

32,000 & Counting: Article 11 of The Constitution of Kenya and the Restitution of Cultural Property

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Abstract

Aside from racism, subjugation and violence, colonialism effectively erased many facets of indigenous history. The alienation of cultural heritage was a core mechanism through which this was achieved. Not only did the coloniser enforce his own 'civilised' notions of what constituted 'proper' society, he engaged in the pillaging of various cultural properties whilst simultaneously advocating for a near complete deletion of traditional life. Seized cultural objects would meander their way to Europe to be displayed, catalogued and famed as 'curiosities', the exhibition of the savage; what European excellence sought to 'correct' in all its charity. The Constitution of Kenya 2010 aims to foster a society built upon Kenyan culture. Article 11 is the spotlight under which these objectives manifest. The State is tasked with a duty to promote all forms of cultural expression including cultural heritage. This signals a reclamation of the country's attachment to its roots, to repair what was lost and transmit it to future generations, such that historical cultural deprivation never occurs again. Various communities have pleaded with European countries for the return of their cultural properties. Not many have been successful, owing to various factors and the reluctance on the part of European museums and governments to release these objects. This paper seeks to examine the nature of cultural heritage, particularly cultural property and its importance to the Kenyan situation, highlighting that the State has a duty under Article 11 to engage in restitution efforts of the said properties.

Keywords: *Cultural Property, Cultural Heritage, Cultural Nationalism, Cultural Internationalism, Purposive Interpretation, Restitution.*

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I. Introduction

‘African heritage cannot be a prisoner of European museums,’ tweeted French president Emmanuel Macron in 2017.¹ This was after he delivered a speech at the University of Ouagadougou concerning the restitution of cultural heritage to former French colonies.² Macron reignited a global conversation surrounding the continued effects of colonialism as felt through the subsequent historical, cultural deprivation of an entire continent. Conversations surrounding the restitution of cultural property to former colonies are not new. As previous European colonies, including Kenya, embraced independence, calls were made for the return of their cultural objects.³ They were never answered.⁴

Cultural property and heritage have been addressed within the realm of international law. The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict defines cultural property as movable or immovable property crucial to the cultural heritage of every people.⁵ Such property includes monuments, works of art, archaeological sites, books and other objects that are of ‘historical or artistic interest’.⁶ More treaties came into effect cementing the international community’s recognition of cultural property and the need to preserve it on a global scale, spawning the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (the 1970 Convention).⁷ In May of 2022, a memorandum was submitted to the National Assembly on the accession of Kenya to the 1970 Convention,⁸ which was then ratified in 2024.⁹

¹ E Macron, X, 28 November 2017—<<https://twitter.com/EmmanuelMacron/status/935488489663156226>> on 8 January 2023.

² Codrea-Rado A, ‘Emmanuel Macron says return of African artefacts a top priority’ *The New York Times*, 29 November 2017 —<<https://www.nytimes.com/2017/11/29/arts/emmanuel-macron-africa.html>> on 8 January 2023.

³ Oluoch F, ‘Will stolen African artefacts ever find their way back home?’ *The East African*, 14 January 2021 —<Will stolen African artefacts ever find their way back home?> on 9 January 2023.

⁴ Oluoch F, ‘Will stolen African artefacts ever find their way back home?’ *The East African*, 14 January 2021 —<Will stolen African artefacts ever find their way back home?> on 9 January 2023.

⁵ Article 1, *Convention for the protection of cultural property in the event of armed conflict*, 14 May 1954, 1-3511 UNTS.

⁶ Article 1, *Convention for the protection of cultural property in the event of armed conflict*.

⁷ UNESCO, —<About the 1970 Convention - Illicit Trafficking> on 9 January 2023.

⁸ Ministry of Foreign Affairs, *Memorandum on the accession to the 1970 UNESCO convention on the means of prohibiting and preventing the illicit import, export and transfer of ownership of cultural property*, 11 May 2022, 4-5.

⁹ UNESCO, 18 April 2024—<Kenya ratifies the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property> on 3 December 2024.

Past Kenyan presidents Mwai Kibaki¹⁰ and Uhuru Kenyatta¹¹ have both urged our former colonisers to return the nation's heritage. These appeals have borne little fruit owing to several variables that affect restitution by virtue of its multifaceted nature. After all, restitution stands as a 'highly charged' subject,¹² one that bleeds into several domains including politics, diplomacy and law.¹³ This indicates that restitution commands attention from various actors outside the legal sphere. Nevertheless, the absence of a robust legal framework in Kenya has also played a major role in inhibiting the assertion of effective restitution claims.¹⁴ Attempts were previously made to enshrine the return of Kenya's cultural heritage in law. Chapter 5 of the 2004 Bomas Draft Constitution, in Article 25, affirmed the importance of culture as the foundation of the nation,¹⁵ a provision noticeably absent from the 1963 Independence Constitution. The Bomas Draft highlighted the role of the State in protecting and preserving the cultural heritage of Kenya, including 'cultural, historical, religious, sacred, archaeological and other significant sites and artefacts'.¹⁶ Article 26 of the Bomas Draft established the National Commission on Culture, assigning it various functions and duties.¹⁷

Of great interest, however, was Article 26 (2)(d), which dictated the Commission's role in securing the return of 'historically and culturally' important relics, documents, archaeological finds and other expatriated material for the enrichment of Kenyan museums.¹⁸ Article 26 (3) further directed Parliament to enact legislation to give effect to the above.¹⁹ The Bomas Draft was never adopted. The following 'Wako' Draft of 2005 echoed its predecessor's sentiments on culture and the establishment of the Commission but erased most of its responsibilities, including that of securing the return of cultural property.²⁰ Neither of these drafts culminated in a new constitutional era for Kenya.

¹⁰ Africa Intelligence, 'Kenyatta's final drive to recover his nation's cultural heritage', 26 August 2022 –<KENYA : Kenyatta's final drive to recover his nation's cultural heritage> on 9 January 2023.

¹¹ Africa Intelligence, 'Kenyatta's final drive to recover his nation's cultural heritage', 26 August 2022 –<KENYA : Kenyatta's final drive to recover his nation's cultural heritage> on 9 January 2023.

¹² Temudo A, 'Current challenges for African cultural heritage: A case study of Guinea-Bissau' *MIDAS Cultural Policies and Museums*, 2021, 2 –<Current challenges for African cultural heritage: A case study of Guinea-Bissau> on 10 March 2025.

¹³ Adjovi S, 'Colonial crimes: Cultural property should be returned unconditionally' JusticeInfo.Net, 1 October 2021 –<Colonial crimes: Cultural property should be returned unconditionally> on 10 March 2025.

¹⁴ Africa Intelligence, 'Kenyatta's final drive to recover his nation's cultural heritage', 26 August 2022 –<KENYA : Kenyatta's final drive to recover his nation's cultural heritage> on 9 January 2023.

¹⁵ Article 25, *The Draft Constitution of Kenya* (2004).

¹⁶ Article 25 (2)(a), *The Draft Constitution of Kenya* (2004).

¹⁷ Article 26, *The Draft Constitution of Kenya* (2004).

¹⁸ Article 26 (2)(d), *The Draft Constitution of Kenya* (2004).

¹⁹ Article 26(3), *The Draft Constitution of Kenya* (2004).

²⁰ Article 27, *The Proposed New Constitution of Kenya* (2005).

The incumbent Constitution encapsulates provisions on culture in Article 11.²¹ It envisions the same attitude towards culture as the foundation of the nation, warranting State recognition, promotion and protection.²² However, it does not directly establish a National Commission on Culture, nor does it express anything about securing the return of cultural property.²³ In addition to Article 11, national legislation has been passed relating to cultural heritage. The National Museums and Heritage Act 2006 establishes the National Museums of Kenya (NMK) and its functions.²⁴ The Act highlights that the NMK shall serve as repositories of cultural, human, technological and scientific interest, elucidating that they shall protect and transmit the cultural and natural heritage of Kenya.²⁵ However, the Act makes no mention of matters dealing with restitution. Moreover, The Heritage and Museums Bill 2023 only addresses the return of illegally exported cultural objects, with no mention of items removed from the country under historical conditions like colonialism.²⁶

The National Policy on Culture and Heritage reiterates the government's duty in protecting and promoting culture and cultural diversity amongst all Kenyans regardless of ethnic background.²⁷ The policy further references the importance of tangible²⁸ and intangible²⁹ cultural heritage, narrating the government's role in preserving both for present and future generations.³⁰ Cultural objects are substantiated within the policy, which directs that the government shall commit itself to protect, preserve and even retrieve 'important objects of tangible culture' that illustrate 'the antiquity of Kenyan cultural expression'.³¹ It is axiomatic that the policy mirrors the perceived importance of cultural artefacts, reflecting their inherent value in their ability to convey and shape meaning, values, identity, and historical context within a society.

²¹ Article 11, *Constitution of Kenya* (2010).

²² Article 11, *Constitution of Kenya* (2010).

²³ Article 11, *Constitution of Kenya* (2010).

²⁴ Section 4, *The National Museums and Heritage Act* (No. 6 of 2006).

²⁵ Section 4, *The National Museums and Heritage Act* (No. 6 of 2006).

²⁶ Section 91, *The Heritage and Museums Bill 2023* (Senate Bills No. 8).

²⁷ National Policy on Culture and Heritage, –<national policy on culture and heritage> 2, on 1 March 2023.

²⁸ National Policy on Culture and Heritage, –<national policy on culture and heritage> 13, on 1 March 2023.

²⁹ National Policy on Culture and Heritage, –<national policy on culture and heritage> 20, on 1 March 2023.

³⁰ National Policy on Culture and Heritage, –<national policy on culture and heritage> 13, on 1 March 2023.

³¹ National Policy on Culture and Heritage, –<national policy on culture and heritage> 13, on 1 March 2023.

Despite both the National Policy³² and Article 11's emphasis on culture as the heart of Kenyan civilisation, the question of temporary or permanent restitution of cultural property remains largely unanswered through the lens of national law. A catalogue of Kenyan artefacts compiled in 2022 revealed that over 32,000 cultural properties remain situated outside of the country.³³ As of this writing, the State has not initiated any proactive steps to facilitate the restitution of these objects, despite the significance of Article 11 in relation to cultural heritage. Like many other African states, Kenya possesses few legal avenues to demand the return of looted cultural artefacts stolen under the yoke of colonialism.³⁴ Indeed, discourse surrounding the nature of constitutional provisions and their intrinsic role in directing governments to take steps to correct societal maladies has increased over the years, as evidenced by countries like South Africa.³⁵ Article 11 represents a beacon within the restitution debate, one whose potential, unfortunately, continues to remain untapped and unexplored.

Article 11 is a symbol of the State's bid to immortalise the crucial seat culture occupies in both the eyes of the law and the Kenyan polity. The physical estrangement between Kenyans (regardless of ethnic background) and facets of their cultural heritage is exemplified by the over 32,000 cultural properties seated in foreign institutions.³⁶ There is no official national procedure or policy in place that dictates the avenues available to government officials, experts or communities seeking the return of cultural objects. This paper acknowledges the constitutional importance and recognition of culture as the foundation of the nation. It aims to examine whether Article 11 places an obligation on the State to make more proactive efforts in composing a national policy focused on securing the return of cultural property stolen or obtained during colonialism. It argues that the provisions of Article 11, as laid out in the Constitution together with its historical contextual backdrop, compel the State to create and endorse a national policy aimed at the restitution of cultural heritage pillaged under colonial rule.

This section has introduced the study. The next will detail the conceptual framework under which this paper bases its main arguments. Section III

³² National Policy on Culture and Heritage, –<national policy on culture and heritage> 1, on 9 January 2023.

³³ Africa Intelligence, 'Kenyatta's final drive to recover his nation's cultural heritage', 26 August 2022 –<KENYA : Kenyatta's final drive to recover his nation's cultural heritage> on 9 January 2023.

³⁴ Oluoch F, 'Will stolen African artefacts ever find their way back home?' *The East African*, 14 January 2021 –<Will stolen African artefacts ever find their way back home?> on 9 January 2023.

³⁵ *Government of the Republic of South Africa and Others v Grootboom and Others* (2000), Constitutional Court of South Africa.

³⁶ International Inventories Programme, –<<https://www.inventoriesprogramme.org/about-iiip>> on 1st March 2023.

will discuss culture and cultural heritage as decreed by Article 11 of the Constitution of Kenya. It shall examine the nature of cultural heritage, detailing its transformation and impact on matters of law in international and Kenyan contexts. Section IV will illustrate the aspect of cultural property, an area of law that has various understandings concerning its definition and significance such as cultural nationalism and cultural internationalism. It shall consider Kenya's own approach to cultural property, its uniqueness and the shortfalls of this current stance in relation to restitution. Section V discusses an interpretation of Article 11 and rationalises how cultural property may find its way back to Kenyan soil through the implementation of a national policy and the usefulness of such an action to the country. Sections VI and VII will conclude on the entire paper and offer recommendations.

II. Cultural Property as Unselfish National Heritage

This concept will be utilised in this paper as the basis of how cultural heritage and its restitution should be viewed in relation to the Kenyan situation. It is evident from the preceding sections that the importance of culture transcends mere sentimentality: it finds itself within our nation's Grundnorm, solidifying the State's duty in its protection, promotion and preservation.³⁷ As such, the restitution of cultural heritage, while viewed through the lens of cultural nationalism, is a vital step towards the continued posterity of culture in Kenya. Before analysing this further, we must introduce the concept of cultural nationalism and its status as 'unselfish' within this study.

Cultural nationalism portrays cultural property and similar heritage as forming part of a specific national heritage, avowing that these objects exhibit nationalistic characteristics regardless of their current location or owner.³⁸ The general idea of cultural property as forming a segment of the corpus of a particular national heritage implies that nation states have a 'special interest' in cultural property.³⁹ Objects harbour national identity no matter their physical locality, whether stationed within their source nation or elsewhere.⁴⁰ Such a conception advocates more for the restitution and retention of cultural property

³⁷ Article 11, *Constitution of Kenya* (2010).

³⁸ Merryman J, 'Two ways of thinking about cultural property' 80(4) *The American Journal of International Law*, 1986, 832.

³⁹ Merryman J, 'Two ways of thinking about cultural property', 832.

⁴⁰ Merryman J, 'Two ways of thinking about cultural property', 832.

within its country of origin.⁴¹ Therefore, this idealisation of cultural heritage postulates that it belongs to a specific people,⁴² an ideal that differs from those who propound cultural heritage, especially cultural property, to be the property of ‘all humankind’.⁴³

International instruments have adopted a nationalistic approach in dealing with aspects of cultural heritage as evidenced by the 1970 Convention.⁴⁴ Though focused on the restitution of property acquired through illicit means after the period of 1970, the Convention voices its acknowledgement of cultural property as a fundamental element forming civilisation and national culture, averring that a property’s true value may only be appreciated ‘in relation to the fullest possible information regarding its origin, history and traditional setting’.⁴⁵

As romantic as the above postulations appear, this author admits they are not without justified criticism. In its most traditional form, cultural nationalism suffers from a risk of being determined as selfishly exclusionary. A side effect of its motives is, of course, hoarding.⁴⁶ John Henry Merryman discusses that hoarding entails the retention of cultural property ‘for no discernible domestic purpose’, other than states merely asserting their right to keep a particular object based on its national character.⁴⁷ He proffers that oftentimes, objects find themselves housed in source nation museums aplenty, that their only purpose is to remain stored and uncatalogued with no chance of being publicly displayed.⁴⁸ Most source nations are part of the ‘Third World’ and there have been reservations as to whether these countries, including Kenya, are up for the task of properly tending to and preserving these cultural objects.⁴⁹ The implication here is that source nations, developing nations in particular, originate and possess vast cultural wealth along with a bumbling ineptitude to care for their *own* cultural properties. Such prejudices have been openly criticised for

⁴¹ Slijivc A, ‘Why do you think it’s yours - an exposition of the jurisprudence underlying the debate between cultural nationalism and cultural internationalism’ 31(3) *George Washington Journal of International Law and Economics*, 1997, 400.

⁴² Merryman J, ‘Two ways of thinking about cultural property’, 831.

⁴³ Watkins J, ‘Cultural Nationalists, Internationalists, and Intra-nationalists: who’s right and whose right?’ 12(1) *International Journal of Cultural Property*, 2005, 78.

⁴⁴ UNESCO, –<About the 1970 Convention - Illicit Trafficking> on 4 March 2023.

⁴⁵ Preamble, *Convention On the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, 1970, UNTS 11806.

⁴⁶ Merryman J, ‘Two ways of thinking about cultural property’, 847.

⁴⁷ Merryman J, ‘Two ways of thinking about cultural property’, 847.

⁴⁸ Merryman J, ‘Two ways of thinking about cultural property’, 847.

⁴⁹ Mwaura G, ‘Government lethargy since independence abetting cultural colonialism’ *Ukombozi Review*, March 18 2021 –<Government lethargy since independence abetting cultural colonialism - Ukombozi Review> on 4 March 2023.

perpetuating ‘colonial stereotypes’ regarding the capacity of former colonies in catering to the enhancement of their own cultural wealth.⁵⁰

However, this author submits that restitution under cultural nationalism is not so simply classified, that its purpose has matured past mere retention schemes and possessiveness. Various scholars have acknowledged this. Thomas Laely highlights the growing popularity of the term ‘restitution’, going so far as to label it as a ‘buzzword’.⁵¹ He breaks away from purely cultural nationalistic sentiments, asserting that restitution symbolises more than simply the return of objects, if anything, it can be considered the beginning of a process⁵² of collaboration between states, museums and other key actors within the debate. The role of museums as mere guardians of cultural heritage has evolved past the institution’s original purpose.⁵³ As museums engage in restitution discussions, the loss of an object transforms the resulting deprivation to opportunity: returns of objects manifest as a ‘potential gain of new relationships’,⁵⁴ foreseeing collaboration between States and other cultural actors at sharing and disseminating knowledge whilst also maintaining its original cultural context.

Felwine Sarr and Bénédicte Savoy describe restitution, aside from its legal implications, as an action of restoration and reparation, one that acknowledges a past wrongdoing.⁵⁵ It is therefore important to gauge the context surrounding the removal of these items. Across Africa, the European acquisition of cultural heritage was ‘violent’.⁵⁶ Artefacts were ‘curiosities’ and their cultural meaning and significance to various communities was frequently misinterpreted by the West.⁵⁷ Items have commonly been mislabelled and displayed with museums ignoring the

⁵⁰ Mwaura G, ‘Government lethargy since independence abetting cultural colonialism’ *Ukombozi Review*, March 7 2021 –<Government lethargy since independence abetting cultural colonialism - Ukombozi Review> on 4 March 2023.

⁵¹ Laely T, ‘Restitution and beyond in contemporary museum work: Re-imagining a paradigm of knowledge production and partnership’ 7(1) *Contemporary Journal of African Studies*, 2020, 17.

⁵² Laely T, ‘Restitution and beyond in contemporary museum work: Re-imagining a paradigm of knowledge production and partnership’, 17.

⁵³ Laely T, ‘Restitution and beyond in contemporary museum work: Re-imagining a paradigm of knowledge production and partnership’, 17.

⁵⁴ Laely T, ‘Restitution and beyond in contemporary museum work: Re-imagining a paradigm of knowledge production and partnership’, 17.

⁵⁵ Sarr F and Savoy B, *The restitution of African cultural heritage. Toward a new relational ethics*, Paris Le Seuil, 2018, 29.

⁵⁶ Sarr F *et al*, *The restitution of African cultural heritage. Toward a new relational ethics*, Paris Le Seuil, 2018, 11.

⁵⁷ Brown K, ‘Artists and Scholars From Europe and Africa Are Collaborating to Help Kenya Reclaim Its Art From Foreign Museums’ *Artnet News*, March 18 2021 –<Artists and Scholars From Europe and Africa Are Collaborating to Help Kenya Reclaim Its Art From Foreign Museums> on 4 March 2023.

cultural sanctity of numerous objects like the *Ngadji* drum stored in the British Museum and the *Ndoome* shield housed in the Weltkulturen Museum.⁵⁸ The *Ngadji* drum is sacrosanct among the Pokomo, serving as the root of sovereign power and communal life, an instrument of supreme authority that has ‘dismissively’ been listed as ‘drum’ in the British Museum’s Archives.⁵⁹ Moreover, the *Ndoome* shield has narrowly been categorised as a weapon despite having significant cultural ritualistic purpose in the circumcision ceremonies of the Agikuyu.⁶⁰ Such dilution is detrimental to the preservation of cultural heritage, as communities remain detached from crucial parts of their histories.

Viewing cultural nationalism in this respect as ‘unselfish’ speaks to the fact that cultural property, once returned, can serve additional purposes aside from standing as records of historical activity. Note that restitution can only be unselfish if it has an objective; one that is not limited to mere property rights but also the proliferation of knowledge and knowledge building on both national and international grounds. Therefore, it cannot be denied that restitution, under cultural nationalism, reaches beyond its superficial functions of simply return and keep. If anything, its objectives have ripened to account for contemporary growth and dialogue on culture, history, law and power dynamics within the same. In doing so, it has acknowledged the need to correct historical injustices, particularly in the context of colonialism and Western hegemony. In this view, cultural heritage is an asset, one that may be wielded in a manner that advocates for its preservation, protection and promotion, whilst also validating the past and present emotional connection it has to the people who espouse it. Thus, this concept will be useful in assessing Article 11’s declarations on cultural heritage and the State’s responsibility in promoting, preserving and protecting the same as the foundation of the nation.

⁵⁸ Mwaura G, ‘Government lethargy since independence abetting cultural colonialism’ Ukombozi Review, March 18 2021 –<Government lethargy since independence abetting cultural colonialism - Ukombozi Review> on 4 March 2023.

⁵⁹ Mwaura G, ‘Government lethargy since independence abetting cultural colonialism’ Ukombozi Review, March 18 2021 –<Government lethargy since independence abetting cultural colonialism - Ukombozi Review> on 4 March 2023.

⁶⁰ Mwaura G, ‘Government lethargy since independence abetting cultural colonialism’ Ukombozi Review, March 18 2021 –<Government lethargy since independence abetting cultural colonialism - Ukombozi Review> on 4 March 2023.

III. The Cultural Heritage Narrative: From Historical Phenomenon to Dynamic Process

The Constitution of Kenya extends its directives relating to culture and heritage beyond the confines of Article 11. For example, the Preamble makes note of the country's cultural diversity⁶¹ and the Bill of Rights echoes each person's right to participate in cultural life.⁶² However, Article 11 is unique: it stands as the root, the foundation upon which these prescriptions are built. Its principles are woven into various provisions, thus inferring the importance of cultural appreciation and preservation within the fabric of Kenyan society. Article 11 has the potential to shape and guide discourse within the realm of cultural heritage law and policy. It is thus necessary to explore the essence of cultural heritage, tracing its evolution as a purely historical issue, to one influential enough to affect ethical, legal and societal dimensions.

i. A decoding of cultural heritage

As classified in the Cambridge Dictionary, 'heritage' is defined as traditions, languages or structures imbued within a society's culture, originating in the past but maintaining their historical significance for present purposes.⁶³ Though characterised as a 'nebulous' concept, the consensus among scholars is that cultural heritage typically involves the act of 'inheriting' something from the past.⁶⁴ For a more nuanced understanding, one must resort to the concept's dissection, tracing its development from classical memory, to lived experience.

To be clear, heritage is not a modern concept. Laurajane Smith asserts that heritage discourse can trace its birth to 19th Century Europe, with major historical events like the Age of Enlightenment, colonial expansion and emerging narratives of race and identity influencing how we view it.⁶⁵ This indicates that cultural heritage was a way to draw lines, to serve as a tool in the construction of individual and group identities. Indeed, colonialism witnessed the use of heritage in fostering an 'us and them' mindset: various former colonial masters would treat non-Western cultural heritage with curiosity,⁶⁶ mostly in a negative light,

⁶¹ Preamble, *Constitution of Kenya* (2010).

⁶² Article 44, *Constitution of Kenya* (2010).

⁶³ – <HERITAGE | English meaning - Cambridge Dictionary> on 4 January 2024.

⁶⁴ Matthes E, 'The ethics of cultural heritage' *Stanford Encyclopedia of Philosophy*, 12 July 2018 – <The Ethics of Cultural Heritage (Stanford Encyclopedia of Philosophy)> on 4 January 2024.

⁶⁵ Smith L, *Uses of heritage*, 1 ed, Routledge, New York, 2006, 17.

⁶⁶ Batt F, 'The repatriation of African heritage: shutting the door on the imperialist narrative' 5(1) *African Human Rights Yearbook*, 2021, 331.

owing to perceptions of Africa being an archive of primitive human culture.⁶⁷ Where museums displayed European artefacts as an ode to European excellence and advancement, African artefacts were exhibited as a demonstration of the continent's 'primordially'.⁶⁸ Thus, the origins of cultural heritage discourse bear the imprint of heavily Eurocentric ideals, the latter of which have had dire consequences on the preservation and management of heritage.

ii. *The evolution of cultural heritage*

Cultural heritage discourse has changed significantly over the years, with this metamorphosis attributed to various factors like historical events, societal changes and even growth in academic thought. In today's world, our perceptions of history are in a state of constant revision,⁶⁹ with cultural heritage providing an avenue through which the human experience may be reevaluated. Its own evolution is a testament to this. To begin, our attention must shift to what is called the 'Authorised Heritage Discourse' (AHD). It is imperative to study AHD because it stands as the origin of how we perceive cultural heritage, how we value it and even how we manage it. This is what Smith terms as the 'hegemonic' view of heritage.⁷⁰ This prevailing understanding encompasses an almost sacred appreciation for the material past. Such esteem is primarily based on the aesthetic appeal attached to old, grand, monumental, artistically pleasing sites, places, buildings and artefacts.⁷¹

Finding its bearings in 19th Century Europe, AHD has prevailed over time, promoting and eventually entrenching Western cultural values as universally applicable.⁷² In this context, material culture needs to be cared for, protected and revered. This is necessary if heritage is to live on and be transmitted to future generations, thus nurturing a shared sense of self; an identity based on the past. It is evident that AHD makes use of certain vocabulary in relation to cultural heritage. As observed by Smith, the power of language within a particular field of discourse cannot be underestimated.⁷³ Therefore, the way people employ

⁶⁷ Deisser A and Wahome E, 'Access to heritage conservation as a human right in Kenya' in Deisser A (ed), 1st ed, *Conservation of Natural and Cultural Heritage in Kenya*, UCL Press, 2016, 21.

⁶⁸ African Studies Gallery, January – September 2012 catalogue –<Between art and artefact> on 4 January 2024.

⁶⁹ Banner J, 'All history is revisionist history' *National Endowment for the Humanities*, July 2022 – <All History is Revisionist History | The National Endowment for the Humanities> on 4 January 2024.

⁷⁰ Smith L, *Uses of heritage*, 11.

⁷¹ Smith L, *Uses of heritage*, 11.

⁷² Smith L, *Uses of heritage*, 11.

⁷³ Smith L, *Uses of heritage*, 14.

language in talking about heritage has consequences and those consequences have impacts.

Like any other academic discipline, perspectives within heritage discourse have experienced paradigm shifts over the years. Dawson Munjeri underscores that ‘authenticity’ in the realm of cultural heritage has been reassessed.⁷⁴ This change in attitude stems from an acknowledgement among various stakeholders that traditional definitions of heritage, as exemplified above, are based primarily on physical attributes, shirking qualities of tradition, technique, societal values and spiritual aspects.⁷⁵ Heritage thus becomes a relic of the past, a passive bystander possessing diminished utility in the modern world, meant to be observed through a primarily ‘tourist gaze’.⁷⁶ Hence, the realisation that the predominant narrative falls short in encompassing the full spectrum of cultural heritage: it cannot simply be hinged on aesthetic allure.

This is where intangible cultural heritage comes in. EH Matthes characterises it as a step away from officially endorsed heritage: it pertains to the ‘grassroots’ approaches employed by individuals as they engage with their connection to the past.⁷⁷ This includes facets of heritage that exist outside the boundaries of the authorised discourse such as festivals or practices.⁷⁸ These, along with the aforementioned features of tradition, technique, societal values and spiritual aspects, form the essential elements of intangible heritage. Kearney states that intangible heritage, as we perceive it today, finds its bearings in earlier manifestations of folklore and non-physical heritage.⁷⁹ Therefore, intangible cultural heritage is almost a perfect antonym to the authorised narrative, being mainly defined by its incorporeality.⁸⁰ It has also been contemplated as a tool, a mechanism through which official heritage may be interpreted by specific individuals.⁸¹

Despite their obvious differences, recent scholarship suggests that the two categories of heritage need not be construed as segregated entities. Rather

⁷⁴ Munjeri D, ‘Tangible and Intangible Heritage: from difference to convergence’ 56(1-2) *Museum International*, 2004, 13.

⁷⁵ Munjeri D, ‘Tangible and Intangible Heritage: from difference to convergence’, 16.

⁷⁶ Smith L, *Uses of Heritage*, 52.

⁷⁷ Matthes E, ‘Who owns up to the past? Heritage and historical injustice’ 4(1) *Journal of the American Philosophical Association*, 2018, 6.

⁷⁸ Matthes E, ‘Who owns up to the past? Heritage and historical injustice’, 6.

⁷⁹ Kearney A, ‘Intangible cultural heritage: global awareness and local interest’ in Akagawa N (eds) *Intangible Heritage*, 1 ed, Routledge, New York, 2008, 210.

⁸⁰ Kearney A, ‘Intangible cultural heritage: global awareness and local interest’, 211.

⁸¹ Matthes E, ‘Who owns up to the past? Heritage and historical injustice’, 6.

than emulating an affiliation based on divergence and incompatibility, perhaps the duo may be reconciled. Munjeri echoes that the two possess a reciprocal relationship.⁸² Not only does the inclusion of intangible dimensions of heritage inaugurate diverse subaltern perspectives, it refines the metric through which tangible heritage can be understood and appreciated. Smith asserts a more radical claim, theorising that *all* heritage is intangible, even in its physical expression.⁸³ This does not mean that one outweighs the other, it simply acknowledges that heritage includes the corporeal but exists beyond that. The very substance of cultural heritage is enshrined in both tangible *and* intangible genera.

Thus, the cultural heritage arena has broadened, accounting for a flurry of diverse perspectives like Smith's conceptualisation of heritage as a cultural process.⁸⁴ According to Barrère, this characterisation moves past perceptions of heritage being a compilation of objects and locations.⁸⁵ Instead, it arises as a cultural process of 'meaning making', a mindset,⁸⁶ what Smith terms as 'a way of knowing and seeing'.⁸⁷ By positing heritage as active and not static, Smith points to the 'work'⁸⁸ it actually performs in linking the past to the present. Smith advances that the very transmission of heritage is an act of experience, affirming its status as a living entity with the potential to bequeath established meanings yet also create new ones.⁸⁹ Aside from embodying physical remnants of times gone by, heritage exhibits a far more complex reality than previously imagined. Its *modus operandi* as a concept has morphed from antiquated material evidence to what Rodney Harrison echoes as a mirroring of the past with the present, an assimilation of memories, experiences and values that societies intentionally select to carry forward into the future.⁹⁰

iii. Cultural heritage under international and regional law

The academic development of cultural heritage studies has had a deep impact on the discipline in the late twentieth and early twenty-first centuries, influencing its form, exhibition and management.⁹¹ As such, cultural heritage

⁸² Munjeri D, 'Tangible and Intangible Heritage: from difference to convergence', 17.

⁸³ Smith L, *Uses of heritage*, 3.

⁸⁴ Löfgren O and Klekot E, 'Culture and heritage' 42(2) *Ethnologie Française*, 2012, 392.

⁸⁵ Barrère C, 'Cultural heritages: From official to informal' 7(2) *City, Culture and Society*, 2016, 6.

⁸⁶ Barrère C, 'Cultural heritages: From official to informal', 6.

⁸⁷ Smith L, *Uses of heritage*, 54.

⁸⁸ Smith L, *Uses of heritage*, 44.

⁸⁹ Smith L, *Uses of heritage*, 47- 48.

⁹⁰ Harrison R, *Heritage: critical approaches*, 1 ed, Routledge, New York, 2013, 4.

⁹¹ Harrison R, *Heritage: critical approaches*, 9.

has not escaped the attention of the law. In numerous instances, the legal forum has vindicated the merits of heritage, that is; its historical, artistic, scientific, and cultural value to mankind. This paper has already introduced two key legal instruments geared at the protection of cultural heritage: the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property.

It is interesting to note that the law has responded in kind to the different phases of the heritage discourse. The emergence of the post-colonial state marked a significant turn within cultural heritage discussions. It would seem that heritage was expected to play a vital role in the shaping of national identities in post-colonial states.⁹² This is why many infant nations placed a special emphasis on culture and heritage as a matter of pride when it came to their post-colonial legal documents. The Organisation of African Unity, a predecessor to the African Union, promulgated the Cultural Charter for Africa in 1976, of which Kenya is a signatory. The Charter's Preamble recognises the detrimental effects of colonialism on African heritage including depersonalisation, falsified narratives, the degradation of African values and the loss of native languages.⁹³ Not only does the Charter condemn the colonial machine's sully of African culture, one of its main objectives stands as 'the rehabilitation, restoration, preservation and promotion of the African cultural heritage'.⁹⁴ Moreover, Article 27 directs governments to adopt national laws and inter-African regulations that govern the protection of cultural property in peacetime and in the event of war.⁹⁵ The attempted resuscitation of African cultural heritage culminates further in Article 28, which directs States to take steps in ensuring cultural assets, which have been removed from Africa, are returned.⁹⁶

iv. The Kenyan legal sphere on heritage

The previous sections have outlined the context of cultural heritage and its significance on historical, social and legal fronts. Considering this, Article 11 emerges as an important provision within Kenya's legal framework given the nation's history as a former colony and the diverse character of the Kenyan polity. It is clear that cultural heritage occupies a crucial seat within the Kenyan

⁹² Harrison R and Lotte H, 'Heritage, colonialism and postcolonialism' in Harrison R (ed) , 1 ed, *Understanding the politics of heritage*, Manchester University Press, Manchester, 2010, 237

⁹³ Preamble, *Cultural Charter For Africa*, 1976.

⁹⁴ Article 1(b), *Cultural Charter For Africa*, 1976.

⁹⁵ Article 27, *Cultural Charter For Africa*, 1976.

⁹⁶ Article 28, *Cultural Charter For Africa*, 1976.

experience. It may also be observed that the evolution of heritage discourse has impacted legal provisions concerning cultural heritage in Kenya.

Referenced above, the National Museums and Heritage Act reverberates the importance of tangible heritage as portrayed by AHD. Moreover, the inclusion of intangible elements and non-Western perspectives as part of the heritage narrative showcases attitudes prevalent within the Protection of Traditional Knowledge and Cultural Expressions Act passed in 2016.⁹⁷ This signifies a pursuit towards realising the provisions of Article 11, which harbours the promotion and protection of both tangible *and* intangible heritage.⁹⁸ In order to fully grasp Article 11's pivotal nature, one must look to the history of the Kenyan Constitution, with particular focus on its goals and aspirations as it relates to the cultural heritage of the country. Thus, this section shall attempt to trace the journey to Article 11 of the current Constitution, beginning from the observations made at the Bomas of Kenya in the mid 2000's.

As evidenced in this paper's introduction, the proposed inclusion of a constitutional provision on culture was first experimented with in the Bomas Draft. However, this is not the sole marker of intention relating to culture in the Bomas drafting process and its subsequent treatment in Articles 25, 26 and 27.⁹⁹ The preparatory documents generated from the venture provide a deeper insight into what exactly was being considered at the time in reference to culture and heritage. John Mutakha Kangu attests that such materials are valuable, especially when read alongside the historical context of Kenya.¹⁰⁰ As an extra-textual source, preparatory drafting material relays useful background information that aids in interpreting and defining the motivations behind constitutional provisions.¹⁰¹ Given this, it is important to examine the preparatory drafting sources underpinning the attempts at a new constitutional dispensation in order to understand the motivations behind the current constitutional position on culture and heritage.

a. The final report of the Constitution of Kenya Review Commission (the CKRC report)

This report summarised the mandate of the Constitution of Kenya Review Commission (CKRC) with respect to culture as well as the aims of

⁹⁷ Protection of Traditional Knowledge and Cultural Expressions Act, (2016).

⁹⁸ Article 11, *Constitution of Kenya*, (2010).

⁹⁹ *The Draft Constitution of Kenya* (2004).

¹⁰⁰ Kangu J, *Constitutional law of Kenya on devolution*, 1 ed, Strathmore University Press, Nairobi, 2015, 44.

¹⁰¹ Kangu J, *Constitutional law of Kenya on devolution*, 44.

the constitutional review process. A major objective, as narrated in the CKRC Report, was to secure provisions in the new constitution that respected the ethnic, regional diversity and communal rights of Kenyan citizens as well as the rights of people to participate in cultural activities and the expression of their identities.¹⁰² Therefore, cultural rights were considered important in the proposed new constitutional order. The CKRC Report also detailed the manner in which culture was addressed in the Independence Constitution, showcasing that the document held very few provisions directly referring to and dealing with culture.¹⁰³ In assessing some of its contents, the Report concluded that the treatment of culture under colonial and post-colonial rule reflected ingrained attitudes of the backwardness, immorality and repugnancy of African cultures.¹⁰⁴

With this purview, the CKRC Report also discussed different approaches to culture in various constitutions. It became apparent that the Independence Constitution viewed culture through a retrospective lens, treating it as something outdated and primitive unless proven otherwise.¹⁰⁵ In contrast, other constitutions viewed culture as an important aspect of national life with Uganda, South Africa, Ethiopia and Swaziland given as examples.¹⁰⁶ Finally, the Report referenced an approach that linked culture with science and technology, illustrating the State's responsibility in promoting the development of culture and scientific research, including safeguarding the natural beauties, and historical, artistic heritage of the nation.¹⁰⁷ Aside from these approaches validating the status of cultural heritage in the country and its utility in the modern world, one may also observe the evolving attitudes directed at heritage as laid out in the previous sections of this paper.

The CKRC Report had some crucial recommendations. It reverberated the people's views as expressed in the referendum's Source Book, surmising that the commentary gathered from the Kenyan polity regarding culture, was influenced by historical, present political, economic, social and cultural factors.¹⁰⁸ This is further emphasised by the Report's reference to the colonial experience and how it 'greatly demeaned' Kenya's culture and cultural heritage, imposing legal, social and economic norms that percolated the lives of Kenyans, severing them from their roots and making them feel as though their cultures were 'retrogressive,

¹⁰² Constitution of Kenya Review Commission, *Final Report*, 2005, 9.

¹⁰³ Constitution of Kenya Review Commission, *Final Report*, 2005, 95.

¹⁰⁴ Constitution of Kenya Review Commission, *Final Report*, 2005, 96.

¹⁰⁵ Constitution of Kenya Review Commission, *Final Report*, 2005, 96.

¹⁰⁶ Constitution of Kenya Review Commission, *Final Report*, 2005, 96.

¹⁰⁷ Constitution of Kenya Review Commission, *Final Report*, 2005, 96.

¹⁰⁸ Constitution of Kenya Review Commission, *Final Report*, 2005, 97.

backward and incapable of being incorporated in the modern society'.¹⁰⁹ Taking the above into account, the CKRC made a number of recommendations, beginning with the fact that the new constitution required a chapter on culture, one that would recognise history and heritage as well as its transmission to future generations.¹¹⁰ The Commission went further and outlined what would constitute cultural heritage including monuments, artefacts, designs, architectural works and inscriptions among other things.¹¹¹

b. The final report of the Committee of Experts on Constitutional Review (CoE Report)

Though the CKRC Report stands as an important manuscript, it is crucial to note that it is not the immediate preparatory document of the incumbent Constitution. That honour belongs to the CoE Report. Like its predecessor, the CoE Report intended to address questions of culture in the proposed constitution, chronicling the Parliamentary Select Committee's (PSC) view that Article 14, (as it then was in the Wako Draft), be deleted entirely, with the PSC arguing that 'culture need not be entrenched in the Constitution'.¹¹² However, the CoE argued that because culture had been contemplated and even situated within previous constitutional drafts, it had to be retained.¹¹³ Moreover, the CoE opined that a constitutional provision on culture would focus more on the creation of a framework that supported intellectual property rights, sciences and the arts.¹¹⁴ This was buttressed further by the Committee's discussion on the appropriation of indigenous knowledge by foreign companies.¹¹⁵

v. *The implications for Article 11*

There is a stark difference between the sentiments expressed in the CKRC Report and the CoE Report. While both reaffirm the value culture holds within the constitutional environment, they do not mirror each other. In fact, the former demonstrates considerably more detail in relation to culture, history and heritage as a whole. The constitutional climate at Bomas encompassed a desire to acknowledge, celebrate, preserve, promote and restore the country's cultural

¹⁰⁹ Constitution of Kenya Review Commission, *Final Report*, 2005, 98-99.

¹¹⁰ Constitution of Kenya Review Commission, *Final Report*, 2005, 99.

¹¹¹ Constitution of Kenya Review Commission, *Final Report*, 2005, 99.

¹¹² Committee of Experts on Constitutional Review, *Final Report*, 2010, 105.

¹¹³ Committee of Experts on Constitutional Review, *Final Report*, 2010, 105.

¹¹⁴ Committee of Experts on Constitutional Review, *Final Report*, 2010, 105.

¹¹⁵ Committee of Experts on Constitutional Review, *Final Report*, 2010, 106.

heritage. We cannot ignore that Article 11 as the resulting provision on culture, explicates many of the sentiments communicated during the first referendum, although it is not as detailed as the Bomas Draft. Still, a constitution, albeit a thorough piece of documentation of a country's legal norms and values, may not lay out everything 'about the system of government it seeks to constitute'.¹¹⁶ The implication here is simple: one cannot draw comprehensive conclusions about the constitutional law of a specific state solely through reference to the constitutional instrument.¹¹⁷ Yash Pal Ghai observes that the Bomas Draft 'did not disappear', echoing that it was the basis for the CoE's Report as well.¹¹⁸ This is why preparatory documents are important when it comes to interpreting specific provisions.

The CoE Report is an essential preparatory document, there is no question about this. However, in reference to culture, it pales in comparison to the CKRC Report, especially when taking into consideration the comprehensive historical context housed within the latter. Extratextual context may be inferred by political, economic, social and cultural themes. As observed by Kangu, constitutional documents are not birthed in isolation: they are enacted and expected to operate within the specific context of a society.¹¹⁹ The CoE Report and Article 11 may make no precise mention of restitution, but this does not mean its relevance pertaining to its achievement is diminished, especially bearing in mind Article 11's origins as a constitutional provision. Article 11 operates as a sanctuary for Kenyan cultural heritage. It serves as a reminder of the country's labyrinthine history under colonial and post-colonial rule, as well as the State's commitment towards restoring the nation's cultural roots towards a transformative society founded on Kenyan values.

IV. Cultural Property as an Avenue Towards the Restoration of Kenyan Cultural Heritage

Restitution claims primarily concern cultural property, which is by its nature, an integral piece of cultural heritage. Indeed, in considering the safeguarding of the latter, cultural property is a major focus, particularly its protection and preservation. Discussions surrounding cultural property have permeated heritage

¹¹⁶ Mbondenyi M and Ambani J, *The new constitutional law of Kenya: Principles, government and human rights*, 1 ed, LawAfrica Publishing (K) Ltd, Nairobi, 2012, 13.

¹¹⁷ Mbondenyi M *et al*, *The new constitutional law of Kenya: Principles, government and human rights*, 13.

¹¹⁸ Ghai Y, 'Why the Bomas Draft is the best constitution we never had', Daily Nation, 25 August 2020 –<Why the Bomas draft is the best constitution we never had | Nation> on 13 March 2025.

¹¹⁹ Kangu J, *Constitutional law of Kenya on devolution*, 48.

discourse for decades, with these exchanges highlighting distinct approaches on how such property is viewed, valued and treated, especially with respect to restitution claims. More often than not, these conversations mimic the evolution of thought within heritage discourse. Therefore, one cannot complete an analysis of cultural heritage without noting the importance of cultural property.

i. Cultural property as worthy preservation

A plethora of cultural property definitions have been put forward over the years. Merryman classifies cultural property as various works of art and objects, all of which emit some form of archaeological, ethnological and historical interest.¹²⁰ Most definitions echo these attributes. The International Institute for the Unification of Private Law Convention on Stolen or Illegally Exported Cultural Objects allocates cultural property in a similar manner, terming it as objects of archaeological, prehistoric, historic, literary, artistic or scientific importance.¹²¹ Therefore, the connection these items share with cultural heritage is apparent, with vocabulary like ‘interest’ and ‘importance’ hinting at their intrinsic value: because they are valuable, they are worthy of being preserved, protected and transmitted. This separates it from conventional property.

The heritage discourse has influenced the manner in which we perceive cultural property. In the past, its scope was limited to tangible elements but now, intangible and intellectual variants may find themselves situated under its mantle.¹²² Furthermore, the development of cultural heritage as a discipline has divulged the public interest associated with cultural property. There are various underlying reasons as to why legal frameworks and policies protect cultural property. Merryman points to the expressive value of cultural objects, stating that they embody different convictions like morality¹²³ and memory.¹²⁴ Morality is obviously true for religious objects;¹²⁵ indeed, artefacts like the *Ngadji* drum of the Pokomo¹²⁶ and the *Vigango* statues of the Mijikenda¹²⁷ bear

¹²⁰ Merryman J, ‘The retention of cultural property’, 21 *U.C. Davis Law Review* 3, 1988, 47.

¹²¹ Article 2, *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects*, 24 June 1995.

¹²² Prott L and O’Keefe P, ‘Cultural heritage or cultural property?’ 1(2) *International Journal of Cultural Property*, 1992, 312.

¹²³ Merryman J, ‘The public interest in cultural property’, 77(2) *California Law Review*, 1989, 346-347.

¹²⁴ Merryman J, ‘The public interest in cultural property’, 347.

¹²⁵ Merryman J, ‘The public interest in cultural property’, 347

¹²⁶ Msingi Afrika Team ‘The Ngadji – The Pokomo Sacred Drum’ Msingi Afrika Magazine, 1 May 2020 – <The Ngadji – The Pokomo Sacred Drum> on 10 January 2024.

¹²⁷ Ernie Wolfe Gallery, ‘The History of Vigango | Commemorative Sculptures of the Mijikenda Peoples of Kenya’ –<What are Kigango & Vigango | The History of Mijikenda Commemorative Ancestral Sculpture Art in Kenya> on 10 January 2024. .

deep moral and religious significance to their respective communities. In terms of memory, cultural property evinces the direct representation of a culture's memory through both physical and symbolic means: special value is placed on hand-made objects in a society increasingly characterised by mass production and consumption.¹²⁸

Recalling the discussion on the utility of heritage, it is worth mentioning that although composed majorly of antiquities, cultural property is not viewed as wholly inutile. It embodies and preserves information,¹²⁹ aiding in the conservation of a group's cultural heritage: it is a base from which progress in cultural achievement becomes possible.¹³⁰ Accordingly, cultural property provides the necessary historical and cultural context that allows societies to progress, develop and build upon their cultural heritage. In Kenya, traditional knowledge occupies a crucial seat in the journey towards sustainable development and innovation,¹³¹ further proving the utility of cultural property.

ii. The cultural property dichotomy

This paper introduced one-half of the duality inherent to cultural property discourse: cultural nationalism. It shall now engage in a discussion that includes its fraternal counterpart; cultural internationalism. The two began as postulations, mere theories pioneered by John Henry Merryman in the late 1980s. They were eventually built upon, infiltrating almost every dialogue centred on cultural property and its restitution. Though the two may emulate common goals: protection, promotion and preservation, they inevitably diverge in how those objectives may be realised.

Cultural internationalism, as Merryman expounds, is evident in the provisions housed within the 1954 Hague Convention, which takes the view that cultural property forms the sinews of a common human culture, irrespective of the object's origin or current locality,¹³² thereby indicating its status as part of a universal world heritage. Cultural nationalism however, embodies the outlook of the 1970 Convention, that cultural property forms part of a specific national heritage, with objects displaying nationalistic characteristics regardless of their

¹²⁸ Merryman J, 'The public interest in cultural property', 347.

¹²⁹ Merryman J, 'The public interest in cultural property', 353

¹³⁰ Merryman J, 'The public interest in cultural property', 354.

¹³¹ Kariuki F, 'Harnessing traditional knowledge holders' institutions in realising sustainable development goals in Kenya' 6(1) *Journal of CMSD*, 2021, 2.

¹³² Merryman J, 'Two ways of thinking about cultural property', 832.

current location or owner,¹³³ thereby legitimising ‘demands for the repatriation of cultural property’.¹³⁴

Merryman analysed the dichotomy in action through an assessment of the Elgin Marbles, stolen Greek statues that have been displayed in the British Museum for over a century. Greece has formally asked for their return on multiple occasions, however, the British Museum has not relinquished its hold over the sculptures.¹³⁵ For many cultural nationalists, source origin qualifies as a persuasive enough argument to sanction restitution. At this stage, one can easily anticipate what a nationalist would say regarding the Elgin Marbles: they should be restored to Greece because they are of Greek origin and hold vast cultural significance to the Greek polity.¹³⁶ After all, it is automatically ‘natural’ and ‘reasonable’ for an object to exist within the borders of where it first originated.¹³⁷ It would be strange, nigh ‘anomalous’ if said object was exported to a foreign location.¹³⁸ The emotive traits of cultural property rear their heads here, making it apparent as to why the restitution argument generates much support.

An internationalist, like Merryman, would view this disposition with considerable wariness. He declares that in thinking about the Elgin Marbles, or cultural property in general, arguments based on cultural nationalism are not persuasive enough to trigger their return. This is because it expresses the seductive appeal of sentiment and mysticism as opposed to reason,¹³⁹ the latter of which is paramount if an artefact is to be preserved effectively. The implication here is that the allocation and disposition of cultural property is a global concern, one that overrides the nationalistic interests of specific countries. Merryman deciphers three main considerations relevant to cultural internationalism: preservation, integrity and distribution. For example, he insists that above all; cultural property should be preserved and insulated from any kind of damage or destruction.¹⁴⁰ Cultural nationalism has often been accused of needlessly hoarding cultural objects, not in the interest of their preservation or protection, but simply to assert one’s right to keep the item based on its origin. Retention

¹³³ Merryman J, ‘Two ways of thinking about cultural property’, 832.

¹³⁴ Merryman J, ‘Two ways of thinking about cultural property’, 832.

¹³⁵ Guzman G and Gordon A, ‘Why the U.K.-Greece dispute over the Elgin Marbles Is heating up’ Time Magazine 29 November 2023 – <Why the U.K.-Greece Dispute Over the Elgin Marbles Is Heating Up> on 10 January 2024.

¹³⁶ Merryman J, ‘Thinking about the Elgin Marbles’ 83 *Michigan Law Review* 8, 1985, 1911.

¹³⁷ Merryman J, ‘The retention of cultural property’, 489

¹³⁸ Merryman J, ‘The retention of cultural property’, 489.

¹³⁹ Merryman J, ‘Thinking about the Elgin Marbles’, 1916.

¹⁴⁰ Merryman J, ‘Thinking about the Elgin Marbles’, 1917.

schemes do not always effectively protect cultural objects, with hoarding serving as a form of ‘destructive retention’ and ‘covetous neglect’, working against values of preservation and access.¹⁴¹ When it comes to the Elgin Marbles, Merryman believes the British Museum has cared for the statues thus far, keeping them guarded and well-maintained,¹⁴² hence, satisfying the requirement that they be preserved and protected.

iii. A criticism and coalescence of the binary framework

The question of whether Merryman’s detailed but binary framework has stood the test of time must be answered. In responding to the above, the short answer is no. Complaints have been raised as to the dichotomy’s utility in the current global landscape. Although it has been influential in forming a base for how cultural property is understood, various developments have led to a reworking of its fundamental principles. In particular, scholars have introduced the idea of a fusion, a convergence of cultural nationalism and cultural internationalism to refine the metric through which we view cultural property. This change in perception has been attributed to a range of factors.

For Lucas Lixinski, Merryman’s approaches have become outdated.¹⁴³ He avers that such an embargo for a system deeply concerned with the protection of cultural heritage actually endangers it.¹⁴⁴ He advocates for a system of law that encourages the participation of an additional actor: communities themselves, thereby recognising that cultural property does not simply only belong to ‘states and national projects’ but to the people whose heritage is espoused within it.¹⁴⁵ When it comes to identity, heritage may be viewed as rising above mere national narratives.¹⁴⁶ In this context, members of different ethnic, cultural or social groups, within a given polity, may use heritage to define their own individual sense of identity.¹⁴⁷ Societies are often a blend of ethnic, cultural and regional groups; it would be irrational to claim that all nations are culturally homogenous.¹⁴⁸ Therefore, while heritage can construct a national identity, it can also *maintain* identity at subnational levels.

¹⁴¹ Merryman J, ‘The retention of cultural property’, 507.

¹⁴² Merryman J, ‘Thinking about the Elgin Marbles’, 1917.

¹⁴³ Lixinski L, ‘A third way of thinking about cultural property’, 564.

¹⁴⁴ Lixinski L, ‘A third way of thinking about cultural property’, 565.

¹⁴⁵ Lixinski L, ‘A third way of thinking about cultural property’, 565.

¹⁴⁶ Smith L, *Uses of Heritage*, 44.

¹⁴⁷ Smith L, *Uses of Heritage*, 45.

¹⁴⁸ Smith L, *Uses of Heritage*, 45.

It would seem that for Lixinski, the dichotomy has to evolve in a manner that is inclusive, community-centred, sensitive and responsive to the voices directly impacted by cultural property governance in order to realise its primary objectives.¹⁴⁹ In particular, Lixinski avers that the traditional dichotomy maintains hierarchies and sustains colonial patterns, especially within the realm of international cultural property law.¹⁵⁰ The dichotomy commands that when it comes to cultural property, the best interest of the object must be held paramount, even at the expense of uprooting it from its original cultural context.¹⁵¹

Merryman himself admitted to how such a mindset may reflect colonial standards, especially considering how developing nations ‘are often the suppliers of cultural property’.¹⁵² Note that even though Merryman acknowledged this over two decades ago, the cultural property disparity between First and Third World nations remains stark, as exemplified by the over 32,000 artefacts situated outside of Kenya.¹⁵³ Along with the *Ngadji* drum, it has been estimated that the British Museum alone houses 2000 Kenyan cultural properties in the form of traditional weapons, human remains, fossils and jewellery.¹⁵⁴ In prioritising cultural internationalism as more viable than nationalism, there is a danger of promoting the one-way flow of cultural resources. In other words, cultural property will move from less powerful nations to wealthier ones based on this premise. What results is ‘cultural imperialism’ rather than internationalism.¹⁵⁵

Marina Papa-Sokal believes Merryman’s dichotomy is ‘misguided’.¹⁵⁶ In her opinion, cultural heritage policy has always embodied a ‘mixture’ of cultural nationalism and internationalism.¹⁵⁷ Despite the cultural internationalist undertones of the 1954 Hague Convention, particularly in its Preamble,¹⁵⁸ Article 4 illustrates the value and respect ascribed to cultural property situated

¹⁴⁹ Lixinski L, ‘A third way of thinking about cultural property’, 611.

¹⁵⁰ Lixinski L, ‘A third way of thinking about cultural property’, 576.

¹⁵¹ Lixinski L, ‘A third way of thinking about cultural property’, 570

¹⁵² Lixinski L, ‘A third way of thinking about cultural property’, 570.

¹⁵³ Kamoga J, ‘Africa urged to unite in push for return of stolen artefacts’ *The East African*, 17 November 2021 – < Africa urged to unite in push for return of stolen artefacts - The East African > on 10 January 2024.

¹⁵⁴ Bloomfield S, ‘Kenya tells museums: give our history back’ *The Independent*, 3 August 2008 – <Kenya tells museums: give our history back | The Independent > on 14 January 2024.

¹⁵⁵ Papa-Sokal M, ‘Beyond the Nationalist-Internationalist Polarisation in the protection of archaeological heritage: a response to Professor Merryman’ 14(3) *Art Antiquity and Law*, 2009, 272.

¹⁵⁶ Papa-Sokal M, ‘Beyond the Nationalist-Internationalist Polarisation in the protection of archaeological heritage: a response to Professor Merryman’, 245.

¹⁵⁷ Papa-Sokal M, ‘Beyond the Nationalist-Internationalist Polarisation in the protection of archaeological heritage: a response to Professor Merryman’, 245.

¹⁵⁸ Preamble, *Convention For the Protection of Cultural Property In the Event of Armed Conflict*, 1954.

within nation states.¹⁵⁹ The 1970 Convention also exhibits a mixture of principles despite its nationalist bearings as referenced in previous sections of this paper: the Preamble dictates the exchange of cultural property for the benefit of *all* mankind.¹⁶⁰ Based on this, Papa-Sokal observes that it is impossible to separate the two, deeming it necessary to find a balance between nationalist and internationalist concerns when it comes to cultural heritage policy. A starting point would be to make the obvious admittance that cultural heritage, of any kind, belongs to its source culture *and* all of humanity.¹⁶¹

Pauno Soirila hints at the impossibility of resolution when it comes to cultural property disputes based on the dichotomy.¹⁶² For him, Merryman's conceptualisations fail to account for the diversity of arguments and motivations present within the restitution debate.¹⁶³ The conversation, as a result, has become stunted.¹⁶⁴ This has warranted the introduction of external tools and factors in an effort to innovate new solutions.¹⁶⁵ Human rights and restitution for the transgressions of colonialism have been considered, especially in conflicts over human remains and indigenous items.¹⁶⁶ The idea here is that human rights approaches can be restorative, a way for correcting past injustices. Thus, in order to realise goals of preservation, protection and promotion, it is imperative to move past simple property dimensions and contemplate the range of factors entwined with heritage discourse.

iv. Cultural rights are human rights

Lotte Hughes and Mark Lamont are of the opinion that since the promulgation of the 2010 Constitution, culture plays a more prominent role than ever before when it comes to public and political life.¹⁶⁷ In their eyes, constitutional change is an avenue that provides a lens through which one can observe how culture is used by the state, civil society and other actors like county

¹⁵⁹ Article 4, *Convention For the Protection of Cultural Property In the Event of Armed Conflict*, 1954.

¹⁶⁰ Preamble, *Convention On the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, 1970.

¹⁶¹ Papa-Sokal M, 'Beyond the Nationalist-Internationalist Polarisation in the protection of archaeological heritage: a response to Professor Merryman', 248.

¹⁶² Soirila P, 'Indeterminacy in the cultural property restitution debate' 28(1) *International Journal of Cultural Policy*, 2022, 11.

¹⁶³ Soirila P, 'Indeterminacy in the cultural property restitution debate', 2.

¹⁶⁴ Soirila P, 'Indeterminacy in the cultural property restitution debate', 11.

¹⁶⁵ Soirila P, 'Indeterminacy in the cultural property restitution debate', 11.

¹⁶⁶ Soirila P, 'Indeterminacy in the cultural property restitution debate', 11.

¹⁶⁷ Hughes L and Lamont M, 'Cultural rights and constitutional change' 77(2) *African Studies*, 2018, 160.

or federal governments.¹⁶⁸ This alludes to what was covered in previous sections of this paper: the manner in which heritage is perceived and the value it holds to post-colonial states. Ana Sljivic states that the cultural property debate transcends mere questions of ownership and protection of cultural property. Legal, ethical and practical implications must also be considered.¹⁶⁹ She recognises the issue of cultural rights, especially in the case of indigenous peoples, ultimately acknowledging that the two sides of the debate must coexist in order to reach meaningful dialogue.¹⁷⁰

Cultural rights are a subset of human rights, though the former has always been viewed as less developed or inferior. Anne-Marie Deisser and Ephraim Wahome attribute this cynicism to the fact that cultural rights are often poorly understood, owing to reasons based on the complexity of concepts inherent to them like heritage and culture.¹⁷¹ Moreover, there appears to be a sentiment that they are unattainable.¹⁷² Indeed, the introduction of various categories of rights into the human rights spectrum has always been eristic. Evidently, much criticism is levelled at socioeconomic and cultural rights, particularly their enforceability.¹⁷³ When construed narrowly, rights only exist if they are enforceable. For some, justiciability is the true marker of a human right.¹⁷⁴

This line of thinking has been criticised as myopic. After all, rights may also be mainstreamed through political pressure on the executive and legislative branches of government.¹⁷⁵ Policies may be used to further their realisation as exemplified by Ghana and Nigeria, where rights are cast as directive principles of state policies.¹⁷⁶ In South Africa, these rights are constitutional obligations: ‘the state is expected to respect, protect and fulfil the right to housing, health and other elements of social, economic and cultural rights’.¹⁷⁷ Nevertheless, cultural rights have continued to grow in importance. Farida Shaheed argues that they

¹⁶⁸ Hughes L *et al*, ‘Cultural rights and constitutional change’, 160.

¹⁶⁹ Sljivic A, ‘Why do you think it’s yours - an exposition of the jurisprudence underlying the debate between cultural nationalism and cultural internationalism’, 395.

¹⁷⁰ Sljivic A, ‘Why do you think it’s yours - an exposition of the jurisprudence underlying the debate between cultural nationalism and cultural internationalism’, 398.

¹⁷¹ Deisser *et al*, ‘Access to heritage conservation as a human right in Kenya’, 21.

¹⁷² Deisser *et al*, ‘Access to heritage conservation as a human right in Kenya’, 21.

¹⁷³ Zeleza P, ‘The protracted transition to the Second Republic in Kenya’ in Murunga G (eds), 1 ed, *Kenya: the Struggle For a New Constitutional Order*, Zed Books Ltd, London, 2014, 59.

¹⁷⁴ Zeleza P, ‘The protracted transition to the Second Republic in Kenya’, 59.

¹⁷⁵ Zeleza P, ‘The protracted transition to the Second Republic in Kenya’, 59.

¹⁷⁶ Zeleza P, ‘The protracted transition to the Second Republic in Kenya’, 60.

¹⁷⁷ Zeleza P, ‘The protracted transition to the Second Republic in Kenya’, 60.

are pivotal to the recognition and respect of human dignity.¹⁷⁸ This is because they shield individual and collective world visions whilst maintaining freedoms related to identity.¹⁷⁹ In light of this, culture, and by extension cultural heritage, is now viewed as inseparable from a people's humanity, dignity and self-realisation, forming the core of their existence as individuals.¹⁸⁰

v. *Kenya's current approach and the continued absence of cultural property*

a. Cultural nationalism in Kenya's Constitution

Kenya's stance on cultural heritage thus far professes a strong alliance with cultural nationalism. Culture itself is heralded as the 'foundation', the substratum upon which the Kenyan nation may trace its origins.¹⁸¹ Moreover, the State is expected to promote and secure all forms of cultural expression and other cultural heritage, recognising indigenous technologies in the development of the nation.¹⁸² This exemplifies many of the characteristics typical of the cultural nationalist spectrum. However, this paper posits that Kenya's approach is unique, almost idiosyncratic, going beyond the traditional visage of the dichotomy.

The Constitution's recognition of cultural heritage as part of the national project presents it as crucial to the domestic agenda and not just a principle relative to international law. Similarly, it views culture in a positive and dynamic light, displaying its utility to the country for present purposes as evidenced by Article 11's directives on indigenous technologies. Traditional cultural nationalism speaks to the connection between cultural heritage and cultural identity. It is evident that Kenya's stance makes a similar distinction, however, certain nuances become apparent upon further reflection.

The recognition of cultural heritage in the Constitution displays it as not merely a marker of identity, but a factor crucial to the very being of the Kenyan nation. One can trace the Kenyan polity's interest in cultural properties back to the first referendum, where the people conveyed their beliefs that individuals, of diverse cultural backgrounds, had the right to compensation or restitution

¹⁷⁸ *Report of the independent expert in the field of cultural rights, Ms. Farida Shabed, 22 March 2010, UN Doc A/HRC/14/36, (hereafter UN IE 2010 Report), para. 3, 3-4.*

¹⁷⁹ *Report of the independent expert in the field of cultural rights, Ms. Farida Shabed, 22 March 2010, UN Doc A/HRC/14/36, (hereafter UN IE 2010 Report), para. 3, 3-4.*

¹⁸⁰ Hughes L *et al*, 'Cultural rights and constitutional change', 163.

¹⁸¹ Article 11, *The Constitution of Kenya* (2010).

¹⁸² Article 11, *The Constitution of Kenya* (2010).

for properties taken without their free will or consent, or in violation of their laws and traditions.¹⁸³ Furthermore, they communicated their belief that special efforts be made to return property appropriated by colonial forces.¹⁸⁴

Hughes and Lamont surmise that the 2010 Constitution represented a vital catharsis, going so far as to label the document a symbolic ‘rebirth’ for Kenya.¹⁸⁵ This is unsurprising given the country’s turbulent past, plagued first by colonialism followed by ethnic tension and political despotism.¹⁸⁶ When viewed in this manner, it is clear that Article 11 is a crucial element of this renaissance, intended to serve the Constitution’s transformative goals by repairing colonial *and* post-colonial injustices. As a victim of colonial oppression, Kenya is no stranger to depersonalisation. While the previous constitution did little to soothe this, its successor has made considerable efforts to create a legal reality that celebrates *all* forms of Kenyan cultural heritage, regardless of ethnic background. Likewise, the first referendum intended any future constitutional era to envision a ‘united Kenya’, a step in the direction towards a paragon of inclusivity based on community membership, where citizens could freely practice their own traditions and cultures in the hopes of ‘working towards a common goal of justice, equality and inclusion’.¹⁸⁷

In light of the above, we may infer certain conditions regarding cultural nationalism and Kenya’s current approach towards cultural heritage. Traditional cultural nationalism has been criticised for promoting heritage as something to be stored, to be hoarded selfishly on the merit of national origin. While these appraisals are not unfounded, they are not an accurate description of cultural nationalism’s goals in the current global climate. This author avers that on the contrary, Kenya’s cultural nationalism gives credence to cultural heritage’s national character but also recognises its potential in enriching the nation, maintaining identities, furthering national goals and healing past traumas. In this respect, the restitution of cultural heritage is ‘unselfish’ given that its goals, as argued in this essay, stretch far beyond simply asserting the narcissistic right to retrieve and keep a cultural object because of its source origin.

¹⁸³ Constitution of Kenya Review Commission, *Final Report*, 2005, 98.

¹⁸⁴ Constitution of Kenya Review Commission, *Final Report*, 2005, 98.

¹⁸⁵ Hughes L *et al*, ‘Cultural rights and constitutional change’, 160.

¹⁸⁶ Hughes L *et al*, ‘Cultural rights and constitutional change’, 160.

¹⁸⁷ Ghai Y, ‘Why the Bomas Draft is the best constitution we never had’, *Daily Nation*, 25 August 2020 –<Why the Bomas draft is the best constitution we never had | Nation> on 13 March 2025.

b. Kenya's current efforts are dilatory

Up to this point, current efforts are no more than a zephyr, a breeze without substantial impact. The quest towards retrieving stolen cultural property has primarily relied on verbal rather than official appeals for its return. There is no formal mechanism in place to assist communities seeking the restoration of their heritage. The ratification of the 1970 Convention has nonetheless hinted at the government's admittance towards the value of cultural property.¹⁸⁸ Still, the Convention is prospective¹⁸⁹ and not retrospective: restitution of cultural property taken under historical conditions, specifically colonialism, remains unaddressed. Most recently, the Culture Bill 2024 was introduced, intending to give effect to Article 11 of the Constitution.¹⁹⁰ Although the Bill takes a step forward in defining what cultural property entails,¹⁹¹ it only discusses restitution in terms of property stolen after the Bill comes into effect.

The National Policy on Culture and Heritage rehashes the government's obligations towards the promotion of culture in Kenya. Along with Article 11, cultural heritage frameworks rely heavily on the policy, which serves as a common blueprint intended to guide and coordinate the promotion of culture within the country.¹⁹² As evidenced by its executive summary, the Policy echoes the relevance of tangible and intangible heritage as well as the institutional functions of the Kenya Cultural Centre, the NMK and more in performing the 'culture function'.¹⁹³ The policy gives credence to cultural objects, directing that the government shall commit itself to their protection, preservation and retrieval as they illustrate 'the antiquity of Kenyan cultural expression'.¹⁹⁴ This indicates that the policy was developed as a reaction to the detrimental effects of colonialism on Kenyan heritage. As bold as the mission of the policy is, the majority of it is

¹⁸⁸ UNESCO, 18 April 2024—<Kenya ratifies the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property> on 14 March 2025.

¹⁸⁹ Ministry of Foreign Affairs, *Memorandum on the accession to the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, 2022, 4-5.

¹⁹⁰ Section 3, *The Culture Bill 2024* (National Assembly Bills No. 12).

¹⁹¹ Section 2, *The Culture Bill 2024* (National Assembly Bills No. 12).

¹⁹² Pepela F and Barsogei J, 'Promoting cultural heritage preservation in Kenya' The Kenya Institute for Public Policy Research and Analysis, 7 May 2024—<<https://kippra.or.ke/promoting-cultural-heritage-preservation-in-kenya/>> on 14 March 2025.

¹⁹³ National Policy on Culture and Heritage, —<national policy on culture and heritage> 13, on 16 January 2024.

¹⁹⁴ National Policy on Culture and Heritage, —<national policy on culture and heritage> 13, on 16 January 2024.

based on a collection of policy statements and definitions.¹⁹⁵ Hitherto, measures directly targeting the return of property usurped by the colonial project have not been considered under the policy.

In 2023, during King Charles III's historic state visit to Kenya, the Nandi renewed their calls for the return of well renowned Chief Koitalel arap Samoei's skull.¹⁹⁶ This is not the first time they have made such an appeal: on record, we can trace their requests back to almost ten years.¹⁹⁷ Off the record, one can only assume. The 1970 Convention would not aid in resolving the Nandi's dilemma, nor would the Heritage and Museum's Bill, nor would the Culture Bill 2024 or the current National Policy on Culture and Heritage.

V. A Decryption of Article 11 of the Constitution of Kenya

i. The entelechy of cultural rights

This paper has underscored the growing prominence of social, economic and cultural rights as milestones for transformative constitutions. Article 11 is one such benchmark, being an unusual but vital clause within the Constitution of Kenya 2010. In terming the provision as 'unusual', this means that its existence in traditional constitutional law is uncanny. But the incumbent Constitution is far from a traditional constitutional document. It is autochthonous, sired as a response to Kenya's tempestuous history across its colonial and post-colonial periods. The previous phases of this paper brought out the use of heritage in demonising the African experience and creating ethnic tension in a country thrumming with cultural diversity. The initiation of socioeconomic and cultural rights into the new constitutional era was viewed as a remedy, a path to progressively alleviate the effects of historical injustices. Against this backdrop, one can understand why the introduction of social, economic and cultural rights are essential for some constitutions, highlighting their implications within the broader context of human rights.

Cultural rights have frequently taken a backseat when it comes to human rights conversations. For a long time, civil, political and now socioeconomic rights have tended to overshadow their less popular cousin. Nevertheless, one

¹⁹⁵ Kyule M 'Assessment of legislation on cultural heritage resources in Kenya' in Deisser A (eds) *Conservation of Natural and Cultural Heritage in Kenya*, 1 ed, UCL Press, 2016, 32.

¹⁹⁶ BBC, 'King Charles III visit sparks fresh call for skull return' Capital News, 27 October 2023 –<King Charles III Kenya visit sparks fresh call for skull return » Capital News> on 15 January 2024.

¹⁹⁷ Too T, 'Elders want Koitalel's skull returned from UK' The Standard 2023, –<Elders want Koitalel's skull returned from UK - The Standard> on 15 January 2024.

may observe that as debates around cultural heritage and restitution picked up speed, so too did the cultural rights forum grow. Concerns have been raised as to their practicality, more specifically, whether they are capable of being realised. This is because, like their socioeconomic counterparts, their implementation requires high levels of proactivity on the part of the state. Via this deduction, we may draw a startling similarity between socioeconomic and cultural rights: both require progressive realisation and sizeable investments on the part of the government. The enjoyment of socioeconomic rights has been termed essential for individuals to lead dignified lives. As evidenced by the arguments of Shaheed and various others, cultural rights are also instrumental in upholding similar connotations relative to the human being.

Through this lens, they are two sides of the same coin. As observed by Cass Sunstein, the incorporation of socioeconomic rights within a constitution offers an avenue through which the concerns of marginalised voices may be heard.¹⁹⁸ It cannot be ignored that in the political sphere, the needs of certain groups, especially those with limited resources and political power, may be overlooked. By including socioeconomic rights in a constitution, they demand legal attention, placing obligations on the government to tackle issues that might otherwise be shirked in the political arena. One may draw parallels with the introduction of Article 11 to the 2010 Constitution, bearing in mind the notable absence of culture and heritage in the Independence Constitution. Article 11's entire existence and purpose aims to affirm the importance of culture, whilst simultaneously mandating the State to take reasonable measures in protecting it. If Article 11 as a constitutional provision did not exist, perhaps culture and heritage would not command as much attention as they do today, dissolving into the background with diminished value and potential.

ii. Deciphering Article 11 under purposive interpretation

A purposive interpretation derives meaning from a provision bearing in mind its intended objectives and what it aspires to achieve.¹⁹⁹ In doing so, it upholds the constitution's aspirational values. The Constitution itself recognises fundamental tenets of the purposive approach as evidenced by Article 259, which mandates that the Constitution be interpreted in a way that promotes its purposes, values

¹⁹⁸ Sunstein C, 'Social and economic rights? Lessons from South Africa' John M. Olin Program in Law and Economics, Coase-Sandor Working Paper Series in Law and Economics, Paper Number 124, 2001, 13, –<Social and Economic Rights? Lessons from South Africa> on 14 February 2024.

¹⁹⁹ Kangu J, *Constitutional law of Kenya on devolution*, 28.

and principles, advances human rights and permits the development of law.²⁰⁰ Therefore, questions of context become all the more relevant when grappling with a purposive interpretation as it often extends beyond the provision's letter, looking to its purpose rather than literal meaning. This reinforces the belief that the Constitution is a living document, embodied with a soul and consciousness,²⁰¹ the very expression of the people's will and psyche.

a. Context

At a textual level, we have already established what Article 11 dictates. It establishes culture as the foundation of the nation, providing an imperative that assigns the State positive obligations to promote all forms of cultural expression and heritage.²⁰² However, a literal reading is not enough to glean the clause's true purpose. To do this, we must look beyond Article 11 itself, making use of what Kangu calls intra and extratextual contexts. Both have historical, present and contemporary dimensions.²⁰³ Context encompasses a range of factors like historical background, economic, social and cultural considerations, foreign jurisprudence and scholarly literature.²⁰⁴

Intratextual context involves extracting meaning from a provision while weighing it in tandem with the constitutional document as a whole. Articles may be reflected upon alongside other provisions, thus constraining the interpretation to the document itself and no further.²⁰⁵ Extratextual context refers to when the interpretation process makes use of material external to the Constitution itself. This includes preparatory material, international instruments and even scholarly work.²⁰⁶ An essential component of the extratextual context, especially in terms of constitutional interpretation, takes shape in the form of preparatory drafting material. It is considered valuable because it provides insight into the atmosphere at the time of the Constitution's writing.²⁰⁷ When viewed adjacent to historical context, preparatory drafts may provide clarity on the motivations behind a particular provision.

²⁰⁰ Article 259, *Constitution of Kenya* (2010).

²⁰¹ *Rev Dr Timothy Njoya and 6 others v The Attorney General and 3 others* (2004) eKLR.

²⁰² Article 11, *Constitution of Kenya* (2010).

²⁰³ Kangu J, *Constitutional law of Kenya on devolution*, 32.

²⁰⁴ Kangu J, *Constitutional law of Kenya on devolution*, 31.

²⁰⁵ Kangu J, *Constitutional law of Kenya on devolution*, 32.

²⁰⁶ Kangu J, *Constitutional law of Kenya on devolution*, 42.

²⁰⁷ Kangu J, *Constitutional law of Kenya on devolution*, 43.

b. Applying context to Article 11

Now that we have an understanding of the contexts that can be applied under a purposive interpretation, it is crucial to inquire what this means for Article 11. More precisely, what may we deduce about the restitution of cultural heritage while taking into account the wider context surrounding Article 11? From an intratextual reading, it is clear that culture plays a predominant theme within the Constitution. The Preamble sets the stage and Article 11 reaffirms the place culture holds within the Constitution and the nation as a whole. Numerous provisions are riddled with mentions of culture such as Article 44 (language and culture), Article 56 (minorities and marginalised groups have the right to develop their cultural values) and Article 63 (community land shall vest in communities identified on the basis of culture).²⁰⁸ Through this, we can affirm Article 11's declaration that culture is indeed the foundation of the nation. When it comes to cultural heritage, the document is not as explicit. Article 11 simply dictates that the State has a role to promote all forms of 'cultural expression' and 'other cultural heritage'.²⁰⁹ As a result of this ambiguity, we must look past the Constitution and contemplate the use of extratextual context.

Kangu makes the astute observation that the constitution-making process in Kenya spawned a number of drafting materials.²¹⁰ The initiative took over ten years and was 'quite consultative'.²¹¹ Kenyans were asked for their input,²¹² to decide what form of government they wished to aspire to. As a result, a number of major preparatory documents materialised: the Bomas Draft, the Final Report of the CKRC and the CoE Report. Matters relating to culture formed an integral part of the constitution-making process. The Bomas Draft maintained culture as the foundation of the nation and established a National Commission on Culture, commanding that it was charged with securing 'the return of historically and culturally significant relics, archaeological finds, documents and other expatriated material culture for the enrichment of Kenyan museums'.²¹³ This clearly points towards an intent to retrieve cultural property.

The Final Report of the CKRC offers more detail into what people thought about the inclusion of a constitutional provision on culture. The people expressed

²⁰⁸ Article 44, Article 56 and Article 63, *Constitution of Kenya* (2010).

²⁰⁹ Article 11, *Constitution of Kenya* (2010).

²¹⁰ Kangu J, *Constitutional law of Kenya on devolution*, 44.

²¹¹ Kangu J, *Constitutional law of Kenya on devolution*, 44.

²¹² Ghai Y, 'Why the Bomas Draft is the best constitution we never had', *Daily Nation*, 25 August 2020 –<Why the Bomas draft is the best constitution we never had | Nation> on 17 January 2024.

²¹³ Article 26, *The Bomas Draft* (2004).

their desire to organise, practice and manifest their culture, identity and heritage. Kenyans also professed the want of the right to protect and develop their cultures, including artefacts, ceremonies, traditions and customs.²¹⁴ Of particular interest is the people's declaration that all citizens 'have a right to the compensation and or restitution for cultural properties taken without their free will and consent'.²¹⁵ The Report elaborates on this further, citing the public's view that 'special efforts should be made to return property appropriated by colonial forces'.²¹⁶ One cannot ignore the historical context behind such a request. The use of the terms 'colonial', 'culture' and 'artefacts', highlights the public's sentiments in wanting to correct the historical erosion of their heritage. Clearly, they wished to partake in cultural life but also reclaim their ancestry, to enjoy it for present purposes and transmit it to future generations. The Report builds upon this, acknowledging the role of context (historical, present political, economic, social and cultural factors) in influencing the views put forward by the Kenyan public in relation to culture.²¹⁷ In light of this, the Report reiterated the demeaning effect of colonialism on Kenya's cultural heritage, further recommending that the proposed new constitution house a provision on culture to alleviate cultural degradation.²¹⁸ Although the Bomas Draft was never implemented, it cannot be denied that it impacted constitution-making and by extension, the 2010 Constitution of Kenya. Article 11 is a prime example of this, housing provisions that relate to many of the views expressed in the CKRC Report.

One may recall the discussions on cultural nationalism and its selfish persona in the eyes of the cultural internationalist. However, this author claims that this stubbornness in regarding its perceived vanity fails to account for the wider context surrounding cultural property and by extension, cultural heritage. Kenyans do not simply call for the return of their heritage as a matter of just asserting their right to keep them. The historical context accompanying the Bomas drafting process clearly triggered the framers to shape the Constitution in a particular manner. Kangu highlights that a purposive and contextual interpretation focuses on negative history, aiming to redress past injustices and prevent their repetition.²¹⁹ It offers a separation from the past, seeking transformative change, thereby breaking away from pejorative historical practices.

²¹⁴ Constitution of Kenya Review Commission, *Final Report*, 2005, 97.

²¹⁵ Constitution of Kenya Review Commission, *Final Report*, 2005, 98.

²¹⁶ Constitution of Kenya Review Commission, *Final Report*, 2005, 98.

²¹⁷ Constitution of Kenya Review Commission, *Final Report*, 2005, 98.

²¹⁸ Constitution of Kenya Review Commission, *Final Report*, 2005, 99.

²¹⁹ Kangu J, *Constitutional law of Kenya on devolution*, 49.

The restitution of cultural heritage could aid with this: taking control of the heritage narrative and revamping history in Kenya. In linking historical context to the present day, Article 11 mandates that the State promote all forms of cultural expression and other cultural heritage. In construing ‘other cultural heritage’, one may discern that cultural property falls under here. When viewed through a contemporary context, much of Kenya’s material cultural heritage lies outside of its borders, despite the Bomas Draft and Final Report advocating for its return in order to enrich the nation. While the CoE Report did not express many of the same concerns, this does not mean it assigned less weight to the views expressed in the first referendum. If anything, it validated the need for a constitutional provision on culture, acknowledging that it was important to the polity and the original framers. This paper simply places greater value on the CKRC Report and the Bomas Draft as interpretive tools for *cultural heritage* with regards to Article 11. This is because they house the base, the initial vision of what cultural heritage protection looked like amid deliberations over a proposed new constitutional epoch for Kenya.

In looking at Article 11’s aspirational aspects, one should keep in mind that the Constitution, as a supreme document, must be construed in a living manner, one that is responsive to the continuing time-frame within which it operates.²²⁰ In other words it serves the present *and* the future, addressing new challenges that may arise. Kangu notes Article 259(3) is explicit in saying that the Constitution be contextually interpreted in a dynamic manner as a living instrument,²²¹ constantly speaking to evolving societal needs. The restitution of cultural property may be looked upon as one such need, especially with regards to culture and cultural heritage in Kenya. It is evident that constitutional provisions become more lucid when viewed against the backdrop of circumstances leading up to them. Therefore, if the 2010 Constitution is a cathartic document, it only makes sense to construe its provisions on culture with reference to the historical effects of colonialism and the subsequent erosion of cultural heritage in the nation. Thus, the restoration and preservation of cultural heritage upholds several of the values and principles enshrined within the Constitution such as patriotism, inclusiveness and of course, human rights.

iii. The practical realities of restitution

This paper has recounted the ever-evolving discourse surrounding restitution. It has conveyed its volatile and almost incendiary nature as echoed in this paper’s

²²⁰ Kangu J, *Constitutional law of Kenya on devolution*, 51.

²²¹ Kangu J, *Constitutional law of Kenya on devolution*, 51.

introduction, highlighting the influence of various fields like diplomacy, politics and international hierarchies on the subject. By virtue of this, it is clear that restitution in itself is a monumental challenge due to its complex character. At this stage, a reader would no doubt have several questions in reference to the practicality of restitution. For example, if the Elgin Marbles are any indication, many restitution claims are an uphill battle and the chances of success, this author concedes, remain slim. The reader would be wise to be cautious, however, difficulty does not equate to impossibility. In recent years, several African nations have regained their cultural properties from European institutions as evidenced by France's restitution of 26 artefacts to Benin in 2021.²²² During a state visit to Tanzania in 2023, President Steinmeier indicated that Germany was ready to cooperate in relation to the restitution of cultural properties,²²³ a small step in the right direction.

Aside from diplomatic struggles, internal problems feed into the difficulty surrounding restitution. A glaring example concerns the return of over two dozen *vigango* (effigies that represent the Mijikenda's ancestors)²²⁴ to Kenya, a feat that was 'complicated' by law, Kenyan internal affairs and bureaucracy.²²⁵ In 2014, the California State University, Fullerton returned the statues in good faith. They were shipped to Kenya where they proceeded to languish at the Jomo Kenyatta International Airport (JKIA) for years.²²⁶ Why? When representatives of the NMK arrived to collect the shipment, they were informed that the statues would only be released upon the payment of a whopping import tax of Kshs 5 million.²²⁷ This sent the message that cultural heritage could be quantified for commercial purposes, reducing its cultural value and placing an insurmountable financial wall between communities and their stolen treasures.²²⁸

The *vigango* episode underlines several key issues that make restitution efforts, particularly those without set policy guidelines, so difficult. For example,

²²² Reuters, 'France returns 26 looted artifacts and artworks to Benin' CNN, 12 November 2021—<France returns 26 looted artifacts and artworks to Benin> on 20 March 2025.

²²³ Hansrod Z, 'Germany seeks to reckon with colonial atrocities in Tanzania' Radio France International, 11 April 2023—<Germany seeks to reckon with colonial atrocities in Tanzania> on 20 March 2025.

²²⁴ Ngowa N, 'Bring back vigango to their rightful locations' Daily Nation, 5 July 2020 —Bring back vigango to their rightful locations on 18 May 2025.

²²⁵ Nevadomsky, 'The Vigango affair: the enterprise of repatriating Mijikenda memorial figures to Kenya' 51(2) *African Arts*, 2018, 58.

²²⁶ Nevadomsky, 'The Vigango affair: the enterprise of repatriating Mijikenda memorial figures to Kenya', 67.

²²⁷ Mutonga S and Jambo-Haro S, 'Offer to return 27 Vigango' Open Restitution Africa, January 2024 —<Offer to return 27 Vigango> on 20 March 2025.

²²⁸ Beja P, 'Community forced to pay tax to reclaim its stolen treasures' The Standard, 2016 —<Community forced to pay tax to reclaim its stolen treasures> on 20 March 2025.

none of the parties involved even knew that they would have to contend with the issue of import tax. Despite repeated pleadings by the Mijikenda and the NMK that the statues exhibited cultural and spiritual significance as opposed to economic value, the Kenya Revenue Authority refused to treat it as such.²²⁹ With no concrete procedure in place to account for a situation like this, the statues remained trapped at JKIA, where they eventually disappeared.²³⁰ They are since believed to have rejoined the illicit trade in cultural property.²³¹

iv. *The usefulness of public policies*

In discussing the gradual attainment of new generation rights, questions have been posed as to what exactly constitutes ‘progress’. Generally speaking, socioeconomic and cultural rights place three fundamental obligations on the state: respect, protection and fulfilment.²³² The first details the state’s negative obligations, mandating that it refrain from an individual’s enjoyment of certain rights. The second, speaks to the state’s role in preventing others from infringing on the exercise of those rights. The third signals the state’s active role in progressive realisation, nudging it to take appropriate measures towards the total realisation of socioeconomic rights. It is evident that the purpose of such a system seeks to transform various societal goals from mere velleity to reality. How exactly these goals are met differs from jurisdiction to jurisdiction. A major tool in promoting these rights however, has been the promulgation of public policies.²³³ Termed as a ‘launch pad’, policies underpin many of the practical effects of different laws and regulations.²³⁴ The nature of a policy lies with its function as a list of guidelines in the pursuit of specific aspirational outcomes.

Policies have been wielded in combating various societal maladies such as poor sanitation, healthcare, housing and education. A primary marker of their

²²⁹ Mutonga S and Jambo-Haro S, ‘Offer to return 27 Vigango’ Open Restitution Africa, January 2024 –<Offer to return 27 Vigango> on 20 March 2025.

²³⁰ Mutonga S and Jambo-Haro S, ‘Offer to return 27 Vigango’ Open Restitution Africa, January 2024 –<Offer to return 27 Vigango> on 20 March 2025.

²³¹ Mutonga S and Jambo-Haro S, ‘Offer to return 30 Vigango’ Open Restitution Africa, January 2024 –<Offer to return 30 Vigango> on 20 March 2025.

²³² *Frequently Asked Questions on Economic, Social and Cultural Rights Fact Sheet 33*, Office of the United Nations High Commissioner for Human Rights, 2008, 11 – <Frequently Asked Questions on Economic, Social and Cultural Rights> on 14 February 2024.

²³³ *Frequently Asked Questions on Economic, Social and Cultural Rights Fact Sheet 33*, Office of the United Nations High Commissioner for Human Rights, 11 –<Frequently Asked Questions on Economic, Social and Cultural Rights> on 14 February 2024.

²³⁴ Policy Making, County Governance Toolkit –<Policy Making | AHADI toolkit> on 14 February 2024.

usefulness is in their flexibility: they can adapt to emerging needs, changing priorities and evolving circumstances within a society. Moreover, policies allow for innovation and experimentation in the achievement of certain goals, ensuring that implementation occurs through reasonable means.

This paper proposes that Article 11, when interpreted purposively, speaks volumes when read alongside its intratextual and extratextual context as the Constitution's provision on culture. As a result of the purposive interpretation elucidated above, Article 11 reveals the State's positive obligation in the promotion of culture and cultural heritage. Consequently, the State has a duty to take proactive steps in facilitating the return of cultural property seized under colonial rule. In doing so, its obligations under Article 11 will be met, given the sociopolitical and historical factors relative to its conception as a constitutional provision. Pursuant to this, this paper posits that one of the best ways to achieve this particular goal is the enactment of a government policy geared towards the restitution of cultural heritage.

Though the restitution of cultural property to Kenya has been highlighted as a serious issue, little to no progress has been made towards achieving this. The existence of any government policy hinges on its ability to solve a particular problem. While the current National Policy on Culture and Heritage addresses many of the issues faced by culture in the nation, it oddly fails to account for the newly arising issue of restitution. Communities who wish for the return of objects have to make appeals with virtually no governmental support, making the process of restitution all the more difficult. Additionally, these requests are mostly ignored by European countries, a feat that is unsurprising and even expected. Government backing would obviously bolster claims to restitution and would perhaps embolden others to engage in calls for the return of cultural property. Njogu makes the correct observation that governments play a critical role in facilitating restitution owing to their international legitimacy and authority.²³⁵ Though influential, this is not enough and states must devise legal or policy mechanisms to engage in the systematic retrieval of cultural property from foreign institutions.²³⁶

vi. Considerations for the Proposed Policy

In drafting a policy of any kind, several key considerations must be accounted for. A policy focused on the restitution of cultural heritage is no

²³⁵ Njogu K, 'Reclaiming our cultural heritage', 10(1) *Jahazi*, 3.

²³⁶ Njogu K, 'Reclaiming our cultural heritage', 3.

exception. First, the policy must outline clear objectives and ensure that these aims are achievable. In order for restitution to become a reality, the policy must set realistic and practicable goals. Furthermore, the policy must establish some form of mechanism geared at tracking and monitoring the restitution claims made under it. For example, it should identify to whom the item may be returned and what will happen to the object upon return. Perhaps this role could be assigned to the National Museums of Kenya with input from various communities seeking the return of their heritage. The involvement of communities is essential towards realising goals relating to cultural diversity in the nation. For example, should the *Ngadji* drum ever be restituted to Kenya, the Pokomo have every right to provide their input on how the object may be handled, stored or preserved before and after its return. To deny them an opportunity to do so would be a gross violation of their cultural rights.

In addition to this, questions of what is to happen to the cultural property once returned must be addressed. The policy should take into consideration that the return of heritage is meant to serve a purpose: objects should not be needlessly hoarded. In reference to the above, the policy should advocate for a balanced approach, asserting that cultural property, though the product of Kenyan history, contributes to a global culture of humanity. Once the property is returned, efforts should be made to build ties with the property's former host nation. The idea here is to maintain the spirit of cooperation and diplomacy, turning their deprivation and our gain into a sustainable relationship. The policy may consider collaborative efforts with other museums, local, regional and international, in an effort to broaden the exchange of knowledge.

The policy should also take into consideration resource availability. We need to aspire towards the return of cultural property but this must be done within feasible limits. Funding will no doubt be a key issue. In drafting the policy, alternative methods towards restitution should be contemplated in the form of innovative solutions. For example, the policy could introduce the possibility of collaborative approaches with fellow East African nations. After all, the Treaty for the Establishment of the East African Community validates cultural heritage's importance and advocates for cooperation through East Africa's shared history.²³⁷ It is important to note that as of this stage, Kenya at least has the resources to at the bare minimum, draft a policy based on restitution.

The incorporation of social, economic and cultural rights within a constitutional framework may seem straightforward enough, but the real

²³⁷ Article 119, *Treaty for the Establishment of the East African Community*, 1999.

challenge lies with their implementation. This is at the core of why such rights cannot be immediately realised. Nevertheless, progressive realisation should not be conflated with inactivity, nor can this be used as an excuse to justify failures in achieving them.

VI. Conclusion

This paper does not position itself as the ultimate panacea to the restitution of cultural property to Kenya. However, it hopes to trigger a discussion, to offer a starting point from which conversations surrounding cultural heritage and restitution can lead to better and long-term solutions. This study has conducted a comprehensive examination of Article 11, cultural heritage, cultural property, socioeconomic rights and cultural rights. By proving the crucial seat heritage occupies in Kenya and the international legal order, this paper has solidified Article 11's stance as an integral constitutional provision. In referencing the country's written history under colonial and post-colonial rule, as well as the significance of the 2010 Constitution as a transformative document, the study has confirmed the State's role in protecting, promoting and preserving the nation's cultural heritage.