.

³⁷⁶ Lanciotti, *supra* note 40, at 321; Patty Gerstenblith, *The Public Interest in the Restitution of Cultural Objects*, 16 CONN. J. INT'L L. 197 234 (2001).

³⁷⁷ *See supra* Part VII.B.

A. *Res Extra Commercium in Quebec, Canada: A Complete Application*

Extending Metzger's argument pertaining to the existence of a *de facto res extra commercium* in the United States to Canada, it could similarly be argued that the same exists in Canada where *de facto res extra commercium* is applied by local courts in adjudicating conflicts implicating private international law and the doctrine of *lex situs*. Metzger instead suggests that Canada explicitly demonstrates a version of the doctrine of *res extra commercium*. Yet the example he refers to, the case of *l'Ange-Gardien*,³⁷⁸ is not atypical of the situation in Canada. First, *l'Ange-Gardien* arose within the Province of Quebec, which is a civil law jurisdiction, and thus necessarily dealt with the claim for return through the legal framework influenced by the civil law tradition rather than the common law framework. Second, while the CCQ and the case of *l'Ange-Gardien* may provide for the *res extra commercium* status of potent cultural objects, other aspects of Quebec's legal framework, such as its Cultural Property Act, do not.³⁷⁹ Much as with Canada's CPEIA, sections 7.12–7.15 of Quebec's Cultural Property Act refer to the "fair market value of a cultural property."³⁸⁰

But Metzger has revealed the tip of an iceberg with his reference to this isolated application of *res extra commercium* in Canada. Upon further examination, *l'Ange-Gardien* provides a potential model for how *res extra commercium* could be realistically applied across Canada in claims for repatriation and return as well as at an international level and within international mechanisms for repatriation and return (such as the 1970 UNESCO Convention and the 1995 UNIDROIT Convention).³⁸¹ The importance of *l'Ange-Gardien* is also elevated through its application of legal pluralism in determining whether or not an object is potent in order to benefit from *res extra commercium* (or *hors de commerce* status in this case). This case demonstrates that Quebec law is able to easily apply

³⁷⁸ Metzger, *supra* note 38, at 623 n.55; *L'Ange-Gardien (Paroisse) c. Québec (Procureur Général)* (1987), 8 Q.A.C. 1 (Can.).

³⁷⁹ Cultural Property Act, R.S.Q. c B-4 (Can.).

³⁸⁰ *Id.*

³⁸¹ 1995 UNIDROIT Convention, *supra* note 44; the 1970 UNESCO Convention, *supra* note 42.

res extra commercium by reference to the law of the group in question in order to determine potency.

It is also important to note that in this case the *res extra commercium* status of the potent cultural objects trumped the typical importance accorded to the third party good faith purchaser and good faith possessor.

1. *l'Ange-Gardien* and Quebec Law

The current CCQ came into effect on January 1, 1994 and replaced the Civil Code of Lower Canada (CCLC), which had been in effect since July 1, 1866. The CCLC was still in force at the time *l'Ange-Gardien* was heard by the Superior Court of Quebec and the Quebec Court of Appeal. The CCLC implicitly referred to canon law in provisions such as Article 2217, which dealt explicitly with things deemed sacred.³⁸² While today the CCQ does not have an exact equivalent to Article 2217 CCLC and does not refer explicitly to sacred objects in the same manner, it maintains the notion by reference to the concept of things that are *hors de commerce*—essentially a permutation of *res extra commercium*—in Article 2876 as well as through the Quebec Code of Civil Procedure Article 553, which deems certain things as exempt from seizure.

As explained above, objects that fall under this category cannot be sold, and thus they are exempt from seizure and prescription such that property and ownership rights cannot be acquired simply due to the passage of time. According to Article 2217, while there are certain things that are *hors de commerce* due to their very nature (such as human corpses), other things are deemed *hors de commerce* due to their “destination” (or “purpose,” such as worship).³⁸³ But

³⁸² Civil Code of Lower Canada, 29 Vict. ch. 41, art. 2217 (Can.):

Les choses sacrées, tant que la destination n'en a pas été changée autrement par l'empiétement souffert, ne peuvent s'acquérir par prescription.

Les cimetières, considérés comme chose sacrée, ne peuvent être changés de destination de manière à donner lieu à la prescription, qu'après l'exhumation des restes des morts, choses sacrées de leur nature.

See also *id.* art. 2218.

³⁸³ See also Benoit Pelletier, *The Case of the Treasures of L'Ange Gardien: An Overview*, 2 INT'L. J. CULTURAL PROP. 371, 372 (1993).

aside from legislation that provides for potent items as well as reference to canon law, Quebec courts have also demonstrated how the notion of *hors de commerce*—or *res extra commercium*—may be interpreted and realistically applied through legal pluralistic methodology in addressing civil legal matters.

As far as the internal legal framework of the Roman Catholic Church functions, canon law takes precedence followed by State law,³⁸⁴ and State law regulates the Church's system of ownership by providing a juridical structure.³⁸⁵ Since 1791, Quebec has integrated relevant canon law through legislation such as the current Act Respecting Fabriques.³⁸⁶

The most important points to take away from the case of *l'Ange-Gardien* for the present purposes are:

- (1) the court's deference to the internal norms and rules of the claimant group in determining the objects claimed were sacred (or "potent");
- (2) the resulting application of *hors de commerce* status (or *res extra commercium*) through a legal pluralistic methodology;
- (3) the nullification of the transfer of property due to its sacred, invaluable, and *hors de commerce* status, and unsanctioned sale pursuant to the internal process, norms, and rules of the claimant group; and
- (4) that the objects were returned to the claimant without indemnity to the possessors in spite of the *bona fide* nature of the sale, the seller, and third party good faith purchasers.³⁸⁷

³⁸⁴ Ernest Caparros, *La Propriété des Églises Catholiques au Québec*, in QUEL AVENIR POUR QUELLES ÉGLISES? WHAT FUTURE FOR WHICH CHURCHES 91, 91 (Lucie K Morisset, ed., Presses de L'Université du Québec 2006).

³⁸⁵ *Id.*

³⁸⁶ Act Respecting Fabriques, R.S.Q. 2010, c. C-35 (Can.); Caparros, *supra* note 384, at 91.

³⁸⁷ The exception being the \$800 the parish offered to refund the original purchaser Roger Prévost. While the Superior Court ruled that the parish could refund Prévost, it also ruled that he had to pay the parish compensation far higher than the \$800. *Fabrique de la Paroisse de l'Ange-Gardien c. Benoit Gariépy* [1980], C.S. 175, 129–30 (Can. Qc.). Essentially making the \$800 refund irrelevant. The way the way in which other civil law frameworks have

Founded in 1664, the parish of l'Ange Gardien in Quebec is one of Canada's oldest.³⁸⁸ The facts of the case begin around 1962 with the Roman Catholic Church in the midst of an overhaul of its liturgy that sought to move towards greater simplicity.³⁸⁹ This required many parish priests, such as the former parish priest of l'Ange-Gardien, Joseph-Henri Gariépy, to reorganize and downsize the Church environment.³⁹⁰ This effort often involved the hasty sale of cultural objects at bargain prices—much to the delight of museums and collectors—since most parish priests were not aware of the artistic, cultural, and patrimonial value embodied by these objects.³⁹¹

Gariépy sold Roger Prévost, a sculptor-gilder, a series of objects that Gariépy believed to be of little value. Evidence produced during the superior court hearings showed the purchase price to have been 800 Canadian dollars.³⁹² Yet, the market value of these objects was far higher than the price for which they were sold.³⁹³ And in selling these objects, Gariépy never asked for permission through the proper channels within the Catholic Church, although the checks for the purchase of the objects were made

treated the *bona fide* sale of cultural objects to “innocent” third parties. See, e.g., FORREST, *supra* note 1, at 302; STAMATOUDI, *supra* note 39, at ch. 2 n.134. Even though *l'Ange-Gardien* was decided in accordance with the provisions of the CCLC, both the case and Article 2217 of the CCLC remain relevant. *l'Ange-Gardien* has been referred to after the coming into force of the CCQ in order to assert that the sacred nature of a thing places it under *hors de commerce* status, thus making it inalienable: Camies-Lefebvre c. Lefebvre [2006], R.D.I. 31, para. 12 (Can. Qc.). The Quebec Superior Court has also referred to *l'Ange-Gardien* since the coming into force of the CCQ in order to state that the internal rules of a religion should be used to determine the sacred status of a thing. Jetté-Corbeil c. Oratoire Église Baptiste Française, J.E. 2000-1534 (Can. Qc.). In this same vein, Maurice Tancelin explains that where some important provisions from the CCLC are not expressly included in the CCQ, their absence does not connote repeal since only formal repeal could accomplish this. Article 2217 CCLC has never been formally repealed. *Les Diligences du Code Civil du Québec*, 39 MLJ 747 (1994).

³⁸⁸ *L'Ange-Gardien (Paroisse) c. Québec (Procureur Général)* (1987), 8 Q.A.C. 1, 13 (Can.). See also O'Keefe, *Repatriation*, *supra* note 77, at 231.

³⁸⁹ Pelletier, *supra* note 383, at 371.

³⁹⁰ *L'Ange-Gardien*, 8 Q.A.C. at 24.

³⁹¹ Pelletier, *supra* note 383, at 371.

³⁹² See, e.g., *L'Ange-Gardien*, 8 Q.A.C. 1 at 19–20, Exhibit D-1.

³⁹³ Pelletier, *supra* note 383, at 371, 373.

payable to the parish's Church Council and were deposited in the Church Council's bank account.³⁹⁴

Through a series of subsequent sales, the objects eventually came to be housed in the National Gallery of Canada and the Musée du Québec, as well as with private collectors. Gariépy left the parish in 1973 and his successor, Marc Leclerc, began to question the sale of the objects until he was finally able to trace them to their current possessors.³⁹⁵ Upon locating them, he referred to the CCLC's treatment of sacred objects as imprescriptible and *hors de commerce* in order to argue that the objects remained protected under this category of things since their sacred "destination" remained. He argued that their destination remained the same because they had not been desacralized according to canon law. Additionally, Leclerc noted that the objects had been alienated without the written authorization that must be obtained from the archbishop of the diocese and that the sale of these objects was thus illegal pursuant to Quebec civil law.³⁹⁶

Following this line of argumentation, in 1976 the Church Council of the parish filed a lawsuit against Prévost and the other parties in possession of the objects. The lawsuit sought the return of the objects and the nullification of the original transaction.³⁹⁷ The defendants, however, argued that the provisions of the CCLC could not be relied on in asserting canon law since the CCLC did not expressly refer to it. According to the defendants, this meant that transaction remained valid because, without reference to canon law, it was irrelevant that Gariépy had not received written permission to sell the objects and that he had both the right to transfer the objects as well as the power to change the destination of the objects, which they argued were thus desacralized upon sale.³⁹⁸

In a 136-page judgment, Justice Bernier of the Quebec Superior Court agreed with the arguments of the claimant and recognized the application of canon law in relation to the identification of a sacred object as well as the process to be followed in order to desacralize

³⁹⁴ *L'Ange-Gardien*, 8 Q.A.C. at 25, 28. See also Pelletier, *supra* note 383, at 373.

³⁹⁵ *L'Ange-Gardien*, 8 Q.A.C. at 38. See also Pelletier, *supra* note 383, at 373.

³⁹⁶ *L'Ange-Gardien*, 8 Q.A.C. See also Pelletier, *supra* note 383, at 373.

³⁹⁷ *L'Ange-Gardien*, 8 Q.A.C.

³⁹⁸ See, e.g., *id.* at 79.

and validly alienate the objects in question.³⁹⁹ Following this analysis, Justice Bernier ultimately found the objects in question to be *hors de commerce* according to canon law and thus, also according to Quebec law. He also found that the defendants had not met their burden of demonstrating that the objects had been desacralized.⁴⁰⁰ This resulted in the nullification of the initial contract of sale without indemnification to the defendants.⁴⁰¹

Interestingly, Justice Bernier asserted that the defendants should have known that the purchased objects came from a parish or a religious community, that the objects were sacred pursuant to Article 2217 CCLC, and that they did not discharge their burden of insuring that the objects had been appropriately desacralized.⁴⁰² He went on to suggest that the defendants should have done this if they wished to avoid the enforcement of “public order” mandating the unindemnified return of the objects to the claimant.⁴⁰³

The decision of the superior court was upheld in the Quebec Court of Appeal.⁴⁰⁴ Agreeing with Justice Maloof’s opinion in support of the first instance judge’s ruling, Justice L’Heureux-Dubé wrote that the relevant portions of the CCLC should be construed in accordance with the internal rules, norms, and codes of the particular group in question. She specifically referred to sectarian groups and their codes, such as Catholic canon law, the Torah for Judaism, and the Koran for those of Muslim faith.⁴⁰⁵ But Justice L’Heureux-Dubé also noted that these codes were not explicitly incorporated into Quebec law and that it instead referred to the authority and sovereignty of the group in question to determine their beliefs.⁴⁰⁶

Some of the defendants, notably the National Museums of Canada and Prévost (the original purchaser), appealed the decision to the Supreme Court of Canada, but leave to appeal was denied on 17 December 1987.⁴⁰⁷ With this definitive confirmation of the

³⁹⁹ *Id.* at 88, 104.

⁴⁰⁰ *Id.* at 90–93, 105, 107.

⁴⁰¹ *Id.* at 107, 127–130.

⁴⁰² *Id.* at 106–07.

⁴⁰³ *Id.* at 106–07.

⁴⁰⁴ *Id.*

⁴⁰⁵ *Id.* at 18. See also *Fabrique de la Paroisse de l’Ange-Gardien c. Benoit Gariépy* [1980], C.S. 175, 93 (Can. Qc.); Pelletier, *supra* note 383, at 379.

⁴⁰⁶ *L’Ange-Gardien*, 8 Q.A.C. at 18. See also Pelletier, *supra* note 383, at 379; O’Keefe, *Repatriation*, *supra* note 77, at 232.

⁴⁰⁷ *L’Ange-Gardien*, 8 Q.A.C.; Pelletier, *supra* note 383, at 379.

decisions of the Quebec Superior Court and the Quebec Court of Appeal, the potent cultural objects of *l'Ange-Gardien* were finally returned home to the parish's Church Council.

X. WHO DECIDES WHAT IS POTENT: LEGAL PLURALISM AS
METHODOLOGY

l'Ange-Gardien demonstrates an important element in applying *res extra commercium*: how the potency of an object may be determined. Even if Moustakas' two-pronged test is applied, whether or not the object is "bound up" with a group's identity would require a subjective case-by-case assessment determined through reference to a group's internal cultural and customary rules.⁴⁰⁸ As a result, legal pluralism is needed in order to fully apply *res extra commercium* in a manner appropriate to dealing with the claimant group in question.

While legal pluralism bears the brunt of numerous critiques that warn against viewing its use as a panacea,⁴⁰⁹ the particular application of legal pluralism used in *l'Ange-Gardien* is important because it defers to the claimant group's cultural or customary internal rules of what constitutes a potent object in determining an object's *res sacrae* status. Legal pluralism, used in this context, would create international consistency towards deference to the claimant group's notions of the potent object in their claims for the return of such objects. Applying legal pluralism in this manner thus leads to the ability for greater incorporation of *res extra commercium*, which would effectively enforce the invaluable nature of potent cultural objects, remove them from the market, and eliminate the colonizer's gaze that remains embodied by the current hegemony of legal frameworks available for repatriation and return. In order to recreate this outcome, international courts and other states need to incorporate this level of deference.

⁴⁰⁸ Moustakas, *supra* note 361, at 1196–1201.

⁴⁰⁹ See generally LEGAL PLURALISM AND DEVELOPMENT: SCHOLARS AND PRACTITIONERS IN DIALOGUE (Brian Tamahana, Caroline Sage & Michael Woolcock, eds., Cambridge Univ. Press 2012).

A. Acceptable Evidence and Legal Pluralism

R v. Heller—the case involving the attempt by the government of Nigeria to recover a Nok artifact that had been illegally exported from Nigeria and imported into Canada⁴¹⁰—exhibits the reality of having international mechanisms that address claims for return. Local courts are often hindered by domestic law in applying international conventions as these may only have come into effect on the date upon which they were incorporated into the domestic legal framework. *R v. Heller* also demonstrates the role played by the acceptability of various forms of evidence in domestic courts. Difficulties with acceptable evidence exist on a number of fronts, including the need to prove the provenance of the object, the potency of the object, and the object's potency to the claimant group.

Even when an equitable resolution should clearly result in the return of potent cultural objects, rigid domestic and international legal frameworks insist on evidence that meets the standards of the forum within which claims are heard. And most of the time these standards are based on conventional Western and Eurocentric conceptions of ownership, title, property, time, purchase, market value, and commodification. As demonstrated in *l'Ange-Gardien*, the application of legal pluralism and reference to the evidence that would be required according to the claimant group's own internal rules would provide the opportunity for a more equitable resolution that begins to step away from the hegemony of Western and Eurocentric legal frameworks.⁴¹¹

⁴¹⁰ *R v. Heller* (1983), 27 Alta. L.R. 2d 346 (Can. Alta.). See *supra* Part V.C.1.

⁴¹¹ In addition, in the Canadian application of legal pluralism to evidentiary rules in Aboriginal title claims provides guidance for “adapt[ing] the laws of evidence so that the aboriginal perspective on their practices, customs and traditions and on their relationship with the land, are given due weight by the courts. *Delgamuukw v. British Columbia* [1997], 3 S.C.R. 1010. In practical terms, this requires the courts to come to terms with the oral histories of aboriginal societies, which, for many aboriginal nations, are the only record of their past.” *Id.* at para. 84; see generally *id.* at paras. 84–107.

CONCLUSION

A. The Realities of Implementation and Enforcement

While enforcing the cooperation of destination, or “market,” states would likely pose a challenge,⁴¹² the model outlined by this Article challenges the ever-present colonizer’s mentality that exists within destination states. The goal is removing the colonial gaze and it takes time to alter pervasive worldviews. But where an object no longer has value and purchasers are expected to know that certain objects are susceptible to *res extra commercium* status—as was stated of the third-party purchasers in *l’Ange-Gardien*—this knowledge and responsibility will ideally become part of the cultural fabric of destination states.

A brief analogy to the trafficking of illegal substances can be drawn. When they are bought and traded, the parties to the transaction are aware that the product could be stripped from them without compensation because it is not a legally merchantable product. It is not possible to purchase an illegal substance in good faith or by accident. In the vein of Justice Bernier’s decision in *l’Ange-Gardien*, the excuse of the innocent third party purchaser would no longer be a shield as it would become accepted that the purchaser “really should have known better” and should have done their due diligence in researching the provenance and potency of the object in question in order to meet their onus.

Justice Bernier’s discussion of this matter is in direct contrast to Judge Gray’s uncomfortable decision in *Peru v. Johnson* regarding the return of Pre-Columbian cultural objects to Peru.⁴¹³ Judge Gray referenced the uncomfortable reality of the legal framework blocking Peru from its claims for the return of the objects. The difficulties encountered notably intersect with the market value that these objects have been attributed—their sale and the value behind ownership—and the notion of a purchase made in good faith. Even though Judge Gray noted the priceless nature of the objects in question and that the courts of the United States should have been supportive of Peru in its endeavours to remedy and end the

⁴¹² Bell & Paterson, *International Movement*, *supra* note 53, at 99.

⁴¹³ *Peru v. Johnson*, 720 F. Supp. 810 (C.D. Cal 1989), *aff’d mem.* *Peru v. Wendt*, 933 F.2d 1013 (9th Cir. 1991).

destruction of its cultural heritage, the good faith element of the purchase trumps the priceless importance of these objects to their source.

Irrespective of the decision in this matter, the court has considerable sympathy for Peru with respect to the problems that it confronts as manifested by this litigation. It is evident that many *priceless* and beautiful Pre-Columbian artifacts excavated from historical monuments in that country have been and are being smuggled abroad and sold to museums and other collectors of art. Such conduct is destructive of a major segment of the cultural heritage of Peru, and the plaintiff is entitled to the support of the courts of the United States in its determination to prevent further looting of its patrimony.

However, there is substantial evidence that Mr. Johnson *purchased the subject items in good faith over the years, and the plaintiff must overcome legal and factual burdens that are heavy indeed before the court can justly order the subject items to be removed from the defendant's possession and turned over to the plaintiff*.⁴¹⁴

In Canada, if the *res extra commercium* status of an object were to trump a *bona fide* purchase and lead to its removal from the hands of the purchaser, this might be reminiscent of forfeiture cases dealing with foreign cultural objects smuggled into Canada. At the border, the smuggler often misidentifies the value and place of origin of the smuggled cultural objects, which leads to forfeiture under Section 122 of Canada's Customs Act.⁴¹⁵ The forfeited objects then become property of the Crown and are usually sent back to the object's country of origination.⁴¹⁶

Economically, the potential *res extra commercium* status of cultural objects creates a risk that motivates potential buyers to meet a self-imposed higher onus in acquiring cultural objects. Cultural objects would become risky investments without thorough research

⁴¹⁴ *Id.* at 811–12 (emphasis added).

⁴¹⁵ Customs Act, R.S.C. 1985, c. 1 (Can.) (2d Supp). *See also* Bell & Paterson, *International Movement*, *supra* note 53, at 90.

⁴¹⁶ Customs Act, R.S.C. s. 142(1)(a). *See also* Bell & Paterson, *International Movement*, *supra* note 53, at 90.

and the barriers in acquiring the objects (rather than in the return of the objects) may lessen demand.

Certainly the argument exists that disallowing the sale of potent cultural objects would create a black market for their sale and even inflate their value⁴¹⁷—but this is largely a red herring. Removing the commodification of these objects and the ability for them to be assigned a market value would work to remove the colonial Western and Eurocentric barriers that currently exist in frameworks for repatriation and return. Once objects were located, the process to have them returned—skewed towards Western and Eurocentric notions—would at least remove the necessity of purchasing an object that is not commodifiable. The intent would be to create a long-term change in the mentality of those interested in cultural artifacts: that potent cultural objects cannot be bought and sold as they do not travel within Western and Eurocentric notions of commodification.

B. Remaining Work to be Done

Of course it bears noting that removing the commodification of cultural objects is no panacea in dealing with the exact group, location, state, and so on, that an object should be returned to. Internationally, even when cultural objects are returned to a source country, this does not necessarily address the concerns of subaltern groups within the borders of the states or groups that span the borders of neighbouring states.⁴¹⁸ Domestically, the return of objects to particular indigenous groups within a state will again not necessarily account for subaltern groups that may be marginalized within the indigenous group in question—whether due to gender identity, social hierarchies, or economic prowess. However, the focus of applying *res extra commercium* through legal pluralistic methodology is to identify and deconstruct the overarching barriers that are faced in claims for repatriation and return and the colonial gaze that is maintained by viewing and dealing with potent cultural

⁴¹⁷ See, e.g., Bell & Paterson, *International Movement*, *supra* note 53, at 87.

⁴¹⁸ For example, in *Peru v Johnson*, it also was not possible to absolutely determine whether the objects would theoretically have originated within the borders of present day Peru, Bolivia, or Ecuador as the originating cultures spanned the borders of these countries. *Peru v. Johnson*, 720 F. Supp. 810, 812 (C.D. Cal 1989), *aff'd mem.* *Peru v. Wendt*, 933 F.2d 1013 (9th Cir. 1991).

objects through Western and Eurocentric legal frameworks and notions of commodification.

Whenever a new system is instituted, manners of treating the retrospective application must be addressed and those who may find themselves suddenly dispossessed of the market value of an object purchased would not be entirely pleased with the situation. These challenges, while they are beyond the scope of the Article, demonstrate that much work will need to be done to truly and completely remove the colonizer's gaze. The intent here stems from a critical analysis to suggest a mechanism that might change perceptions. An analysis that might raise awareness as to the deeply problematic legal and extralegal frameworks that characterize the current options available for claims of repatriation and return by subaltern groups and countries as the scourges of colonialism are gradually removed. This Article's intention has been to explore what a departure from the status quo might look like if the attempt were made to remove all relics of colonialism exemplified by the hegemony of Western and Eurocentric values, frameworks, and commodification.