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Argumentative aspects of disputes over return of cultural objects lost to colonial powers

1. Introduction

In the great variety of discussions on the subject of cultural heritage one will find some that relate to art. This is hardly surprising: art law itself is a broad discipline, covering diverse issues such as the protection of cultural heritage, artists' rights, contracts, artistic authenticity, inheritance issues and restitution of cultural objects.[1] Nowadays, resolution of disputes happens in numerous ways – by judicial recourse, international judicial mechanisms, alternative dispute resolution or cultural diplomacy.[2] Despite the multiplicity of options, one can distinguish a common feature when it comes to art-related disputes – naturally, it is the specificity of the objects involved; to quote Quentin Bryne-Sutton, "works of art are distinguishable from everyday objects in that they not only have financial but also cultural and immaterial value".[3] In this article the analysis of art-related disputes will be narrowed down to the problems of restitution of cultural objects of special nature. Indeed, disputes on the return of cultural objects lost to colonial powers share not only similar stories of movement of the goods, but also perspectives on their potential return. As Jeanette Greenfield stated, "in Africa, South-East Asia and South Asia, the pattern of exploration, colonisation, tribute, and then the punitive removal of treasures was repeated, with the result that many African and Asian nations were deprived often of the central core of their own art, as in the case of Benin, or of

[1] Q. Bryne-Sutton, "Arbitration and mediation in art-related disputes", *Arbitration International* 1998, vol. 14, no. 4, p. 448.

[2] See: I. Stamatoudi, *Cultural property law and restitution. A commentary to international conventions and European Union law*, Cheltenham – Northampton 2011, pp. 189–209.

[3] Q. Bryne-Sutton, "Arbitration and mediation…", p. 448.

invaluable documentary records, as in the case of Sri Lanka".[4] A survey of the nature of arguments raised in cases regarding the return of these objects allows one to grasp a pattern of the exchanged statements.

2. Cultural objects lost to colonial powers

One of the ramifications of European colonialism is an unbalanced movement of antiquities all over the globe, while the countries of their origin remain poorly endowed.[5] In the second half of the 20th century attempts to amend historical injustices caused by the course of the Second World War set an example for a global movement of decolonisation.[6] The transfer of goods involving a colonial actor raises multiple questions regarding the degree of equality among the parties.[7] Indeed, in the colonial relationship the law affirms a model of subjugation of weaker population by stronger actors.[8] When it comes to the acquisition of cultural objects in that historical context, one may ask after Jos van Beurden: "did the acquirers consult its makers, original owners or their descendants? Was the transfer voluntary or was pressure exerted and was it and involuntary loss?".[9] The fact that the transfer was made to a colonially associated actor (e.g., colonial administrators) from a party under colonial power is fundamental to the discussion on cultural objects lost to colonial countries.

In this article cultural objects lost to colonial countries are understood as objects of cultural or historical importance that were acquired without just compensation or were voluntarily lost during the European colonial era.[10] Adding to that definition, J. van Beurden distinguishes three methods of transferring the goods: 1) acquisition by normal purchase or barter, at equal level; 2) acquisition in accordance with colonial legislation, but at unequal level; 3) acquisition in violation of this legislation and at unequal level.[11] Moreover, from the point of view of circumstances under which the objects were

[4] J. Greenfield, *Return of cultural treasures,* Cambridge 2009, p. 99.

[5] J. von Beurden, *Treasures in trusted hands. Negotiating the future of colonial cultural objects*, Leiden 2017, p. 118.

[6] E. Barkan, *The guilt of nations. Restitution and negotiating historical injustices*, Baltimore – London 2001, p. 159.

[7] See: J. von Beurden, *Treasures in trusted hands*…, p. 40.

[8] U. Mattei, L. Nader, *Plunder. When the rule of law is illegal*, Malden – Oxford – Carlton 2008, p. 26.

[9] Ibid., p. 40.

[10] See: J. von Beurden's definition of colonial cultural objects: *Treasures in trusted hands*…, p. 39; see further: U. Mattei, L. Nader, *Plunder*…, pp. 20–44.

[11] J. von Beurden, *Treasures in trusted hands*…, p. 41.

acquired one may enumerate following types: 1) gifts to colonial administrators and institutions; 2) objects acquired during private expeditions; 3) objects acquired during military expeditions; 4) missionary collecting; 5) archives.[12]

Among other causes for restitution of cultural objects, claims for return can be made regarding goods removed from former colonial States and indigenous peoples by specific States holding colonial power or other actors associated with that power at the time.[13] These cases remain profoundly connected with the process of settling accounts with the period of colonialism and acknowledging guilt for its consequences. Thus, states which achieved independence from colonial rule seek reinforcement of their original national identity, also by protecting their cultural heritage. In that sense, protection can mean not only preserving and retaining cultural objects within countries, but also recovering goods that were previously transferred or lost.[14] For that reason, countries of origin of antiquities lost during colonial era support initiatives of creating international instruments on the issue of return cultural objects, as well as raise direct requests regarding certain objects.

3. Return of cultural objects lost to colonial powers as a hard case

Legal definitions of cultural goods present in international law indicate that they may carry importance of a complex nature, including archaeological, prehistorical, historical, literary, artistic or scientific value.[15] This special character of cultural objects, manifested not only in their economic value, often inspires a debate, resulting in searching beyond the scope of legal regulations and scientific facts, but also raising moral, political and scientific issues.[16] Moreover, in the case of cultural goods lost during colonial period, direct application of rules of law is usually impossible as their removal occurred prior to establishing laws on the protection of cultural heritage.[17] Marie Cornu and Marc-André Renold address this subject stating that "where earlier dispossessions are concerned, the question arises in different terms. If the test used were whether the dispossession was unlawful, any principle of restitution could easily be defeated. In most situations,

[12] Ibid.

[13] K. Zeidler, *Restitution of cultural property. Hard case, theory of argumentation, philosophy of law*, Gdańsk – Warsaw 2016, p. 36.

[14] Ibid.

[15] See for example: Article 2 of the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects signed in Rome on 24 June 1995.

[16] See: K. Zeidler, *Restitution of cultural property*…, pp. 105–130.

[17] See: Guidelines prepared by the UNESCO Intergovernmental Committee on the Return of Cultural Property to its Countries of Origin or Its Restitution in the Case of Illicit Appropriation, 1986.

either it was not unlawful under the law applicable at the time, or any wrongfulness has been purged by time. Besides the fact that it may not always be possible to ascertain and evaluate the circumstances in which a dispossession occurred, it sometimes took place with the consent of the states or communities concerned".[18]

Principles of international law applicable nowadays, as expressed in Article 11 of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, signed in Paris on 14 November 1970 and other instruments, forbid the "export and transfer of ownership of cultural property under compulsion arising directly or indirectly from the occupation of a country by a foreign power". Retroactive application of these rules of law, however, is usually not possible due to established principles on State responsibility as well as the rule of intertemporal law.[19] As stated in 1928 by Judge Max Huber of the Permanent Court of Arbitration in the case of Island of Palmas: "a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled".[20] From this point of view, examining the chain of ownership solely from the legal perspective often results in effective defence by allowing to claim that the ownership has been acquired legally (argument from ownership).[21] It is also worth mentioning that the aspect of legality of the acquisition has shaped the vocabulary used to describe the nature of claims. As Janet Blake explains, "in a strict sense, 'restitution' is used where cultural property removed from a State's territory without its consent or in contravention of its export laws and to use 'return' where cultural property has been removed before such laws had been enacted".[22] With this in mind, throughout this work the term "restitution" is used in a broader sense, whereas "restitution" and "return" are used interchangeably.

Moreover, attempting to translate indigenous culture to the dominant legal structure of the debate may generate additional problems. Indigenous peoples, being neither

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[18] M. Cornu, M.-A. Renold, "New Developments in the Restitution of Cultural Property: Alternative Means of Dispute Resolution", *International Journal of Cultural Property* 2010, vol. 17, no. 1, p. 15.

[19] J. Shuart, "Is All 'Pharaoh' in Love and War: The British Museum's Title to the Rosetta Stone and the Sphinx's Beard", *Kansas Law Review* 2004, vol. 52, no. 667, pp. 689–690.

[20] Quoted fragment of the award published in: J. Crawford, *The International Law Commission's articles on state responsibility. Introduction, text and commentaries*, Cambridge – New York – Melbourne 2002, p. 131.

[21] See: K. Zeidler, *Restitution of cultural property*…, pp. 145–150.

[22] J. Blake, *International cultural heritage law*, Oxford 2015, p. 50; see further: L.V. Prott, P. O'Keefe, *Law and the cultural heritage*, vol. 3, *Movement*, London – Edinburgh 1989, pp. 834–836; see also: W. Kowalski, "Types of claims for recovery of lost cultural property", *Museum* 2005, vol. 57, no. 4, pp. 85–102.

individuals nor sovereign nations, often exceed the definition of actors in existing legal purview.[23] Specificity of indigenous traditions – largely oral and dynamic – clashes with the idea of culture as an established and definable heritage.[24] Elazar Barkan remarked that "traditional societies are based on the practice of maintaining and reproducing the past in ways that are believed by the practitioners to be traditional – namely, unaltered – over which they claim rights of proprietorship".[25]

Lack of direct legal regulations applicable to the transfer of cultural objects before a certain period and a diversity of values manifested in these treasures force one to evaluate the question of restitution as a hard case, possible to settle with more than one justified solution.[26] According to Kamil Zeidler, "we are dealing with a hard case when the case does not generate one standard solution, but, on the contrary, when there may be many correct findings. The solution of a hard case does not proceed clearly from the legal rules applied, and most frequently in such a situation it is necessary to appeal to norms other than legal ones and to assessments and evaluations".[27] Complex character of arguments raised in restitution debates proves that searching for a fair solution almost as a rule requires turning to reasons other than law. Thus, actors in a restitution debate concerning cultural objects lost to colonial countries need to acknowledge that in the course of exchanging arguments for and against return, it is possible to reach more than one solution justifiable by the criteria of equity and rationality.[28]

4. Argumentative aspects of restitution disputes

Perceiving restitution disputes as hard cases allows one to search for various frameworks for an exchange of arguments possibly leading to an achievement of proper assessment, evaluation or understanding. Current practice of resolving cultural heritage debates relies upon several means of dispute settlement, including adjudication by domestic courts, international judicial recourse, international judicial settlement mechanisms, alternative dispute resolution (notably Intergovernmental Committee for Promoting the

[23] E. Barkan, *The guilt of nations*…, p. 167.

[24] Ibid.

[25] Ibid.

[26] K. Zeidler, *Restitution of cultural property*…, p. 19; see further: R. Dworkin, *A matter of principle*, Oxford 2001.

[27] K. Zeidler, *Restitution of cultural property*…, p. 19.

[28] See: J. Stelmach, *Kodeks argumentacyjny dla prawników*, Kraków 2003, p. 21.

Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation) and cultural diplomacy.[29]

As it has been noted above, seeking judicial recourse in the cases regarding cultural objects lost during the colonial era can prove problematic. In fact, nonretroactivity of law is perceived as one of the deciding disadvantages of turning to traditional legal proceeding as it excludes certain types of cases.[30] Irini Stamatoudi is correct to say that "this, however, does not mean that the claim is not sound on ethical, scientific, historical, humanitarian or other grounds. These grounds, however, are not grounds that are judiciable by courts, which have to follow the rigid legal approach".[31] Therefore, it needs to be emphasised that regardless of the platform on which a given cultural heritage dispute is to be resolved, the special nature of the object in question introduces arguments other than derived from legal regulations. Because of that, dealing with claims for the return of cultural objects removed from their places of origin during the colonial era enables the use of a wide variety of arguments.

Analysing argumentative aspects of restitution cases or international legal instruments requires applying the theory of arguments relating to restitution. An argument is a statement aiming to ensure an acknowledgement of a thesis or to strengthen a meaning of the thesis itself; to put it differently, its purpose is to convince the addressee of the accuracy or inaccuracy of given statements.[32] The concept of restitution arguments – understood as arguments that are raised by parties in restitution dispute – constitutes one of the perspectives on cultural heritage case studies, explored by researchers of this field.[33]

To exemplify, Lyndel V. Prott and Patrick J. O'Keefe construct a typology of restitution arguments, dividing them into "the arguments for restitution or return" and "the arguments for retention", and organising them with more detail within these two

[29] See: A. Chechi, *The settlement of international cultural heritage disputes*, Oxford 2014, pp. 134–185; I. Stamatoudi, *Cultural property*…, pp. 189–209.

[30] I. Stamatoudi, *Cultural property*…, pp. 190–192.

[31] Ibid., p. 191.

[32] K. Zeidler, *Restitution of cultural property*…, p. 136.

[33] See e.g.: K. Zeidler, A. Plata, "The argumentative aspects of the Terezín Declaration and its place in public international law" [in:] *Terezin Declaration – Ten Years Later, 7th International Conference, The documentation, identification and restitution of the cultural assets of WWII victims. Proceedings of an international academic conference held in Prague on 18–19 June, 2019*, ed. V. Drbohlavova, Documentation Centre for Property Transfers of Cultural Assets of WWII Victims, p.b.o., Prague 2019, pp. 25–31; K. Zeidler, *Restitution of cultural property*…; L.V. Prott, P. O'Keefe, *Law and the cultural heritage*…, pp. 838–850; A.F. Vrdoljak, *International law, museums and the return of cultural objects*, Cambridge 2008, p. 2.

groups.[34] Arguments for restitution or return are as follows: wrongful taking of property, need for cultural identity, appreciation in its own environment, need for national identity, dangers to the cultural heritage from trafficking, dynamics of collecting; whereas in the category of arguments for retention the authors include: ownership, access, conservation, place in cultural history, the need to maintain Western collections.[35] Referring to the views of Ana F. Vrdoljak, one can delineate three rationales for restitution, emphasising such grounds as: sacred property (derived from the principle of territoriality and the connection between people, land and cultural goods), righting international wrongs (making an attempt to make amends for historical injustices), and self-determination and reconciliation.[36] Moreover, Kamil Zeidler offers a complex perspective by dividing restitution arguments into positive (supporting a restitution claim) and negative (supporting retention).[37] Determining whether a given argument is of positive or negative nature depends on the position it defends made by one of the parties of a restitution dispute.[38] The catalogue of restitution arguments assembled by K. Zeidler emphasises special nature of cultural objects as well as the complexity of possible bonds to cultural goods. To enumerate a few, K. Zeidler's proposition names arguments from justice, ownership, place of production, right of loot, national affiliation, cultural affiliation, social utility, most secure location, historical eventuation and the passage of time.[39] The theories of restitution arguments enable an in-depth assessment of statements expressed in documents regarding return of cultural objects or exchanged between the parties during a dispute.

5. Fundamental question of justice

The gravity of consequences of colonial relationships and gross historical crimes inspired a change in international perspective on morality. Modern approach motivates not only to accuse other States of human rights violation but also to self-examinate.[40] New sensitivity leads to exploring a broader meaning of restitution itself, understood not only as a legal category but also as a cultural concept combining return of the specific belongings (restitution *sensu stricto)*, forms of material redress for that which cannot be returned

[34] See: L.V. Prott, P. O'Keefe, *Law and the cultural heritage*…, pp. 838–850.
[35] Ibid.
[36] A.F. Vrdoljak, *International law*…, p. 2.
[37] K. Zeidler, *Restitution of cultural property*…, p. 138.
[38] Ibid.
[39] See: ibid., pp. 141–202.
[40] E. Barkan, *The guilt of nations*…, p. XVII.

such as human life, thriving culture and economy, cultural and national identity (reparations), and an expressed acknowledgment of wrongdoing or even an acceptance of responsibility (apology).[41]

Researchers remain sceptical whether emergence of the legal protection of human rights can further the discussion about the return of cultural objects lost during colonial era as the regulations themselves are often non-binding and rarely retroactive.[42] Thus, as a rule, it makes them irrelevant for settling these disputes in judicial proceedings.[43] However, UN's activity in early 1960s proved to be of great support in decolonisation.[44] Article 2 of the Declaration on the Granting of Independence of Colonial Countries and Peoples, General Assembly resolution 1514 (XV) adopted in New York on 14 December 1960, provides that "all peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development". Further developments in international instruments confirmed that direction. Ultimately, Article 11 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) adopted by the General Assembly on Thursday, 13 September 2007 directly included the option of restitution by expressing that "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".

The idea of justice is fundamental to the exchange of arguments during a restitution dispute. Actually, the argument from justice may be raised equally efficiently by either side involved in a discourse.[45] According to Zygmunt Ziembiński the term itself carries an intense emotional context, and clearing up its meaning is immensely difficult as it undergoes a many-sided relativisation.[46] Thus, the argument from justice remains connected to moral norms. As K. Zeidler states, a restitution claim might be based on the argument from justice "as a certain state that was morally and legally justified previously, one that as a result of specific, usually illegal actions has been infringed".[47]

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[41] Ibid., p. XIX.

[42] See: J. von Beurden, *Treasures in trusted*…, p. 40.

[43] Ibid.

[44] See: S. Williams, *Who killed Hammarskjöld? The UN, the Cold War and white supremacy in Africa*, New York 2014, pp. 35–36.

[45] K. Zeidler, *Restitution of cultural property*…, p. 141.

[46] Z. Ziembiński, "Sprawiedliwość" [in:] *Zarys teorii prawa*, eds. S. Wronkowska, Z. Ziembiński, Poznań 2001, p. 95.

[47] K. Zeidler, *Restitution of cultural property*…, pp. 143–144.

A rhetoric example of an argument from justice applied in a restitution debate is present in a Memorandum submitted in 2000 to the House of Commons in London by Prince Edun Akenzua.[48] The member of the Benin Court expressed his claim for the return of Benin cultural objects "on behalf of the Oba and people of Benin who have been impoverished, materially and psychologically, by the wanton looting of their historical and cultural property".[49] Memorandum also emphasises that "Britain, being the principal looters of the Benin Palace, should take full responsibility for retrieving the cultural property or the monetary compensation from all those to whom the British sold them".[50]

Another illustration of the argument from justice in practice can be observed in a claim for the return of the Koh-i-noor diamond. In the specific words on behalf of the Sikh community, "if Koh-i-noor is to be returned to its last owner, then fairly and squarely the only legitimate claimant is the Sikh community from whose ruler, Maharaja Dalip Singh, it was forcibly taken by the East India Company (…). In all fairness to the Sikhs, Koh-i-noor should, therefore, be returned to the Government of India to be restored somewhere near Punjab as part of Sikh heritage. Undoubtedly, the Sikh claim is based on moral and historical grounds".[51]

With this in mind, it is vital to emphasise that although the history can be perceived as a continuum of facts immune from any amends or reinterpretation, the debate about fairness and sensitivity exposes that it is constantly shaped by differing perspectives.[52] The manifestation of fairness, as sought through the argument from justice, indeed can be different to the parties of the restitution debate, which is why it is usually supported by further ideas.

6. Complexity of cultural affiliation

In 1986 John H. Merryman identified two systems of thinking about cultural property, stating that theories of cultural nationalism and cultural internationalism are fundamental to cultural heritage debates.[53] This dualism of understanding cultural goods either as

[48] https://publications.parliament.uk/pa/cm199900/cmselect/cmcumeds/371/371ap27.htm (accessed: 29.11.2020).

[49] Ibid.

[50] Ibid.

[51] H. Singh, *Letter to editor*, "The Times", 11 September 1976: fragment reprinted in: J. Greenfield, *Return of cultural treasures*…, p. 130.

[52] E. Barkan, *The guilt of nations*…, p. X.

[53] See: J.H. Merryman, "Two ways of thinking about cultural property", *The American Journal of International Law* 1986, vol. 80, no. 4, pp. 831–853.

belonging to all humankind or as a part of a particular national patrimony establishes a new viewpoint on restitution arguments from cultural affiliation. This category of arguments draws from the concept of a nation or other social group as a community, which has formed and cultivates a separate and distinct culture of its own.[54] Undoubtedly, while discussing the future of cultural objects lost during the colonial era, the argument from cultural affiliation remains often linked to the argument from justice as they both emphasise moral sense of restitution. For instance, it is of great importance for the former colonial states to take pride in their indigenous heritage, which was denigrated or transferred from the place of its origin.[55] Thus, it is noticed that it is just to reconstruct artistic heritage of those states *in situ* both as their cultural patrimony and as an economic resource.[56] This method of argumentation, however, may prove problematic in the context of state borders, when it comes to clarifying the actual cultural affiliation of a given object.[57] Kamil Zeidler observed that often "two or more social groups see the same cultural property as their heritage, thereby negating other communities' ties to it".[58]

To illustrate, arguments from cultural affiliation are present throughout the text of "A Plea for the Return of an Irreplaceable Cultural Heritage to those who Created It", an appeal made by the former UNESCO Director-General Amadou-Mahtar M'Bow on 7 June 1978.[59] The significance of the transcendent bond between a culture or a nation and the object is described as follows: "architectural features, statues and friezes, monoliths, mosaics, pottery, enamels, masks and objects of jade, ivory and chased gold – in fact everything which has been taken away, from monuments to handicrafts – were more than decorations or ornamentation. They bore witness to a history, the history of a culture and of a nation whose spirit they perpetuated and renewed".[60] Moreover, the Plea emphasises an educational value of cultural objects and their role in self-exploration of each culture or nation: "the peoples who were victims of this plunder, sometimes for hundreds of years, have not only been despoiled of irreplaceable masterpieces but also robbed of a memory which would doubtless have helped them to greater self-knowledge and would certainly have enabled others to understand them better".[61] Nevertheless, the text of the Plea introduces the ideas behind cultural internationalism by acknowledging

[54] K. Zeidler, *Restitution of cultural property*…, p. 167.

[55] L.V. Prott, P. O'Keefe, *Law and the cultural heritage*…, p. 840.

[56] Ibid.

[57] K. Zeidler, *Restitution of cultural property*…, p. 167.

[58] Ibid., p. 169.

[59] A Plea for the Return of an Irreplaceable Cultural Heritage to those who Created It. An appeal by Amadou-Mahtar M'Bow, Director-General of UNESCO, https://unesdoc.unesco.org/ark:/48223/pf0000034683_eng (accessed: 29.11.2020).

[60] Ibid.

[61] Ibid.

that through the passage of time and undertaken care for the objects in their place of transfer it is possible to establish a new cultural bond. To illustrate: "(…) certain works of art have for too long played too intimate a part in the history of the country to which they were taken for the symbols linking them with that country to be denied, and for the roots they have put down to be severed".[62]

As a matter of fact, the concept of cultural heritage of all humankind often supports the position of institutions that are reluctant about returning the objects in their collections. This reasoning was vividly expressed in the text of Declaration on the Importance and Value of Universal Museums signed in December 2002.[63] There, the accentuated concept of universalism suggests that no specific culture is solely entitled to the objects of cultural value but also that the cultural affiliation can actually change overtime. As follows: "Over time, objects so acquired – whether by purchase, gift, or partage – have become part of the museums that have cared for them, and by extension part of the heritage of the nations which house them".

Even though cultural internationalism and the argument from cultural affiliation often contradict each other in the course of restitution disputes, their nature, in fact, is similar. In a way, the argument from the cultural affiliation to all humankind draws from the same reasoning as the arguments describing that special bond reserved to certain groups and objects. Analysing the texts of mentioned instruments exposes that these concepts can become so intertwined that they happen to be used simultaneously to support one statement.

7. Restitution claims and passage of time

Restitution disputes concerning cultural objects lost during the colonial era demonstrate that the passage of time influences legitimacy of the case, legal framework of the discourse, as well as its dynamic contextual aspects. Developing the last part, one may refer to the views of Gary Edson: "social change has had an impact on moral attitudes and caused a change in ethical behavior. Multi-cultural acceptance has manifested itself as a part of the new ethical orientation of museums. Concern for right action, right representation, and equal and fair treatment for all has altered the thinking, planning, programming, and orientation of many museums".[64] This change of perspective surely

[62] Ibid.

[63] Full text of Declaration was reprinted in: *Witnesses to history*, ed. L.V. Prott, Paris 2009, pp. 116 ff.

[64] G. Edson, *Museum Ethics*, London 1997, p. 44.

becomes visible in the sensitivity of cultural events and debates on diversity, but also in engagements possibly leading to change in dealing with restitution claims.

However, arguments from passage of time usually hold their place as negative restitution arguments in statements opposing to the return of cultural treasures. In case of goods lost during the colonial era, the passage of time is often claimed in relation to factual circumstances causing the change of perspective on acquiring cultural objects, namely from the moment of the event which caused their loss, up to the situation where a restitution claim is raised. Arguments of similar nature are present in the aforementioned Declaration on the Importance and Value of Universal Museums: "The objects and monumental works that were installed decades and even centuries ago in museums throughout Europe and America were acquired under conditions that are not comparable with current ones. (…) Objects acquired in earlier times must be viewed in the light of different sensitivities and values, reflective of that earlier era".[65] Nevertheless, modern statements of museums holding objects of colonial provenance often acknowledge colonial or military collection history which led to the acquisition of the objects in question.[66]

During a restitution dispute, arguments from passage of time, highlighting the difference in circumstances under which the objects were acquired, often clash with the arguments from justice, calling for compensation for historical atrocities, regardless of the time that has passed. Cultural diplomacy and alternative means of dispute resolution grant a platform for confronting these ideas on case-by-case basis. Developing discipline of museum ethics also provides reflections on the test of time and change in sensitivity due to ongoing social change and the evolving role of museums.[67]

Despite fundamental differences, disputants appear to agree on at least one point: certain Western museums (appointing themselves as universal) are a historical phenomenon, which is nowadays impossible to recreate.[68] Regardless of the colonial circumstances under which the objects in their collections were acquired, their removal, acquisition and display became facts of cultural history.[69] The restitution argument from historical eventuation accentuates that historic processes are usually accompanied by transformations of property, including the movement of cultural objects.[70] In that

[65] As reprinted in: *Witnesses to history*…, p. 116.

[66] See for example: https://www.britishmuseum.org/about-us/british-museum-story/objects-news/maqdala-collection (accessed: 29.11.2020).

[67] T. Besterman, "Museum Ethics" [in:] *A companion to museum studies*, ed. S. Macdonald, Malden (MA) – Oxford 2006, p. 431.

[68] K. Singh, "Universal museums: The view from below" [in:] *Witnesses to history*…, p. 126.

[69] L.V. Prott, P. O'Keefe, *Law and the cultural heritage*…, pp. 848–849.

[70] K. Zeidler, *Restitution of cultural property*…, p. 176.

sense it does not suggest the fairness of the *status quo*. Instead, it seems to invite a discussion about possible future actions, including improvements in sensitive narrative about the past and other forms of cooperation.

8. Perspectives on social utility and safety

The argument from social utility draws from the assertion that the right of an owner might be limited, when cultural property represents a significant value not only for them, but for a broader recipient, for whom the access to that property must be guaranteed.[71] The great museums often argue that their universalism and educational value are maintained in the name of international scholarship, human curiosity and global culture.[72] Furthermore, the argument from social utility tends to emphasise museums' mission which is, *inter alia*, to educate and influence aesthetic sensitivity. Museums considering themselves as universal claim to exhibit objects displaced from their place of origin in a valuable and informative context of the objects collected worldwide.

Opponents to that rhetoric observe that this practice provides the visitors only with an aesthetic experience, separated from all the background factors enriching the perception of the objects.[73] In almost poetic words addressed in 1973 to the President of the United Nations General Assembly, the Permanent Representative of Zaire to the United Nations remarked "there is a deep-rooted and indissoluble bond between nature, man and his artistic creations. The cultural riches of the poor countries are at their best in their natural setting, because there they glow in an almost sensual aura. An authentic work of art burns with an inner flame, vibrates with the ardent faith which has led a people to believe in immortality, in supreme values, and to embody those values in deathless form with chisel and brush, in bamboo and rare woods".[74]

Nevertheless, the question of objects' safety poses another complex issue in discussions about the future of the goods lost by the former colonial States. Museums and other owners of cultural objects are expected to safeguard these treasures so that it remains possible to leave for future generations the richest possible collections of their heritage in the best possible condition.[75] Argument from the most secure location is

[71] Ibid.

[72] L.V. Prott, P. O'Keefe, *Law and the cultural heritage*…, p. 845.

[73] I. Stamatoudi, *Cultural property*…, pp. 189–209.

[74] Letter dated 2 November 1973 from the Permanent Representative of Zaire to the United Nations addressed to the President of the General Assembly: https://digitallibrary.un.org/record/852847 (accessed: 30.11.2020).

[75] K. Zeidler, *Restitution of cultural property*…, p. 179.

often used as a negative restitution argument suggesting that the requesting party is not capable of securing the objects.

These rationales are expressed in Restitution and Repatriation: Guidelines for Good Practice issued by British Museums and Galleries Commission.[76] According to section 3.1.10 titled "Refer to Current Museum Policies", British museums facing restitution request should "consider whether the museum is able to store and care for the material adequately and appropriately, including providing religious and cultural care requested by the traditional owners; provide adequate and safe public access to this material and its associated research information";[77] and, according to section 3.1.11 titled "Consider Ethical Concerns", should consider "ability of those requesting return to safeguard material in the long term".[78]

On the other hand, in the New Zealand case of the carved meeting house (*whare whakairo*) named Te Hau ki Tūranga indigenous peoples' claims supported by the arguments of moral nature were judged sceptically by another tribal member Karl Johnstone who claimed: "to request it back is an interesting proposition because we actually don't have the resources to care for it nor the expertise, so what do you do with it when you get it back?".[79] However, it needs to be emphasised that, in a dynamically changing reality, wider acceptance that former colonial States are unable to take proper care of their heritage would definitely be simplistic and often inaccurate. That is why examining each request on case-by-case basis remains vital.

9. Conclusions

The issue of restitution of cultural objects remains a topical one. It evokes strong emotions and induces disputes exceeding legal argumentation. Cultural objects carry unique values, appreciated from various perspectives, ranging from purely aesthetic to patriotic and even existential. This is why return of cultural objects lost in colonial context provokes thoughts on justice and the possibility of amending historical atrocities. The variety of restitution arguments illustrates the diversity of interests present in the context of the future of cultural goods.

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[76] Excerpts published in: *Witnesses to history*…, pp. 130–149.

[77] Ibid., p. 139.

[78] Ibid., p. 140.

[79] C. McCarthy, "Practice of Repatriation: A Case Study from New Zealand" [in:] *Museums and restitution. New practices, new approaches*, eds. L. Tythacott, K. Arvanitis, Farnham – Burlington 2014, p. 77.

Modern developments in the dispute resolution prove that restitution of cultural objects, with all probability, will be conducted on case-by-case basis; including, where possible, by way of creating specific solutions and making exceptions to existing legal regulations. It is also vital to acknowledge that although universalism of the great museums stands for genuine humanistic approach to cultural heritage and broad public enjoyment of exhibitions, it can be also rightfully scrutinised by introducing narratives of the peoples affected by injustices that have led to the acquisition of the objects in admired collections. Perceiving the issue of return of cultural treasures as a hard case invites a possibility that there is often more than one right solution. It makes room for the parties to evaluate each story and to take into account the meaning of every object. Thus, it makes it possible to pay respect to all witnesses to human history.

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Summary

Argumentative aspects of disputes over return of cultural objects lost to colonial powers

The aim of the paper is to analyse elements of argumentative discourse on return of cultural objects lost to colonial powers during the colonial era. Loss of these objects took place prior to establishing legal norms on protection of cultural heritage, therefore nations and peoples raising the requests for their return often rely on others means of dispute resolution than judicial recourse. Arguments from justice and cultural affiliation form a core of argumentation supporting the requests for return of the objects in question, whereas arguments from the ownership, passage of time, social

utility and the most secure place are often used to argue for the retention. Variety of arguments shows a diversity of interests present in the context of the future of cultural goods. The author offers examples of the usage of arguments in legal instruments and within restitution dispute.

Keywords: argumentation, colonialism, cultural heritage, hard case, restitution

Streszczenie

Argumentacyjny aspekt dyskursu nad zwrotem dóbr kultury utraconych na rzecz imperiów kolonialnych

Celem artykułu jest analiza dyskursu dotyczącego zwrotu dóbr kultury utraconych na rzecz byłych imperiów kolonialnych z terytoriów znajdujących się pod ich wpływem. Utrata omawianych obiektów nastąpiła przed ustanowieniem norm prawnych dotyczących ochrony dziedzictwa kultury. Z tego względu państwa zgłaszające żądania ich zwrotu korzystają z alternatywnych metod rozstrzygania sporów. Argumenty ze sprawiedliwości i przynależności kulturowej stanowią kluczowe koncepcje popierające żądania zwrotu omawianych dóbr kultury, podczas gdy argumenty dotyczące własności, upływu czasu, użyteczności społecznej i najbezpieczniejszego miejsca są często wykorzystywane jako przemawiające za zatrzymaniem dóbr w aktualnym miejscu ich przechowywania. Różnorodność argumentów podnoszonych w toku sporu restytucyjnego eksponuje wielość interesów stron dotyczących przyszłości dóbr kultury. Autorka wskazuje przykłady użycia opisywanej argumentacji w źródłach prawa i w dialogu dotyczącym zwrotu dóbr kultury utraconych przez byłe kolonie.

Słowa kluczowe: argumentacja, kolonializm, dziedzictwo kultury, trudny przypadek w prawie, restytucja