

FROM GLOBAL DATABASES TO GLOBAL NORMS? THE CASE OF CULTURAL PROPERTY LAW

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ABSTRACT

This Article identifies the key role that digital databases with global access can play in bridging over significant disparities between national legal systems. Such global databases can be utilized for the resolution of cross-border disputes that involve case-specific challenges of fact-finding, as well as for the interpretation of legal terms such as “good faith,” “due diligence,” or “due care.” More fundamentally, the existence of transparent, reliable, and globally accessible databases, which enable public and private actors from different jurisdictions to both register data and retrieve it, can bring legal systems closer in reconsidering the underlying normative principles that govern various legal fields that had been traditionally typified by cross-border legal differences. This Article seeks to show that the natural flow of information through global databases can have significant implications in mitigating certain ill-effects of legal disparities across national legal systems, without undermining the general power of countries to promote local goals and values.

To illustrate the potential of global databases to gradually bring closer national legal systems, or to facilitate the creation of new ‘soft law’ or ‘hard law’ cross-border norms, this Article focuses on recent developments in the national and supranational legal regimes

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concerning cultural property. Particularly, it looks at the growing influence that such global databases may have on rules and procedures concerning the restitution or return of cultural objects – such as artwork or archaeological artifacts – that have been stolen, looted, or illicitly exported across national borders. It shows how such global databases can foster a better enforcement of current legal instruments, such as the 1970 UNESCO Convention and the 1995 UNIDROIT Convention on cultural property, while creating a basis for future cross-border substantive and procedural norms.

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INTRODUCTION

In the spring of 2021, the Musée du Louvre, one of the world's most celebrated cultural institutions, launched a new open-access digital database.¹ This database features more than 480,000 objects in the museum's collections. Alongside photos and various details that may be of great interest to art historians, museum professionals, and the global public of art lovers, each entry in the database also includes details known to the museum about the object's provenance—namely, the history of ownership and possession of the object until its arrival in the museum. The extensive provenance research into the collection is an unprecedented move in French museums, and one of the most comprehensive efforts done to date by any cultural institution in the world.²

The purpose of making such data about the provenance of cultural objects publicly available and accessible via the internet is not merely one of satisfying the curiosity of those interested in historical details, or serving the traditional role of provenance research—namely, enhancing the value of a piece by emphasizing its 'career highlights,' such as when it was in the possession of historically significant persons, such as royals.³ Rather, a key role of the provenance research done by the Louvre is one of aiming to reconstruct a chronological chain of ownership and possession of the artifact in order to identify potential problems along the object's history, and accordingly, to allow parties who claim to have been dispossessed of an interest to come forward.⁴

In the context of the Louvre's collections, this latter goal applies specifically—but not solely—to two types of collections. First is the category of *Musées Nationaux Récupération* (National Museums Recovery), or "MNR."⁵ This category refers to works of art that were

¹ Collections, LOUVRE, <https://collections.louvre.fr/en/> [https://perma.cc/BK58-XERN].

² See Vincent Noce, *Louvre Probes Its Collection for Nazi and Colonial Loot in Massive Provenance Research Project*, ART NEWSPAPER (Mar. 26, 2021), <https://www.theartnewspaper.com/2021/03/26/louvre-probes-its-collection-for-nazi-and-colonial-loot-in-massive-provenance-research-project> [https://perma.cc/K7GA-8KQ8].

³ See Jacques Schumacher, *British Museums and Holocaust-Era Provenance Research*, in *MUSEUMS AND THE HOLOCAUST* 34, 35 (Ruth Redmond-Cooper ed., 2d ed. 2021).

⁴ See Noce, *supra* note 2.

⁵ National Museums Recovery, LOUVRE, <https://collections.louvre.fr/en/album/1> [https://perma.cc/RNH8-LQHE].

retrieved in Germany and brought back to France after the Second World War. Originally, this category included about 61,000 works, many of which had been stolen or looted from Jewish families. To date, more than 45,000 works have been returned to their rightful owners. Unclaimed works were sold by the French State, except for 2,143 objects placed under the legal responsibility of the Ministry of Foreign Affairs and entrusted to French national museums, mostly to the Louvre, for safekeeping.⁶ The key purpose of the provenance conducted by the Louvre about these MNR items is, therefore, to carry out research in an effort to find their rightful owners or beneficiaries. Making such data globally available and accessible thus serves the goal of promoting restitution.

A second, more dispersed category, concerns items in the collection that originate from former French or other colonies.⁷ As this Article will show, provenance research into such items and the question of their restitution to their states of origin (i.e., the former colonies that have since then become independent states) lies at the heart of current policy debates across many governments and cultural institutions.⁸

The establishment of this globally accessible digital database therefore seeks to address, at least to some extent, a key challenge that often typifies cultural property – i.e., dealing with incidents of legally or ethically controversial transfers of artifacts both within and across national borders.

This problem is particularly acute in the case of cross-border disputes that invoke past actions of stealing, looting, or illegal exports, or of past practices that are currently considered ethically problematic. In such cases, the ability to address, and to potentially redress, such past wrongs, may be formally and practically cumbersome because of various kinds of cross-border legal disparity. Such types of legal disparity may result from differences in substantive rules, such as those that deal with the respective interests of a dispossessed owner versus a subsequent *bona fide* purchaser. Cross-border varieties may also arise from a disparity in jurisdictional and procedural rules, such as time limits on submitting claims, the standing of non-state parties in such disputes, and so forth. The currently limited scope of ‘hard law’ international

⁶ The Louvre currently has 1,738 items under this category. *Id.* In addition, as of March 2021, the Louvre has checked some two-thirds of the 13,943 works it acquired between 1933 and 1945 for problematic provenance. Noce, *supra* note 2.

⁷ *Id.*

⁸ See *infra* Section III.b.iii.

instruments in addressing the various aspects of cross-border disputes means that the problem of legal disparity remains largely intact.

The key argument made in this Article is that the existence of transparent, reliable, and globally accessible databases, which enable public and private actors from different jurisdictions to both register data and retrieve it, can aid in mitigating cross-border legal disparities that may arise in various legal settings. Such databases can be utilized for the resolution of cross-border disputes that involve case-specific challenges of fact-finding, as well as for finding a common ground in the interpretation of open-ended legal terms, such as “good faith,” “due diligence,” or “due care.”

More fundamentally, such globally accessible databases can bring legal systems and public decision-makers in different countries closer in reconsidering the underlying normative principles that govern various legal fields that had been traditionally typified by cross-border legal differences. This Article will show that the natural flow of information through global databases can have significant normative implications in mitigating certain ill-effects of legal disparities across national legal systems – without requiring states to engage in full-scale harmonization of laws and while respecting certain differences that stem from country-specific value judgements.

The Article proceeds as follows. Part I concisely analyzes the various causes of legal differences among national legal systems. Alongside legal disparity that results from specific historical developments, locally distinctive cultural, social, and economic values, and so forth – legal differences can also be the result of “legal competition,” such as in the case of creating tax havens in order to attract capital and foreign investors to a certain jurisdiction. Whereas legal competition explicitly creates some types of “legal arbitrage,” in other cases the exploitation of legal arbitrage is done through ‘creative’ or sheer opportunistic behavior by sophisticated actors. In such cases, national legal systems negatively implicated by the strategic use of legal arbitrage may seek to ‘close the gaps’ and mitigate such arbitrage, even if they do not endorse the uniformity of laws.

Part II looks at the ways in which publicly accessible information, and particularly that which is available via digital databases, can go beyond mere information-sharing to impact professional standards and to foster legal innovation within a certain jurisdiction. It examines the role of such databases in the

context of registries of rights, such as recordation or registration systems in real estate registries. Because priorities to legal claims are often governed on the basis of the first-to-file or the first-to-register party in such registries, this means that the databases in these registries provide information that is time-sensitive—such that the ability to register data and retrieve it by digital means not only ensures general accessibility to the database, but may also guarantee more timely access, allowing relevant stakeholders to plan their legal actions in real time. It shows how databases in contexts such as three-dimensional registration in land can promote legal innovation.

Part III examines the case study of cultural property and analyzes how the emergence of digital databases, and particularly those that can be accessed by parties across national borders for purposes of both data-insertion and data-retrieval, can impact cross-border professional norms, and consequently, legal norms. This part looks at the evolution and current status of cross-border norms and institutions pertaining to cultural property. It studies both binding cross-border legal instruments, such as the 1970 UNESCO Convention and the 1995 UNIDROIT Convention on cultural property, and ‘soft law’ instruments, such as the code of ethics crafted by the International Council of Museums (ICOM), and the growing body of instruments and coordination mechanisms pertaining to Nazi-looted assets. It then offers a taxonomy of the ever-growing number and scope of coverage of cultural property databases, by looking at: (1) international and national databases for crime detection; (2) private databases offering services for “due diligence;” (3) theme-specific databases on Nazi-looted assets and “colonial contexts;” and (4) academic and professional databases for provenance research. Consequently, Part III identifies the effect of cultural property databases on setting professional and legal cross-border standards. It does so by looking at the role of such databases in facilitating fact-finding in specific disputes, serving as a benchmark for exercising due diligence, enabling information-sharing as a basis for crafting ethically driven norms, such as “just and fair solutions,” and promoting a general value of transparency.

I. LEGAL DISPARITY, LEGAL COMPETITION, AND LEGAL ARBITRAGE: A DYNAMIC ANALYSIS

This part concisely identifies the origins and dynamics of legal disparities among national legal systems. Such differences result

chiefly from the fact that each national system develops its own set of substantive and procedural norms over time in light of specific historical developments, distinctive cultural, social, and economic values, methodological principles, and intellectual styles – such that legal differences among nations reflect these country-specific extra-legal or meta-legal features.⁹ These processes can obviously also be impacted by past or present connections to other legal systems, such as in the case of former colonies,¹⁰ neighboring or affiliated countries,¹¹ or ‘borrowing’ from foreign legal systems in establishing or reforming a certain field of law.¹²

The effect of political, cultural, economic, or social attributes on the design of public law, and constitutional law in particular, in national legal systems, is well documented.¹³ This also means that changes to such exogenous factors – from major shifts in political institutions (whether as a result of independence, revolution, or transition of power through the regular political process), through economic crises (or, alternatively, quick growth and prosperity), and up to slower cultural changes¹⁴ – can bring about significant reforms

⁹ For an analysis of these extra-legal or meta-legal factors, which result in lingering differences among legal systems, see AMNON LEHAVI, PROPERTY LAW IN A GLOBALIZING WORLD 28-34 (2019).

¹⁰ This aspect relates also to the concept of “legal origins,” deriving to a large extent from patterns that had originated in the colonial period. See, e.g., Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, *The Economic Consequences of Legal Origins*, 46 J. ECON. LIT. 285, 285 (2008).

¹¹ This feature is manifested in some suggested typologies of “legal families,” such as Scandinavian or Slavic countries. There are, however, other connecting factors, such as religion, suggested as a binding factor among national legal systems – even if some or all of the relevant affiliated countries are not physically adjacent. See KONRAD ZWEIGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 64 (Tony Weir trans., 3d ed. 1998).

¹² This practice is also known in the literature as one of incorporating “legal transplants” in a certain legal system. See ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW 21-30 (2d ed. 1993); see also Jaakko Husa, *Developing Legal System, Legal Transplants, and Path Dependence: Reflections on the Rule of Law*, 6 CHINESE J. COMP. L. 129, 129-31 (2018) (pointing also to the difficulties associated with developing a legal system through the use of foreign models, especially because of the key role of local path-dependent, self-reinforcing mechanisms).

¹³ See, e.g., Stephen Holmes, *Constitutions and Constitutionalism*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 189, 189-91 (Michel Rosenfeld & Andrés Sajó eds., 2012) (identifying historical patterns of constitution-making as a political dialogue between elites and non-elites).

¹⁴ See Gérard Roland, *Understanding Institutional Change: Fast-Moving and Slow-Moving Institutions*, STUD. COMP. INT’L DEV., Dec. 2004, at 109, 109-11, 116-18 (2004).

in public law, including through constitutional amendments or the introduction of a new constitution altogether.¹⁵

Importantly, private law is also prone to such dynamics, such that alongside the persistence of cross-country differences in private law doctrines embedded in longstanding local features or other forms of path dependence, exogenous changes may significantly impact the re-design of private law. This was the case with the introduction of the great civil codes in Europe, mostly during the nineteenth century. For example, the French Civil Code of 1804 (Code Napoléon) reflected the ideology of the French Revolution and the 1789 Declaration of the Rights of Man and of the Citizen. It sought to create a new legal order, repeal all prior law – particularly the feudal features that had served mostly the landed aristocracy – and, accordingly, to reconceptualize the right to full-scale private ownership (as opposed to lesser legal interests that were previously dependent on the feudal hierarchy).¹⁶ The various European civil codes can therefore be seen more broadly as an act of “nation building.” This means that while these civil codes were influenced by the tradition of Roman law, and to some extent also from one another, each such code emphasized the national enterprise of re-crafting domestic private law to reflect changing political, social, and economic values.¹⁷ Similarly, over the past few decades, transitional and emerging economies engaged in a massive re-

¹⁵ For an analysis of constitutional amendments versus constitutional “replacements” (i.e., those entailing a “comprehensive or fundamental reform” to the constitution), and of the extra-legal circumstances leading to such different types of constitutional changes, see David S. Law & Ryan Whalen, *Constitutional Amendment Versus Constitutional Replacement: An Empirical Comparison*, in ROUTLEDGE HANDBOOK OF COMPARATIVE CONSTITUTIONAL CHANGE 74 (Xenophon Contiades & Alkmene Fotiadou eds., 2020); Gabriel L. Negretto, *Replacing and Amending Constitutions: The Logic of Constitutional Change in Latin America*, 46 L. & SOC. REV. 749 (2012); see also *Timeline of Constitutions*, COMPAR. CONSTS. PROJECT, <https://comparativeconstitutionsproject.org/chronology/> [<https://perma.cc/HPZ2-ASEM>] (providing country-specific data on constitutions and constitutional changes along the time horizon).

¹⁶ See Sjeff van Erp, *Ownership of Data and the Numerus Clausus of Legal Objects* 7-9 (Maastricht Eur. Priv. L. Inst., Working Paper No. 2017/6, 2017); LEHAVI, *supra* note 9, at 29-30 (depicting the reconsideration of the concept of property in the European civil codes); see also JOHN H. MERRYMAN & ROGELIO PÉREZ-PERDMOM, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEM OF EUROPE AND LATIN AMERICA* 15-17, 28-31 (3d ed. 2007).

¹⁷ See Daniela Caruso, *Private Law and State-Making in the Age of Globalization*, 39 N.Y.U. J. INT’L L. & POL. 1, 24-26 (2006); see also Gerhard Danneman & Reiner Schulze, *Introduction to GERMAN CIVIL CODE–BÜRGERLICHES GESETZBUCH (BGB)* 4-7 (Gerhard Danneman & Reiner Schulze eds., 2020).

design of various private law fields to reflect political, social, or economic changes in them.¹⁸

In addition to cross-border legal differences resulting from the diverging nature of endeavors by nation-states to construct their legal systems in light of their respective political, social, economic, and cultural features, legal disparities can also be the result of a conscious effort to engage in “legal competition” vis-à-vis other countries or jurisdictions in order to gain a certain advantage in a relevant regional or global setting. This happens frequently in the context of cross-border “tax competition,” whereby a certain national legal system designs its rules to create a “tax haven” with low tax rates, often combined with ensuring financial secrecy for clients, in order to attract investments and other forms of capital flows from foreign entities.¹⁹ Legal competition is also prevalent in the context of “charter competition,” in which national legal systems (or sub-national jurisdictions in federal systems such as the United States)²⁰ offer a set of distinctive corporate law rules aimed at incentivizing businesses to incorporate in their territory.

Whereas legal competition, as a supply-side mechanism, explicitly creates some types of “legal arbitrage” that seeks to incentivize persons and firms to take advantage of such disparities, in other cases the exploitation of legal arbitrage or “regulatory arbitrage”²¹ is done through ‘creative’ or sheer opportunistic

¹⁸ See LEHAVI, *supra* note 9, at 98-103 (surveying such changes in land law in transitional and emerging economies).

¹⁹ See Philipp Genschel & Peter Schwarz, *Tax Competition: A Literature Review*, 9 SOCIO-ECON. REV. 339, 339 (2011); see also Adam H. Rosenzweig, *Why Are There Tax Havens?*, 52 WM & MARY L. REV. 923, 923-27 (2010).

²⁰ The most notable example is probably the State of Delaware in the United States. See Lucian A. Bebchuk & Assaf Hamdani, *Vigorous Race or Leisurely Walk: Reconsidering the Competition over Corporate Charters*, 112 YALE L.J. 553, 586-89 (2002) (arguing that Delaware has secured significant—maybe even insurmountable—competitive advantages for corporate charters, such as network externalities, an elaborate body of case law, and an expert judiciary).

²¹ The term “regulatory arbitrage” consists of “those financial transactions designed specifically to reduce costs or capture profit opportunities created by different regulations or laws.” Frank Partnoy, *Financial Derivatives and the Costs of Regulatory Arbitrage*, 22 J. CORP. L. 211, 227 (1997); see also Annelise Riles, *Managing Regulatory Arbitrage: A Conflict of Laws Approach*, 47 CORNELL INT’L L.J. 63, 71 (2014) (distinguishing between two different types of regulatory arbitrage: jurisdictional arbitrage, which is a matter of “profiting from differences in the laws of different jurisdictions,” and categorical arbitrage, which involves “profiting from a legal discrepancy between the treatment of two forms of conduct that are functionally the same”).

behavior by private actors and other parties.²² In such cases, at least some of the national legal systems negatively implicated by the strategic use of legal arbitration may seek to ‘close the gaps’ or at least increase the cost of arbitration for such actors.²³ Moreover, in some cases, countries on both (or more) sides of the legal arbitration may find it mutually beneficial to coordinate their legal policies to address certain undesirable results of such legal arbitration. This could be done by a variety of means, from bilateral or multilateral agreements (such as in the case of taxation treaties) or by agreeing on conflict-of-law rules on jurisdiction and applicable laws that would govern cross-border transactions or disputes.²⁴ This means that countries need not necessarily face a binary dilemma, by which they must either harmonize their substantive legal rules or otherwise face the full consequences of legal arbitration. Countries may still maintain their distinct national legal rules to promote underlying political, social, economic, or cultural goals, while recognizing that other countries do just the same—but they may then work together to prevent certain adverse, unintended consequences of legal arbitration that are exploited by private actors and other entities.

Two examples illustrate why countries may find it mutually beneficial to address some types of legal arbitration, without undermining legal differences embedded in local values or policies.

First, in the context of bilateral investment treaties (BITs),²⁵ countries undertake to adhere to certain standards of treatment in protecting investments made by persons and firms from the other party to the treaty. BITs grant such foreign investors a direct cause of action against the host government for alleged breaches of its commitments, and typically refer the resolution of disputes to

²² See Riles, *supra* note 21, at 73-76 (exploring the potential differences between “good” and “bad” legal arbitration).

²³ See *id.* at 101-102.

²⁴ See *id.* at 89-102.

²⁵ For an analysis of the history and underlying principles of BITs, see Amnon Lehari & Amir N. Licht, *BITs and Pieces of Property*, 36 YALE J. INT’L L. 115, 118-28 (2011).

international arbitration,²⁶ rather than litigating the case in the host country's domestic courts.²⁷

BITs thus offer unique advantages to foreign investors, such as potentially limiting the host country's right to regulate vis-à-vis foreign investors, while providing the latter access to dispute-resolution fora that have proven quite amicable to investors.²⁸ This state of affairs may incentivize businesses from a certain country to exploit a legal arbitrage by registering a corporation in another country that is counterpart to a BIT with their home country, so that the essentially domestic investor would enjoy the substantive and procedural advantages of a foreign investor. The same situation could apply to an investor that essentially comes from a third country that does not have a BIT with the country that is the target of its investment – but this investor can then incorporate in a country that is a counterpart to such a BIT.²⁹ In the face of such types of legal arbitrage, investor-state arbitration tribunals are dealing with an increasing number of objections to their jurisdiction by governments who claim that the allegedly foreign investor is ultimately controlled by domestic or non-party investors.³⁰ Moreover, in negotiating new-generation BITs, many countries try to limit the definition of

²⁶ Such arbitration is done most often by the International Centre for Settlement of Investment Disputes (ICSID). See *The ICSID Caseload – Statistics*, ICSID, <https://icsid.worldbank.org/resources/publications/icsid-caseload-statistics> [<https://perma.cc/8VHX-784K>] (containing a profile of ICSID case load and profiling various aspects of these cases).

²⁷ See U.N. Conference on Trade and Development, *Investor-State Dispute Settlement Cases Pass the 1,000 Mark: Cases and Outcomes in 2019* (July 2020) <https://unctad.org/system/files/official-document/diaepcbinf2020d6.pdf> [<https://perma.cc/2RJ5-YVPJ>] (detailing the statistics of investor-state dispute settlement (ISDS) cases brought before different international arbitration tribunals between 1987 and 2019).

²⁸ Out of all ISDS decisions on the merits between 1987 and 2019, 61% of cases were decided, wholly or partly, in favor of the investor, and 39% in favor of the state. *Id.* at 5.

²⁹ See U.N. Conference on Trade and Development, *International Investment Agreements Reform Accelerator*, U.N. Doc. UNCTAD/DIAE/PCB/INF/2020/8 (Aug. 2020), https://unctad.org/system/files/official-document/diaepcbinf2020d8_en.pdf [<https://perma.cc/47TN-MVCY>] (noting that a “broad definition of ‘investor’ can result in unanticipated or unintended coverage of persons,” such that “if a treaty determines the nationality of a legal entity solely on the basis of the place of incorporation, it creates opportunities for treaty shopping or free-riding by investors not conceived to be beneficiaries”).

³⁰ U.N. Conference on Trade and Development, *Review of 2020 Investor-State Arbitration Decisions: IIA Reform Issues at a Glance* (Aug. 2022), https://unctad.org/system/files/official-document/diaepcbinf2022d5_en.pdf [<https://perma.cc/ZWM4-N2JE>].

“investor” to mitigate the potential for exploiting such a legal arbitrage, and are motivated to do so because each one of them may fall victim to such practices.³¹

Second, whereas the previous example demonstrated why countries may want to cooperate in dealing with a legal arbitrage exploited through a notional or intangible shift between jurisdictions, the problem of legal arbitrage could also be pertinent for an opportunistic or outright illicit *physical* transit across national borders. This is the case with cultural property—a legal field that will be explored in detail in Part III. In particular, many cultural artifacts, such as antiquities that originate in ‘source countries,’ such as Eastern Mediterranean countries, arrive in ‘market countries’ after being stolen, looted, or illegally excavated from archaeological sites.³² Such illicit transfers of goods across borders may be facilitated by the lack of a sufficient legal framework to guard against the smuggling of goods, lax border control, corruption, or by the use of third countries that do not prohibit trade in antiquities or export thereof, serving as transit countries, in order to “whitewash” title to the object and enable its transfer to a destination state.³³ The different countries impacted by such practices may therefore seek to mitigate these types of legal arbitrage between the various countries, even if national laws on sale and export of cultural artifacts are far from harmonized.

³¹ See U.N. Conference on Trade and Development, *supra* note 29, at 13-14 (detailing examples of recent reform-oriented formulations of the term “investor” in BITs and related instruments to exclude certain categories from treaty coverage).

³² See BIRTHE HEMEIER & MARKUS HILGERT, FED. MINISTRY OF EDUC. & RSCH., TRANSPARENCY, PROVENANCE AND CONSUMER PROTECTION FACTS AND POLICY RECOMMENDATIONS CONCERNING THE TRADE IN ANCIENT CULTURAL PROPERTY IN GERMANY 7-8 (2020) (Ger.), https://www.kulturstiftung.de/wp-content/uploads/2020/09/Illicid_report_english.pdf [<https://perma.cc/W456-XCFF>].

³³ See, e.g., NORDIC COUNCIL OF MINISTERS, ILLICIT TRADE IN CULTURAL ARTEFACTS 44-46 (2017), <https://www.norden.org/en/publication/illicit-trade-cultural-artefacts> [<https://perma.cc/6MSH-ED7E>] (identifying ‘transit countries’); Ruth Schuster, *Vast Cache of Stolen Antiquities Found in Huge Raid in Central Israel*, HAARETZ (Jan. 5, 2021), <https://www.haaretz.com/archaeology/2021-01-05/ty-article/.premium/vast-cache-of-stolen-antiquities-found-in-central-israel/0000017f-dbcc-df62-a9ff-dfdf91140000> [<https://perma.cc/6EGR-TGJG>] (explaining that because Israel is one of the few countries around the Mediterranean basin that enables traders to obtain a license to sell, then “if one has illegal antiquities and slips them into the inventory of a licensed trader, they’re effectively whitewashed; t]hen one can market them around the world under the guise of artifacts legally traded in Israel”).

II. PUBLICLY ACCESSIBLE DATABASES AS INFORMATION-PROVIDERS AND STANDARD-SETTERS

Publicly accessible databases play an increasingly important role for markets, industry professionals, and legal institutions on local, national, and supranational levels.³⁴ This is particularly so for databases in which multiple users can both insert data and retrieve it, based on the rules and procedures that govern the establishment and administration of the database. Thus, access to such databases facilitates a dynamic, interactive system that enables relevant stakeholders to simultaneously provide information to other parties and retrieve information from them.

When the database has a legally binding force—such as in the case of registries of rights in land—then the ongoing provision of information is an essential building block for the requirement of publicity that is typical of *in rem* rights,³⁵ by which stakeholders are bound by the information duly registered in the database in establishing their respective legal rights and duties. In such kind of databases, the information included in the database is not simply a service or commodity that parties can choose whether to take advantage of, but it also binds a broad array of parties in governing legal claims to the underlying assets or other objects registered in the database.³⁶

Accordingly, the digital transformation of databases plays a major role in ensuring that publicity and accessibility are practically available not only to government officials or sophisticated private actors, but also to other stakeholders and the public at large. This is particularly important in the case of registries of rights, such as recordation or registration systems in real estate registries,³⁷

³⁴ Consider, for example, the role that publicly accessible indices, such as *Doing Business*, have for both governments and market actors, in making decisions about setting up businesses in a certain jurisdiction. *Ease of Doing Business Rankings*, WORLD BANK, <https://data.worldbank.org/indicator/IC.BUS.EASE.XQ?view=map> [<https://perma.cc/8WUR-URHA>].

³⁵ See BENITO ARRUÑADA, INSTITUTIONAL FOUNDATIONS OF IMPERSONAL EXCHANGE: THEORY AND POLICY OF CONTRACTUAL REGISTRIES 52-62 (2012).

³⁶ See generally Sief van Erp, Professor, Maastricht Univ., Walter van Gerven Lecture: European and National Property Law: Osmosis or Growing Antagonism? (2006), in 6 WALTER VAN GERVEN LECTURES 14-16 (Wouter Devroe, Dimitri Droshout & Michael Faure eds., 2006) (explaining that all European legal systems of property law share two leading principles: (i) *numerus clausus*, and (ii) transparency).

³⁷ See ARRUÑADA, *supra* note 35, at 52-60 (explaining the differences between real-estate registries that are based on “recordation of deeds” — ones that merely

registries for intellectual property rights such as patents, trademarks, and industrial designs,³⁸ or registries for security interests³⁹—in which priorities to legal claims are often governed on the basis of the first-to-file or the first-to-register party.⁴⁰ This means that the databases in these registries provide information that is time-sensitive—such that the ability to register data and retrieve it by digital means not only ensures general accessibility to the database, but it may also guarantee more timely access that allows relevant stakeholders to plan their legal actions in real time. Digital access also carries consequences for other types of databases that have legally binding implications, such as companies' registers,⁴¹ cadasters,⁴² or zoning ordinances and comprehensive land-use plans.⁴³

provide sequential information about claims—and those registries based on “registration of rights,” which formally define the rights after performing a mandatory purge of claims).

³⁸ For global statistics on the number of applications and actual registration of rights recorded in various national or supranational registries for patents, trademarks, and industrial designs (as well as plant varieties and utility models), see *World Intellectual Property Indicators 2021*, WORLD INTELLECTUAL PROP. ORG., https://www.wipo.int/edocs/pubdocs/en/wipo_pub_941_2021.pdf [<https://perma.cc/388Z-6CLQ>].

³⁹ For the system of registration of security interests, see GERARD MCCORMACK, SECURED CREDIT UNDER ENGLISH AND AMERICAN LAW 129-62 (2009) (discussing the differences between “notice filing” and “transaction filing” for secured interests in Anglo-American law); ULRICH DROBNIG & OLE BÖGER, PROPRIETARY SECURITY IN MOVABLE ASSETS 476-505 (2014) (discussing the legal rules on entries in the register of security interests for movable property in various European countries, and suggesting a template for a unified European model for such entries). For a blueprint on setting up a national security rights registry by the United Nations Commission on International Trade Law (UNCITRAL), see U.N. COMM. ON INTERNATIONAL TRADE L., UNCITRAL GUIDE ON THE IMPLEMENTATION OF A SECURITY RIGHTS REGISTRY, U.N. Sales No. E.14.V.6 (2014).

⁴⁰ See, e.g., ARRUÑADA, *supra* note 35, at 55 (discussing the first-to-record rule in real-estate registry systems based on recordation of deeds, such as in the United States, parts of Canada, and France); MCCORMACK, *supra* note 39, at 101-04 (discussing the first-to-file priority rule under Article 9 of the American Uniform Commercial Code (UCC)).

⁴¹ See ARRUÑADA, *supra* note 35, at 52-56 (explaining the role and requirements of company registries).

⁴² See, e.g., Jesper M. Paasch, Jenny Paulsson, Gerhard Navratil, Nikola Vučić, Dimitrios Kitsakis, Marcin Karabin & Mohamed El-Mekawy, *Building A Modern Cadastre: Legal Issues in Describing Real Property in 3D*, 60 GEODETSKI VESTNIK 256, 256 (2016) (identifying topics concerning the legal aspects of 3D property and cadasters).

⁴³ See ROBERT C. ELLICKSON, VICKI L. BEEN, RODERICK M. HILLS & CHRISTOPHER SERKIN, *LAND USE CONTROLS: CASES AND MATERIALS* 57-81 (4th ed. 2013).

Beyond the provision of legally binding information, publicly accessible databases can also play another important role—one of setting professional and market standards that may serve as a basis for a future development of regulatory and legal mechanisms. Here too, the digital transformation of such databases makes them not only accessible, but also influential. This means that a streamlined flow of information through these databases can also have normative implications in setting professional standards and laying the ground for reforming the legal regime.

To illustrate this point, consider how digital technology is increasingly being employed by both governmental agencies and private entities to create interactive databases in the context of land use and land markets. This includes the use of advanced technologies and professional standards, such as interactive graphic visualization, geographic information systems (GIS), building information modelling (BIM), and the land administration domain model (LADM).⁴⁴

The key challenge for implementing such new technologies as potential policy tools lies in the ability to integrate these technologies across different professional and governmental platforms that are relevant to land use and land markets, and particularly in land registries and cadastral systems. Optimally, such professional and policy tools should be formalized and accessible to all parties concerned—and governed by a unified system of data registration and data retrieval.⁴⁵

For example, such techniques are being increasingly used in an attempt to gradually switch cadasters and land registries from two-dimensional (2D) systems to three-dimensional (3D) ones, with diverging degrees of success in introducing 3D systems and in synchronizing industry and governmental platforms—while making them accessible to the various stakeholders.⁴⁶ This has been

⁴⁴ Christian Lemmen, Peter van Oosterom & Rohan Bennett, *The Land Administration Domain Model*, 49 LAND USE POL'Y 535, 536-38 (2015).

⁴⁵ See Changbin Yu, Lin Li, Biao He, Zhigang Zhao & Xiaoming Li, *LADM-Based Modeling of the Unified Registration of Immovable Property in China*, 64 LAND USE POL'Y 292, 293-294 (2017).

⁴⁶ See Paasch et al., *supra* note 42.

done in different countries, such as Australia,⁴⁷ Croatia,⁴⁸ Korea,⁴⁹ India,⁵⁰ and Slovenia.⁵¹

In 2016, the Netherlands experimented with the first registration of an interactive 3D visualization of “legal volumes”—i.e., 3D physical spaces, each of which was identified as a distinctive unit—in the cadaster and the land registry.⁵² The program was run for the Delft Railway Zone Project.⁵³ Without elaborating here on the lengthy process of converting the 3D data of the construction itself, using BIM technology, into 3D geometries representing the six legal volumes, and then converting the 3D representations of the property rights to these legal volumes into a 3D PDF, the final result was that in the cadastral registration, a 3D complex ID was generated and the different rights were assigned unique indices.⁵⁴ Additionally, a reference was made in the cadastral registration to the interactive 3D visualization of property rights. The 3D data itself was stored by the cadaster to accommodate future needs, which may require the adjustment of the legal situation. The 3D data is also stored and maintained by the public registries of rights. Accordingly, the 3D

⁴⁷ See Behnam Atazadeh, Mohsen Kalantari, Abbas Rajabifard, Serene Ho & Tuan Ngo, *Building Information Modelling for High-Rise Land Administration*, 21 *TRANSACTIONS GIS* 91 (2017).

⁴⁸ See Nikola Vučić, Miodrag Roić, Mario Mađer, Saša Vranić & Peter Van Oosterom, *Overview of the Croatian Land Administration System and the Possibilities for its Upgrade to 3D by Existing Data*, 6 *INT’L J. GEO-INFORMATION* 223 (2017).

⁴⁹ See Sangmin Kim & Joon Hoe, *Registration of 3D Underground Parcel in Korean Cadastral System*, 89 *CITIES* 105 (2019).

⁵⁰ See Qudsia Hamid, Muhammad Hamid Chauhdry, Shaker Mahmood & Muhammad Shahid Farid, *Arc GIS and 3D Visualization of Land Records: A Case Study of Urban Areas in Punjab*, 39 *NAT’L ACAD. SCI. LETTERS (INDIA)* 277 (2016).

⁵¹ See Petra Drobež, Mojca Kosmatin Fras, Miran Ferlan & Anka Lisec, *Transition from 2D to 3D Real Property Cadastre: The Case of the Slovenian Cadastre*, 62 *COMPUTS., ENV’T & URB. SYS.* 125 (2017).

⁵² See Jantien Stoter, Hendrik Ploeger, Ruben Roes, Els van der Riet, Filip Biljecki, Hugo Ledoux, Dirco Kok & Sangmin Kim, *Registration of Multi-Level Property Rights in 3D in The Netherlands: Two Cases and Next Steps in Further Implementation*, *INT’L J. GEO-INFO.*, May 2017, at 1, 1.

⁵³ The project covers an area of 24 hectares, but the 3D cadaster was introduced for a smaller part, consisting of the combined new Railway Station and City Hall, together with the underground platforms and railway tunnel, several technical installations, and underground bicycle parking. *Id.* at 4-5.

⁵⁴ For a fuller account, see Amnon Lehavi, *The Future of Property Rights: Digital Technology in the Real World*, in *DISRUPTIVE TECHNOLOGY, LEGAL INNOVATION, AND THE FUTURE OF REAL ESTATE* 59, 69-72 (Amnon Lehavi & Ronit Levine-Schnur eds., 2020).

PDF is publicly viewable not only from the public registries, but also from the cadaster.⁵⁵

As a professional standard-setter, the transition into 3D interactive registration has clear benefits for facilitating more efficient land uses and land markets. A system of 3D surveying of the land for cadastral purposes, followed by a system of 3D land-use regulation and the 3D creation of “legal volumes,” allows for more flexibility in the initial stage of developing the project and any future redevelopment. Yet beyond the role that these interactive platforms play as professional standard-setters for the various industries involved in land use and land markets, the development of such publicly accessible databases and platforms can pave the way for legal innovation. The switch toward a more flexible, transparent, and dynamic system of allocating property rights across subsurface, surface, or above-surface physical spaces may provide an opportunity for creating new types of property rights—ones that may better accommodate the current needs of landowners, developers, financiers, or tenants, and so forth, and that may be supported by digital technology. Accordingly, in considering the list of recognized property rights as embedding “optimal standardization” that balances between increasing the efficiency of land use and the societal costs of introducing new types of rights,⁵⁶ the innovation of 3D registration and legal volumes might create a new optimal standard in determining the number and variety of property rights in land.

Moreover, while publicly accessible digital databases can therefore impact professional standards and legal innovation on a national basis, such databases can also play a key role in the context of reconsidering professional and legal norms that have a cross-border effect. The next part introduces the role that globally accessible databases can play in mitigating certain legal disparities pertaining to the cross-border governance of cultural property – and in prompting a broader reconsideration of professional, ethical, and legal norms across different jurisdictions.

⁵⁵ For this interactive 3D visualization, see *Rights Can be Registered in 3D in the Netherlands Kadaster Since Today!*, TU DELFT (Mar. 21, 2016), <https://3d.bk.tudelft.nl/news/2016/03/21/3DKadaster.html> [<https://perma.cc/TN3R-3J9G>].

⁵⁶ See Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 38-40 (2000).

III. GLOBALLY ACCESSIBLE DATABASES AND CULTURAL PROPERTY DISPUTES

This part analyzes how the emergence of digital databases – and particularly those that can be accessed by parties across national borders for purposes of both data insertion and data retrieval – can impact cross-border professional norms, and consequently legal norms, pertaining to cultural property. While some of these databases are still in their early stages of operation, and there are significant differences in the scope of coverage, transparency, reliability, and accessibility of information available across different types of internationally-, nationally-, and locally-run databases dealing with cultural artifacts, one can already discern a broad-based impact that such databases have on both public and private actors. The natural flow of information embedded in such databases, one that exhibits the results of research done into the provenance of such cultural artifacts, but at the same time allows other stakeholders to shed light on ‘black holes’ in the history of ownership and possession of these artifacts, can play a crucial role in reconsidering and revising both ‘hard law’ and ‘soft law’ instruments that deal with the cross-border governance of cultural artifacts. Digital technology can thus offer a future path to mitigate legal disparities among national systems, and to reconsider, more fundamentally, the underlying principles of governing cultural property – without undermining the general power of countries to promote local goals and values.

a. Current Cross-Border Institutions and Norms on Cultural Property

The evolution of the institutional and legal governance of cultural property artifacts – and cultural heritage, more generally – is deeply embedded in the histories of peoples, nations, and international relations.⁵⁷ While a comprehensive study of the

⁵⁷ See, e.g., TUULI LÄHDESMÄKI, VIKTORIJA L.A. ČEGINSKAS, SIGRID KAASIK-KROGERUS, KATJA MÄKINEN & JOHANNA TURUNEN, *CREATING AND GOVERNING CULTURAL HERITAGE IN THE EUROPEAN UNION: THE EUROPEAN HERITAGE LABEL* (2020) (discussing the history of cultural heritage governance in the European Union); *OXFORD HANDBOOK OF INTERNATIONAL CULTURAL HERITAGE LAW* (Francesco Francioni & Ana Filipa Vrdoljak eds., 2020) (describing the general international legal framework governing cultural heritage protections).

different milestones in the development of national, regional, and international rules on cultural property is outside the scope of this Article, it is obvious that cross-border legal disparities, as well as different forms of legal competition and legal arbitrage, can be explained by both past events and the current features of the global market—whether legitimate or illicit—for trade in art, antiquities, and other artifacts.

Thus, different countries may have diverging approaches to the definition of “national treasures,”⁵⁸ as well as to rules governing initial ownership in archaeological artifacts excavated or found in their territory, or to limits on the export or import of certain types of cultural artifacts.⁵⁹ Legal systems also diverge in setting proprietary priorities in cases of conflict between owners who involuntarily lost control of their property (e.g., through theft or embezzlement) and buyers or current possessors of the artifact—with some legal systems generally adhering to the *nemo dat quod non habet* rule (“he who does not have cannot give”) that favors the owner, and other legal systems protecting good-faith buyers at least after a certain period of time.⁶⁰ The reasons for such disparities go well beyond different jurisprudential approaches to particular legal principles or doctrines, such as those embedded in civil law versus common law systems.⁶¹ Divergences between national legal systems stem principally from more fundamental considerations. These may

⁵⁸ See Michele Graziadei & Barbara Pasa, *The Single European Market and Cultural Heritage: The Protection of National Treasures in Europe*, in CULTURAL HERITAGE IN THE EUROPEAN UNION: A CRITICAL INQUIRY INTO LAW AND POLICY 79, 95-99 (Andrzej Jakubowski, Kristin Hausler & Francesca Fiorentini eds., 2019) (discussing the different interpretations of the term “national treasures” across different Member States in the European Union (EU) and how this leaves room for legal disparities in the implementation of EU regulations and directives dealing with cultural property).

⁵⁹ For a comparative analysis of national legal rules on these and other issues pertaining to cultural artifacts, see MARA WANTUCH-THOLE, CULTURAL PROPERTY IN CROSS-BORDER LITIGATION: TURNING RIGHTS INTO CLAIMS 27-159 (2015).

⁶⁰ See LEHAVI, *supra* note 9, at 157-60; Dan Klerman & Anja Shortland, *The Transformation of the Art Market: Law, Norms, and Institutions*, 23 THEORETICAL INQ. L. 219, 222-23 (2022).

⁶¹ See, e.g., Birgit Kurtz, Friederike von Brül & Gregor Kleinknecht, *Standards of Care in the Art Market: A Comparative Study on What is Expected of Buyers, Sellers, and Consignors on the United States, Germany and England*, 21 ART ANTIQUITY & L. 1, 9-25 (2016) (comparing the legal frameworks relating to due diligence in the art market in United States, Germany, and England); Marc-André Renold, *Legal Obstacles to Claims for the Restitution of Looted Art*, in 14 YEARBOOK OF PRIVATE INTERNATIONAL LAW 255-59 (Andrea Bonomi & Gian Paolo Romano eds., 2018) (pointing to differences between civil law and common law on the good-faith buyer rule).

include domestic value preferences (such as the particular balance struck between the public interest in preserving local control over items of cultural heritage and the market interests in promoting trade);⁶² the specific political history of the country, such as its former status as a colony, or adversely, as a colonial power, and the implications this has had on cross-border transit of artifacts from or to the country;⁶³ and the current role that countries play in the global market for artifacts as ‘source countries,’ ‘market countries,’ or both.⁶⁴ Moreover, some ‘source countries’ are typified by a weak rule of law that prevents them from practically enforcing national rules that protect cultural property—especially those torn by a lingering armed conflict or civil disorder—such that the onus of legally preventing illicit trade from them, while exploiting a de facto legal arbitrage, lies chiefly on the willingness of ‘transit countries’ or ‘market countries’ to do so, as was done by the European Union in the context of moving artifacts away from Iraq and Syria.⁶⁵

Against this backdrop, it should be noted that the first international instruments aimed at cross-border coordination concerning cultural property were made in the context of armed conflicts. Going back to the 1648 Peace Treaty of Westphalia, numerous bilateral or multilateral treaties required states to abstain from the destruction of cultural sites or the looting of cultural artifacts.⁶⁶ The most prominent international instruments are the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its two protocols,⁶⁷ which prohibit,

⁶² See, e.g., Alberto Frigerio, *The New Italian Law on the Exportation of Cultural Goods and Its Relationship with EU Regulations*, 24 *ART ANTIQUITY & L.* 263, 263-64 (2019) (discussing the changing attitudes in striking this balance across the history of legislation on the protection of cultural property in Italy since the early twentieth century).

⁶³ The issue of restitution of cultural artifacts transferred across territories during the colonial period is the subject of increasing attention, especially in European countries that are former colonial powers. See *infra* Section III.b.iii.

⁶⁴ See *supra* text accompanying notes 32-33; see also WANTUCH-THOLE, *supra* note 59, at 21-22 (noting that some countries, such as Australia or China, can be typified as both source states and market states).

⁶⁵ See Council Regulation 1210/2003, 2003 J.O. (87) 3.

⁶⁶ See ZEYNEP BOZ, *FIGHTING THE ILLICIT TRAFFICKING OF CULTURAL PROPERTY: A TOOLKIT FOR EUROPEAN JUDICIARY AND LAW ENFORCEMENT* 1, 18 (2018).

⁶⁷ See Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 215 [hereinafter 1954 Hague Convention]; Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 358 [hereinafter 1954 First Protocol]; Second Protocol to the Hague Convention of 1954 for the Protection of

inter alia, the “theft, pillage or misappropriation” of cultural property.⁶⁸ Over the years, the Hague Convention has been supplemented by instruments aimed at enabling the cross-border return of artifacts looted during wartime, such as the 2019 European Parliament’s resolution in the matter.⁶⁹

That said, such restitutions of wartime-looted artifacts continue to encounter numerous difficulties. This is due especially to the insufficient legal framework concerning private law, private international law, and civil procedure aspects pertaining to illegally obtained artifacts – which means that private individuals and other non-state entities often lack procedural and substantive legal tools to claim such restitution from the current possessors of the looted artifacts.⁷⁰

As the following paragraphs show, the gaps between the scope of public international law norms and rules that govern private law, private international law, and civil procedure are also prevalent for the restitution of artifacts lost, stolen, or illegally exported/imported outside the context of war. Differences between national legal systems on both procedural matters (e.g., time limits on submitting claims for restitution) and substantive ones (e.g., whether good-faith buyers prevail over original owners, or what factual elements are required to demonstrate “good faith”) may practically undermine the effectiveness of public international law norms on cultural property.⁷¹ These gaps are clearly illustrated in the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970 UNESCO Convention),⁷² ratified as of 2022 by 143 states.⁷³

Cultural Property in the Event of Armed Conflict, Mar. 26, 1999, 2253 U.N.T.S. 172 [hereinafter 1999 Second Protocol].

⁶⁸ 1954 Hague Convention, *supra* note 67, art. 4(3).

⁶⁹ Resolution of the European Parliament of Jan. 17, 2019 on Cross-Border Restitution Claims of Works of Art and Cultural Goods Looted in Armed Conflicts and Wars, 2019 O.J. (C 411) 125, §§ M.30-31.

⁷⁰ *Id.* §§ J, M.3.

⁷¹ See Renold, *supra* note 61, at 252-59.

⁷² UNSECO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231 [hereinafter 1970 UNESCO Convention].

⁷³ See *About 1970 Convention*, UNESCO, <https://en.unesco.org/fighttrafficking/1970> [https://perma.cc/S5MU-XU3S] (last visited Jan. 15, 2023) (containing a list of Member States of the 1970 UNESCO Convention).

To start with, the 1970 UNESCO Convention does not include a unified definition of “cultural property.” Under Article 1, an asset is classified as cultural property if it is “specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science” and it must also fall within one of eleven general categories included in Article 1.⁷⁴ Accordingly, each Member State must designate and publicize in its national laws the types of assets it wishes to protect as cultural property. Moreover, the 1970 UNESCO Convention places the main onus on potential states of origin to set the terms for exporting cultural artifacts, such that a cross-border transfer that violates such norms would be considered illicit. Yet absent such specific norms promulgated by the state of origin, the cross-border transfer of artifacts is not per se prohibited.

In contrast, the affirmative duties imposed on destination states are narrower. Most importantly, the duty of a state to return a cultural artifact to the state of origin arises only when the cultural property has been stolen from a “museum or a religious or secular public monument or similar institution” and upon the specific request of the state of origin to the destination state, made through “diplomatic offices.”⁷⁵ The 1970 UNESCO Convention thus applies only among states. It does not grant standing to non-state claimants, including, for that matter, a privately-owned museum from which an artifact, classified as “cultural property” under the respective national laws, has been stolen.

Moreover, even for the limited subset of stolen cultural artifacts that mandate their cross-border return, the 1970 UNESCO Convention does not establish clear, unified rules as to the conditions under which the buyer or current possessor of the artifact should be compensated for the restitution.

While Article 7(b)(ii) provides that the “requesting State shall pay just compensation to an innocent purchaser or to a person who has valid title to that property”⁷⁶ it does not specify the standards for identifying the buyer or current possessor as an “innocent purchaser” – thus leaving room for disparity in light of substantial differences between national legal systems on this point. Also, the 1970 UNESCO Convention includes no rule on the time limit for claims, which means that because each state party implements the

⁷⁴ 1970 UNESCO Convention, *supra* note 72, art. 1.

⁷⁵ *Id.* arts. 7(b)(i)-(ii).

⁷⁶ *Id.* art. 7(b)(ii).

convention (because the convention is not self-executing), states may apply their domestic limitation periods—leading to further legal disparity.⁷⁷

The 1970 UNESCO Convention therefore lacks cross-border private law, private international law, or civil procedure mechanisms that govern the respective rights and duties of the parties—especially non-state parties—thus making restitution under this convention an impractical feat.⁷⁸

To remedy these institutional and legal deficiencies, a different strategy was followed in the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (1995 UNIDROIT Convention).⁷⁹ This convention seeks to adopt a private international law approach to aid in the “fight against illicit trade in cultural objects,” by “establishing common, minimal legal rules for the restitution and return of cultural objects between Contracting States.”⁸⁰ In so doing, it aims at improving the prospects of returning illegally exported or stolen cultural artifacts. That said, it should be noted that the 1995 UNIDROIT Convention is ratified by a smaller number of states—fifty-four as of 2022—most of which are ‘source countries’ such that its formal global reach is limited.⁸¹

The 1995 UNIDROIT Convention creates a uniform definition of cultural objects, unlike the 1970 UNESCO Convention. Explicitly applying to “claims of an international character,”⁸² the 1995 UNIDROIT Convention is self-executing, and it addresses the prospective substantive and procedural rights of distant parties, whether public or private ones, to a cross-border dispute.

As for the illegal export of cultural objects, the 1995 UNIDROIT Convention provides that a court or another competent authority in the destination state must order the return of the object, if the state

⁷⁷ WANTUCH-THOLE, *supra* note 59, at 188-89.

⁷⁸ See Marina Schneider, *The 1995 UNIDROIT Convention: An Indispensable Complement to the 1970 UNESCO Convention and an Inspiration for the 2014/60/EU Directive*, 2016 SANTANDER ART & CULTURE L. REV. 149, 152-154 (2016) (identifying these weaknesses of the 1970 UNESCO Convention and recounting an initiative to adopt a protocol to the convention that would cover crucial issues of private law—which was finally abandoned).

⁷⁹ UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, 2421 U.N.T.S. 457 [hereinafter 1995 UNIDROIT Convention].

⁸⁰ *Id.* pmb. ¶ 4.

⁸¹ For the current status of signatory states, see *States Parties*, UNIDROIT, <https://www.unidroit.org/instruments/cultural-property/1995-convention/status/> [https://perma.cc/QX9N-8NLU] (last visited Oct. 3, 2022).

⁸² 1995 UNIDROIT Convention, *supra* note 79, art. 1.

of origin establishes that the removal of the object from its territory violated the provisions of its domestic law on exporting cultural artifacts and that such an act “significantly impairs” the physical preservation or integrity of the object, preservation of information of a scientific or historical character, or the traditional or ritual use of the object.⁸³ In such cases, the possessor of the object, who acquired it after its illegal export and “neither knew nor ought reasonably to have known at the time of acquisition that the object had been illegally exported” (thus placing the onus of proof on him or her), is entitled to “fair and reasonable compensation” by the requesting state.⁸⁴

In the case of a stolen object, the 1995 UNIDROIT Convention provides that the possessor of a cultural object that has been stolen shall return it,⁸⁵ while subjecting the claimant to certain time periods for filing a claim for restitution.⁸⁶ Article 4(1) provides that:

the possessor of a stolen cultural object required to return it shall be entitled, at the time of its restitution, to payment of fair and reasonable compensation provided that the possessor neither knew nor ought reasonably to have known that the object was stolen and can prove that it exercised due diligence when acquiring the object.

The term “due diligence,” which does not appear in the 1970 UNESCO Convention, was chosen as a distinctive legal benchmark in order to avoid the ambiguity and legal disparity among national legal systems over the more commonly used legal concept of “good faith.”⁸⁷

⁸³ *Id.* art. 5(3).

⁸⁴ *Id.* art. 6(1). Article 6(2) then provides that “[i]n determining whether the possessor knew or ought reasonably to have known that the cultural object had been illegally exported, regard shall be had to the circumstances of the acquisition, including the absence of an export certificate required under the law of the requesting State.” *Id.* art. 6(2).

⁸⁵ *Id.* art. 3(1).

⁸⁶ “Any claim for restitution shall be brought within a period of three years from the time when the claimant knew the location of the cultural object and the identity of its possessor, and in any case within a period of fifty years from the time of the theft.” *Id.* art. 3(3).

⁸⁷ See Schneider, *supra* note 78, at 154-55; see also ASPER TAŞDELEN, THE RETURN OF CULTURAL ARTEFACTS: HARD AND SOFT LAW APPROACHES 77-87 (2016); JOHN SPRANKLING, THE INTERNATIONAL LAW OF PROPERTY 55-56 (2014).

How can the current possessor of the cultural artifact meet the burden of proof that he or she exercised due diligence?⁸⁸ In setting out a non-exhaustive list of potential indicators, Article 4(4) of the 1995 UNIDROIT Convention also makes reference to sources of information that are the focus of this Article, by looking at “whether the possessor consulted any reasonably accessible register of stolen cultural objects, and any other relevant information and documentation which it could reasonably have obtained . . .”⁸⁹ As shown in Section III.b, while the amount and scope of coverage of such registers and other sources of data were fairly limited when the convention was signed in 1995, the volume of such databases has grown dramatically since then. Consequently, this means that the relative weight of resorting to such databases when examining if the possessor exercised “due diligence,” and more generally, in interpreting this legal term, is also growing.⁹⁰

Another key supranational instrument, the European Union’s 2014 Council Directive on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State (2014 Directive),⁹¹ seeks to complement public international (here, EU-level) norms with certain rules pertaining to private law and civil procedure in order to facilitate the cross-border return of “unlawfully removed” cultural artifacts among EU Member States. Providing in Article 3 that “cultural objects which have been unlawfully removed from the

⁸⁸ It should be noted that reversing the burden of proof in this regard is also a major change from the 1970 UNESCO Convention. See WANTUCH-THOLE, *supra* note 59, at 213-14.

⁸⁹ 1995 UNIDROIT Convention, *supra* note 79, art. 4(4).

⁹⁰ See Schneider, *supra* note 78, at 157. Thus, for example, according to Article 87(a) of Book 3 of the Dutch Civil Code (*Burgerlijk Wetboek Boek 3*), which deals with “observance of the necessary diligence at the acquisition of a cultural object,” a trader as a professional buyer is considered as not having observed the necessary diligence at the acquisition of a cultural object, if he or she failed, *inter alia*, “to consult the registers for stolen cultural property which in the given circumstances in view of the nature of the cultural object are eligible for consultation.” Art. 3:87(a) para. 2d BW; see also the 2003 Swiss Federal Act on the International Transfer of Cultural Property (*Kulturgütertransfergesetz*), as amended, which places a duty of diligence on art traders and auction businesses. Langues, Arts, Culture [LAC], June 20, 2003, RS 444.1, art. 16 (Switz.). While not referring specifically to registers or databases, such a duty includes also the need to “maintain written records on the acquisition of cultural property by specifically recording the origin of the cultural property, to the extent known, and the name and address of the supplier or seller, a description as well as the sales price of the cultural property” *Id.* art. 16(2)(c).

⁹¹ Directive 2014/60/EU, of the European Parliament and of the Council of 15 May 2014 on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State (Recast), 2014 OJ (L 159/1).

territory of a Member State shall be returned in accordance with the procedure and in the circumstances provided for in this Directive,” the 2014 Directive focuses on inter-state claims for restitution of cultural objects that had been removed from the territory of a Member State in breach of its national provisions or the 2009 Council Regulation on the Export of Cultural Goods.⁹² It does not address private claims for cross-border restitution based on the ownership of the claimant, which are covered by Article 7(4) of Regulation (EU) No 1215/2012 that deals generally with civil and commercial matters.⁹³

The 2014 Directive aims at improving deficiencies in the previous European directive in the matter, Council Directive 93/7/EEC,⁹⁴ which had a limited impact in combatting illegal trade in cultural goods.⁹⁵ The 2014 Directive applies to artifacts that were identified as “national treasures” by each Member State,⁹⁶ but without subjecting such designations of “national treasures” to additional requirements included in the 1993 Directive that proved burdensome.⁹⁷

Focusing on claims for restitution between a Requesting Member State (i.e., country of origin) and a Requested Member State (i.e., country where the artifact is now located) that are submitted to the court in the Requested Member State, the 2014 Directive addresses issues of civil procedure and private law that may be particularly prone to legal disparity among Member States – while following in many respects the relevant provisions of the 1995 UNIDROIT Convention. Thus, for example, it sets a timeline for submitting a claim not more than three years after the Requesting

⁹² Council Regulation 116/2009 of 18 December 2008 on the Export of Cultural Goods, 2009 OJ (L 39/1).

⁹³ Regulation 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2012 OJ (L 351/1).

⁹⁴ Council Directive 93/7/EEC of 15 March 1993 on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State, 1993 O.J. (L 74).

⁹⁵ Schneider, *supra* note 78, at 160.

⁹⁶ This is done pursuant to Article 36 of the Treaty on the Functioning of the European Union (TFEU) that allows Member States to place certain limits on exports within the internal market. Consolidated Version of the Treaty on the Functioning of the European Union, art. 36, Oct. 26, 2012, 2012 OJ (C 326) 47 [hereinafter TFEU].

⁹⁷ Schneider, *supra* note 78, at 160.

Member State becomes aware of the location of the cultural object and identity of its possessor.⁹⁸

As for the right of the current possessor of the cultural object for compensation from the Requesting Member State in the case of restitution, the 2014 Directive uses the normative benchmark of requiring the possessor to exercise “due care and attention” in acquiring the object.⁹⁹ While the 1993 Directive used this term without elaborating any criteria for identifying “due care and attention” – thus leaving the term for interpretation by the national court with jurisdiction over the claim and in so doing perpetuating legal disparity among Member States – the 2014 Directive offers a non-exhaustive list of considerations for identifying “due care and attention.” This list is taken almost verbatim from the list of criteria used to define the term “due diligence” in Article 4 of the 1995 UNIDROIT Convention in the case of stolen property. Accordingly, Article 10 of the 2014 Directive looks also at “the documentation on the object’s provenance,” and specifically, at whether “the possessor consulted any accessible register of stolen cultural objects and any relevant information which he could reasonably have obtained.”¹⁰⁰

While the 1995 UNIDROIT Convention is currently binding only on fifty-four countries, most of which are not regularly ‘destination countries’ or ‘market countries’ of stolen or illegally removed cultural artifacts, and the 2014 Directive applies only within the twenty-seven EU Member States, one should not undermine the broader cross-border effect of consolidating legal provisions that may govern the rights and duties of parties to cultural property disputes. This is particularly so in identifying the concepts of “due diligence” or “due care and attention” and tying them to the reliance on registries and other databases as a benchmark for such concepts – as discussed further in Section III.c.

Moreover, the development of provenance research, registries of stolen or lost objects, and other relevant databases also plays an increasing role in the reconsideration of normative criteria for settling disputes over cultural property in a series of recent cross-border ‘soft law’ instruments.

⁹⁸ Directive 2014/60/EU, *supra* note 91, art. 8. Article 8 also provides that such proceedings shall not be brought, in any event, more than 30 years after the unlawful removal of the object from the territory of the Requesting Member State, or within an extended period of up to 75 years for certain categories of protected cultural objects. *Id.*

⁹⁹ *Id.* art. 10.

¹⁰⁰ *Id.*

For example, the Code of Ethics of the International Council of Museums (ICOM) provides minimum standards of professional conduct for museums in 138 countries and territories, thus reaching many more actors than the state parties to the binding conventions, including in all major destination states.¹⁰¹ According to Rule 2.3 that deals with provenance and due diligence:

Every effort must be made before acquisition to ensure that any object . . . has not been illegally obtained in, or exported from its country of origin or any intermediate country in which it might have been owned legally Due diligence in this regard should establish the full history of the item since discovery or production.¹⁰²

This ethical commitment also reflects a fundamental change in the role of provenance research done by museums and other cultural institutions. As noted in the Introduction, whereas the traditional role of provenance research was to enhance the value of a piece by emphasizing its ‘career highlights,’ such as when it had been in the possession of a historically significant individual, the current role of provenance is to reconstruct an unbroken chain of ownership to identify potential problems.¹⁰³ Provenance thus becomes inherently related to the duty of due diligence. Accordingly, the emergence of due diligence as a global benchmark for museums across the world, and the increasing role that databases play in exercising it, as shown in Sections III.b and III.c, are particularly important because museums across the world are ever more abiding by such ‘soft law’ norms—often engaging in consensual steps of returning artifacts that turn out to have been looted, stolen, or illegally excavated, following provenance research done about such items.¹⁰⁴

¹⁰¹ INT’L COUNCIL OF MUSEUMS, ICOM CODE OF ETHICS FOR MUSEUMS (2017); see also *International Code of Ethics for Dealers in Cultural Property*, UNESCO (1999), <https://unesdoc.unesco.org/ark:/48223/pf0000121320> [<https://perma.cc/YT8N-HE8D>].

¹⁰² INT’L COUNCIL OF MUSEUMS, *supra* note 101, Rule 2.3. The terms “provenance” and “due diligence” are defined in further detail in the code. *Id.* at 9.

¹⁰³ Schumacher, *supra* note 3, at 35.

¹⁰⁴ As noted in *infra* Section III.B, many countries have either formally announced or are considering the return of artifacts looted from former African colonies. Interestingly, in Britain—whose soldiers looted the Benin Bronzes from the royal palace in Benin City in 1897—some museums are taking an independent position of seeking to return Benin Bronze items held in their collections, despite the British government’s reluctance to do so on the state level. See Nadia Khomami, *Cambridge College to Be First in the UK to Return Looted Benin Bronze*, GUARDIAN (Oct. 15, 2021), <https://www.theguardian.com/education/2021/oct/15/cambridge->

The most prominent setting in which such 'soft law' international instruments have led to both an extensive flow of information through provenance research and digitally accessible databases, and to the reconsideration of normative criteria for rules on cultural property with a significant cross-border effect, concerns the growing effort to provide restitution or compensation for property wrongfully seized from Jewish victims of the Holocaust and other victims of Nazi persecution.

This effort is grounded in two fundamental non-binding instruments, the 1998 Washington Conference Principles on Nazi-Confiscated Art (Washington Principles)¹⁰⁵ and the 2009 Terezin Declaration on Holocaust Era Assets and Related Issues (Terezin Declaration), adopted by forty-seven countries.¹⁰⁶ These instruments recognize the existing disparity among different countries—as a matter of both public policy and legal rules, in addressing the historical injustice embedded in the mass looting, confiscation, and involuntary transfer of property from their owners—while trying to build a new common ground. As noted in the Preamble to the Washington Principles:

In developing a consensus on non-binding principles to assist in resolving issues relating to Nazi-confiscated art, the Conference recognizes that among participating nations there are differing legal systems and that countries act within the context of their own laws.¹⁰⁷

This Article suggests that the way to bridge over existing legal disparities, while respecting the sovereignty of states in implementing the joint non-binding principles, lies in practically binding together the two main pillars of these instruments. *First*, providing broadly accessible information about the history of possession and ownership of the assets, especially in the period between 1933 and 1945. *Second*, creating institutional frameworks

college-to-be-first-uk-return-looted-benin-bronze [https://perma.cc/FH27-PXP7]; Craig Simpson, *Oxbridge Agrees to Return Looted Benin Bronzes to Africa*, TELEGRAPH (July 29, 2022), <https://www.telegraph.co.uk/news/2022/07/29/britain-agrees-return-looted-benin-bronzes-treasure-africa/> [https://perma.cc/DGH4-AET9].

¹⁰⁵ *Washington Conference Principles on Nazi-Confiscated Art*, U.S. DEP'T OF STATE (Dec. 3, 1998), <https://www.state.gov/washington-conference-principles-on-nazi-confiscated-art/> [https://perma.cc/QC2G-ACZH].

¹⁰⁶ *Terezin Declaration on Holocaust Era Assets and Related Issues*, U.S. DEP'T OF STATE (June 30, 2009), <https://www.state.gov/prague-holocaust-era-assets-conference-terezin-declaration/> [https://perma.cc/8GDE-GK4K].

¹⁰⁷ *Washington Conference Principles on Nazi-Confiscated Art*, *supra* note 105.

and substantive criteria in each country for implementing the normative benchmark set forth in both instruments – that of a “just and fair solution”¹⁰⁸ – when such information reveals that property was confiscated or looted. The flow of information is thus instrumental in developing the normative criteria for this end-result. This link between data gathering and norm setting is clearly manifested in the Terezin Declaration, by which:

[R]ecognizing that restitution cannot be accomplished without knowledge of potentially looted art and cultural property, we stress the importance for all stakeholders to continue and support intensified systematic provenance research, with due regard to legislation, in both public and private archives, and where relevant to make the results of this research, including ongoing updates, available via the internet . . .¹⁰⁹

The Terezin Declaration thus envisions that the data, which should serve as the basis for setting general principles for restitution and addressing specific disputes, would come from multiple sources, both public and private, with the goal that such data would be broadly accessible. This data then could not only serve the regular court system in each country, but moreover, should facilitate “alternative processes, while taking into account the different legal traditions.”¹¹⁰

The call to engage extensively in data-gathering on potentially looted cultural property, while creating “alternative processes” in each country that would implement the cross-border call to “facilitate just and fair solutions,”¹¹¹ was met to varying degrees in the forty-seven countries that adhered to the Terezin Declaration.¹¹² Of particular interest are the five countries that embraced the call to set up “alternative processes” by establishing restitution committees

¹⁰⁸ *Id.* ¶ 8; *Terezin Declaration on Holocaust Era Assets and Related Issues*, *supra* note 106, § 3.

¹⁰⁹ *Terezin Declaration on Holocaust Era Assets and Related Issues*, *supra* note 106, § 2.

¹¹⁰ *Id.* § 3.

¹¹¹ *Id.*

¹¹² See OFFICE OF THE SPECIAL ENVOY FOR HOLOCAUST ISSUES, U.S. DEP’T OF STATE, JUSTICE FOR UNCOMPENSATED SURVIVORS TODAY (JUST) ACT REPORT (2020), <https://www.state.gov/reports/just-act-report-to-congress/> [<https://perma.cc/5P9R-5MFC>] (surveying the actions taken by the forty-seven states – with the exception of the United States itself – to implement the principles of the Terezin Declaration).

that work in conjunction with other administrative agencies tasked with fostering provenance research about potentially Nazi-looted

objects: Austria,¹¹³ France,¹¹⁴ Germany,¹¹⁵ the Netherlands,¹¹⁶ and the United Kingdom.¹¹⁷

¹¹³ In Austria, the Art Restitution Advisory Board (*Der Kunstrückgabebeirat*) examines dossiers prepared by the Commission for Provenance Research (*Die Kommission für Provenienzforschung*) about potentially Nazi-looted artworks currently located in Austrian Federal museums and collections and issues recommendations to the Federal Minister responsible on whether to reconstitute the object concerned. See *Provenance Research and Restitution in the Austrian Federal Collections*, BUNDESMINISTERIUM KUNST, KULTUR, ÖFFENTLICHER DIENST UND SPORT (Oct. 3, 2022), <https://www.provenienzforschung.gv.at/en/> [<https://perma.cc/UY2S-99QR>].

¹¹⁴ In France, the Commission for the Compensation of Victims of Spoliation (*Commission pour l'indemnisation des victimes de spoliations* - CIVS) proposes to the Prime Minister reparation measures for cultural property spoliated during the Nazi period currently held in public museums and collections, based on research done by the Mission for Research and Restitution of Spoliated Cultural Property between 1933 and 1945 (*la Mission de recherche et de restitution des biens culturels spoliés entre 1933 et 1945*). See *Cultural Personal Property and Works of Art*, COMM'N FOR THE COMPENSATION OF VICTIMS OF SPOILIATION (CIVS) (Oct. 3, 2022), <http://www.civs.gouv.fr/en/getting-compensation/cultural-personal-property-and-works-of-art/> [<https://perma.cc/Q3C9-HW63>].

¹¹⁵ In Germany, the Advisory Commission on the Return of Cultural Property Seized as a Result of Nazi Persecution, especially Jewish Property (*Beratende Kommission im Zusammenhang mit der Rückgabe NS-verfolgungsbedingt entzogenen Kulturguts, insbesondere aus jüdischem Besitz*), can be approached by the parties to a dispute with the purpose of working toward an amicable settlement and making recommendations in the matter. The Advisory Commission's work is supported by the German Lost Art Foundation (*Deutsches Zentrum Kulturgutverluste*), which is a federal foundation in charge of strengthening and expanding provenance research in museum, libraries, archives and other institutions and documenting search requests and found reports submitted by reporting parties from Germany and abroad via the Lost Art Database, introduced in Section III.B. See BERATENDE KOMMISSION, <https://www.beratende-kommission.de/en> [<https://perma.cc/7PF3-9UR8>] (last visited Jan. 15, 2023); see also *Guidelines for Implementing the Statement by the Federal Government, the Länder and the National Associations of Local Authorities on the Tracing and Return of Nazi-Confiscated Art, Especially Jewish Property, of December 1999*, BERATENDE KOMMISSION NS-RAUBGUT [MINISTER OF STATE FOR CULTURE AND THE MEDIA] (2019), <https://www.beratende-kommission.de/en/grundlagen#s-guidelines> [<https://perma.cc/D6KG-KJ3V>].

¹¹⁶ In the Netherlands, the Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War (Restitutions Committee) (*De Adviescommissie Restitutieverzoeken Cultuuroederen en Tweede Wereldoorlog*) was established in 2002 by the Minister of Education, Culture and Science (OCW). The Advisory Committee relies also on provenance research conducted by the Restitution of Items of Cultural Value and the Second World War Expertise Centre (Expertise Centre), established in September 2018. The Restitutions Committee advises the Minister of OCW about claims to items of cultural value in the Dutch National Art Collection, which contains all items of cultural value owned by the Dutch State. In addition, the Restitutions Committee may issue opinions about items held by non-state entities, such as provincial and local authorities, institutions, and private individuals, when the Restitutions Committee is approached by both the claimant and the possessor, and the parties

The restitution committees in these five countries diverge in many respects, including in their particular institutional features, work processes via-a-vis public and private bodies engaged in provenance research, identity of parties entitled to initiate claims, and legal status of the committees' recommendations or opinions.¹¹⁸ That said, in all five countries, the work of the restitution committees is done outside the general framework of legal doctrine that would have otherwise governed proprietary disputes, such that, for example, claims are not subject to statutes of limitation that apply in civil litigation or to private law rules on the protection of good-faith buyers. The task of the restitution committees is to engage in extensive fact-checking about the circumstances under which owners may have involuntarily lost control of the cultural asset in the period between 1933 and 1945, and how the object ended up in the hands of the current possessor. In so doing, these committees rely on provenance research done by designated state agencies, museums, or other bodies. Based on this factfinding, the restitution

state in advance that they will accept the recommendation as binding. *See* RESTITUTIONS COMM., [https://www.restitutiecommissie.nl/en/\[https://perma.cc/2M4R-DL7T\]](https://www.restitutiecommissie.nl/en/[https://perma.cc/2M4R-DL7T]) (last visited Jan. 15, 2023). In 2020, a public committee appointed by the Dutch Council of Culture to evaluate the work of the Restitutions Committee issued a report, which includes recommendations for both normative and practical revisions in the Restitutions Committee's work. *See Striving for Justice*, RAAD VOOR CULTUUR [COUNCIL FOR CULTURE] (July 12, 2020), <https://www.raadvoorcultuur.nl/documenten/adviezen/2020/12/07/striving-for-justice> [<https://perma.cc/3WKX-KV79>].

¹¹⁷ In the United Kingdom, the Spoliation Advisory Panel was established in 2000. It considers claims from anyone who lost possession of a cultural object during the Nazi era, where the object is located in a national museum or gallery. The Holocaust (Return of Cultural Objects) Act 2009, as amended in 2019, allows national museums and galleries to return cultural objects in response to a claim where the Panel recommends it and the Secretary of State for Digital, Culture, Media and Sport agrees. The Panel may also consider claims for items in private collections, where the owner consents to such an alternative process. The recommendations of the Panel are not binding on the parties, but institutions have to date sought to implement the recommendations. SPOILIATION ADVISORY PANEL, <https://www.gov.uk/government/groups/spoliation-advisory-panel> [<https://perma.cc/XFS7-T8RJ>] (last visited Oct. 3, 2022).

¹¹⁸ Thus, while the restitution committees in Austria and France are authorized to deal only with cases concerning cultural objects located in public museums and collections, in Germany, the Netherlands, and the United Kingdom the restitution committees may serve, at the consent of the parties, as a venue for alternative dispute resolution also for cultural objects that are in the possession of private institutions or collectors. *See supra* notes 113-117.

committees are tasked with crafting a “just and fair solution” that relies primarily on moral and ethical considerations.¹¹⁹

While the term “just and fair solution” is not defined in detail in the underlying national statutes or governmental decisions that established the restitution committees, or in the guidelines adopted by the committees across these five countries, one can nevertheless discern at least a moral or ethical common denominator in the underlying goal of pursuing a “just and fair solution.” A factual finding by which an owner involuntarily lost title or possession of the property due to Nazi persecution should lead to a solution that seeks to correct the historical injustice, but one that leaves substantial leeway to the committee in crafting the particular remedy—i.e., restitution to the heirs, compensation, declarative recognition of the historic ownership, or any other ‘creative’ solution.¹²⁰

Accordingly, given the major emphasis on the process of provenance research, while tying case-specific circumstances to the broader-based historical framework of Nazi persecution in Europe, and on providing a transparent, amicable, and ethically driven process of alternative dispute resolution, the potential success in bridging over legal disparities should be measured by the ability of the five restitution committees to engage in information-sharing and an ongoing dialogue. The goal of collaboration among these national restitution committees should not be one of defining a single normative metric or achieving legalistic uniformity. Rather, this collaboration should create an information network that focuses on comprehensive provenance research of state archives, museums, and other sources as a broad goal. Accordingly, when the five countries decided in late 2018 to set up the Network of European Restitution Committees,¹²¹ the Chairman of the French restitution committee (CIVS) explained its key purpose:

What is the Network about? It is a question of creating a strong link, but one that respects the distinctiveness of each committee,

¹¹⁹ See Evelien Campfens, *Epilogue to FAIR AND JUST SOLUTIONS? ALTERNATIVES TO LITIGATION IN NAZI-LOOTED ART DISPUTES: STATUS QUO AND NEW DEVELOPMENTS* 231 (Evelien Campfens ed., 2015).

¹²⁰ *Id.* at 232-34.

¹²¹ For all editions, see *Network of European Restitution Committees on Nazi-Looted Art, RESTITUTIONS COMM.*, https://www.restitutiecommissie.nl/en/news/newsletter_network_of_european_restitution_committees.html_1 [<https://perma.cc/R87A-FCXD>] (last visited Jan. 2, 2023).

*whose action is carried out within a national institutional framework with its own history and specific legal rules. Based on the exchange and sharing of information and know-how, our Network offers a new response to the effectiveness of provenance research and the moral requirement of "clean museums."*¹²²

Therefore, the key to bridging over legal disparity in order to create an institutional, moral, and ethical framework for restitution committees—without aiming for unity or strict abidance by the same formal legal rules—lies in understanding the broad-based goal of generating and sharing information, both within the network and outside of it. This means that other stakeholders, such as museums, heirs of victims, and other members of the public are able not only to retrieve information, but also to illuminate forlorn historical facts. To achieve the broad purpose of creating a common framework, a central role must be played by dynamic, accessible, and reliable databases.

b. The Landscape of Cultural Property Databases

Recent advances in computing technology, data analysis, and development of digital networks are changing the way that data is collected, stored, and searched—and this has a profound impact on cultural property. Digital databases pertaining to cultural property are developed, expanded, and upgraded at an increasingly rapid pace, by a multitude of private and public entities.¹²³

As noted earlier, alongside the more traditional role of provenance research as an academic and professional enterprise aimed at emphasizing 'career highlights' of the artifact, the current focus of information-gathering about the history of the artifact lies in reconstructing an unbroken chain of ownership and possession in order to identify potential problems, such as theft, looting, or illegal transition across borders.¹²⁴ Provenance thus becomes inherently

¹²² Michel Jeannotot, *Editorial*, RESTITUTIONS COMM. ON NAZI-LOOTED ART 1 (Mar. 2019), <https://www.restitutiecommissie.nl/wp-content/uploads/2021/12/Network-Newsletter-no.1-March2019.pdf> [<https://perma.cc/WHG2-79L5>].

¹²³ See Jason Sousa & Ariane Moser, *Data and Databases in Provenance Research*, in *PROVENANCE RESEARCH TODAY: PRINCIPLES, PRACTICE, PROBLEMS* 85, 85-86 (Arthur Tompkins ed., 2020).

¹²⁴ Schuhmacher, *supra* note 43, at 35.

related to crime detection, enforcement of international and national legal rules on ownership and control over cultural assets, and the duty of due diligence (or similar norms) in buying or otherwise dealing with such artifacts. Some of these databases can and do promote such various goals, as is the case with the Louvre's database discussed in the Introduction—such that alongside the provision of a digital catalogue for the benefit of academics, museum professionals, and the general public, the database also seeks to facilitate the possibility of unveiling the history of artworks included in the category of *Musées Nationaux Récupération* (MNR), in order to restitute such works to heirs of owners whose assets had been looted as a result of the Nazi occupation.¹²⁵

While the multitude of such databases do not lend themselves to a neat division into distinct categories, this section offers a general outline of the different types of cultural property databases.

i. International/National Databases for Crime Detection

The first broad category of digital databases is one that aims at preventing or detecting acts of theft, looting, or the illicit transfer of cultural property across borders (i.e., without a valid export license, when this is required by the laws of the state of origin). The most prominent database, which applies generally to different types of cultural property, such as artwork, historical documents, ancient musical instruments, and archaeological artifacts, is the INTERPOL's Stolen Works of Art Database (operated as part of the "Psyche Project").¹²⁶ As of 2022, this database includes over 52,000 items.¹²⁷ The INTERPOL's database enables national law enforcement agencies and other entities to report cases of theft, looting, and so forth, and at the other end, it allows registered users—which are not limited to law enforcement agencies at potential destination states, but may also include museums, art dealers, collectors, and all other interested persons—to search the INTERPOL's database prior to dealing with a certain cultural artifact. Searching the INTERPOL's database is viewed as a standard

¹²⁵ See *supra* text accompanying notes 5-847.

¹²⁶ See *Stolen Works of Art Database*, INTERPOL, <https://www.interpol.int/en/Crimes/Cultural-heritage-crime/Stolen-Works-of-Art-Database> [<https://perma.cc/9YWW-5R4P>] (last visited Oct. 3, 2022).

¹²⁷ *Id.*

benchmark in exercising the duty of due diligence or due care when such a norm is required under relevant national or international rules.¹²⁸ In 2021, the INTERPOL also launched the ID-Art mobile app that enables users to search the database.¹²⁹

In addition to the role of the INTERPOL's database in detecting crimes that have already been committed in regard to particularly identified objects, with the purpose of locating and returning such objects – other databases have been developed to alert the key actors in the global market for art and antiquities about the types of cultural objects and places of origin that may be especially prone to cases of theft or illegal trafficking. Thus, the International Council of Museums (ICOM) established the “Red Lists Database,”¹³⁰ which includes various types of “objects at risk” in certain places at risk, especially countries that are in the midst of a military conflict or ones that lack effective law enforcement to prevent looting. These lists are intended also to curb the motivation of organized crime or terrorist groups to engage in the illicit trade of objects for profit-making.¹³¹

Alongside databases that focus on the cross-border illicit trafficking in cultural property, several countries have developed their own databases as part of their effort to fight illegal activities pertaining to cultural property, and more generally, to protect their national cultural heritage. For example, Italy established in 1969 the Carabinieri Headquarters for the Protection of Cultural Heritage (*Comando Carabinieri Tutela Patrimonio Culturale* - TPC).¹³² Pursuant to a legislative decree from 2004, the TPC established the “Database of Illegally Removed Cultural Artifacts” (*La Banca Dati dei beni culturali illecitamente sottratti*), also known as the “Leonardo Database,” which contains details about over one million stolen

¹²⁸ See, e.g., Kurtz et al., *supra* note 6161, at 18-19 (referring to French case law requiring to perform such a search).

¹²⁹ See *ID-Art Mobile App*, INTERPOL, <https://www.interpol.int/en/Crimes/Cultural-heritage-crime/ID-Art-mobile-app> [<https://perma.cc/LV58-GEEB>] (last visited Oct. 3, 2022).

¹³⁰ *Red Lists Database*, INT'L COUNCIL OF MUSEUMS (ICOM), <https://icom.museum/en/resources/red-lists/> [<https://perma.cc/57LG-EMHN>] (last visited Oct. 3, 2022).

¹³¹ See, e.g., ICOM, EMERGENCY RED LIST OF IRAQI ANTIQUITIES AT RISK (2008) (explaining that “[c]ultural heritage in Iraq has suffered seriously as a result of war. Many objects have been looted and stolen from museums and archaeological sites and risk appearing on the market through illicit trafficking”).

¹³² See *Beni Culturali Illecitamente Sottratti*, CARABINIERI, <http://tpcweb.carabinieri.it/SitoPubblico/search> [<https://perma.cc/G6UE-ZUTK>] (last visited Jan. 7, 2023).

cultural artifacts in Italy.¹³³ Access to the database is integrated in the overall effort of such agencies under the INTERPOL's Psyche Project.¹³⁴ Similar national databases on stolen cultural artifacts exist in Austria, Belgium, the Netherlands, Spain, and other countries.¹³⁵

In addition to databases created and maintained by law enforcement agencies and other public agencies, the use of digital databases to detect stolen cultural items also involves other bodies, such as museums and academic institutions. One such recent example, still in the early stages of development as of 2022, is the Circulating Artefacts (CircArt) Project, which is a "global platform against the looting and trafficking of pharaonic antiquities."¹³⁶ The CircArt database, coordinated by the Department on Egypt and Sudan at the British Museum, is not yet publicly searchable, but it allows academics and students to request database records about particular objects of study.¹³⁷ Another initiative is the Antiquities Trafficking and Heritage Anthropology Research (ATHAR) Project, led by independent experts, which monitors groups engaged in transnational trafficking, and is particularly critical of digital platforms, such as Facebook, for not taking action against using them as a channel for illicit trade.¹³⁸

ii. Private Databases Offering Services for Due Diligence

Alongside the national and international network of databases operated by law enforcement agencies and other entities with the

¹³³ *Id.*

¹³⁴ See Antonio Coppola, Commander of the Operational Department, Carabinieri for the Protection of Cultural Heritage, Presentation in New York (June 3, 2015), http://ambottawa.esteri.it/ambasciata_ottawa/resource/doc/2016/03/uncarabini/briefingnewyork.pdf [<https://perma.cc/J6EP-2WC5>].

¹³⁵ See *Stolen Works of Art Databases for Law Enforcement Agencies at European Level*, NETCHER (Nov. 17, 2020), <https://netcher.eu/project-news/stolen-works-of-art-databases-for-law-enforcement-agencies-at-european-level/> [<https://perma.cc/XM4G-572H>].

¹³⁶ See *Circulating Artefacts (CircArt)*, BRITISH MUSEUM, <https://www.britishmuseum.org/our-work/departments/egypt-and-sudan/circulating-artefacts> [<https://perma.cc/JN75-BYGP>] (last visited Oct. 30, 2022).

¹³⁷ CircArt is "funded by the British Council's Cultural Protection Fund, in partnership with the Department for Digital, Culture, Media and Sport." See *id.*

¹³⁸ See *About the ATHAR Project*, ATHAR PROJECT, <http://atharproject.org/> [<https://perma.cc/EQA4-GSMQ>] (last visited Oct. 3, 2022).

goal of detecting and combating illegal trading in cultural artifacts, a number of private companies offer paid services to the different actors in the market for art and antiquities, such as museums, auction houses, private collectors, and so forth. Such companies offer market actors search and research services, which are anchored in a digital database, while allowing owners of stolen or missing artifacts to report the theft or loss at no cost, so that these items would be registered on the database. Such databases are therefore based on numerous sources, including the INTERPOL and national law enforcement agencies, alongside reporting by victims of looting or theft, insurance companies, and other public and private actors.

The world's largest private database of lost, stolen, and looted art, antiquities, and collectibles is that of the Art Loss Register (ALR).¹³⁹ As of 2022, it includes over 700,000 items. While services are offered free of charge to law enforcement agencies and nation states, the ALR offers paid services to potential vendors and purchasers, as well as to other interested parties. At the end of the database search, and other research done, the company issues an "ALR Certificate" that details the results of the search.¹⁴⁰ While such a document has no formal status as such, it can serve the practical purpose of alerting the customer against a potential problem in the chain of title, and accordingly, of attesting to an effort made by the customer to exercise due diligence when a dispute arises later.

That said, concerns have been raised about the potential manipulation of the ALR database by sophisticated illicit actors.¹⁴¹ For example, by requesting searches for freshly looted items, such as recently illegally-excavated antiquities which dealers know will not yet be recorded in the ALR database, some traffickers have been able to obtain certificates stating a specific item was not found in the database of lost or stolen items.¹⁴² Trafficking rings can thus insert the item into the 'legitimate' market, claiming it has been cleared by an ALR Certificate. This requires the ALR company, as well as dealers, buyers, and other market actors to be very cautious in,

¹³⁹ *About Us*, ART LOSS REG., <https://www.artloss.com/about-us/> [<https://perma.cc/JQ53-KXL4>] (last visited Oct. 3, 2022).

¹⁴⁰ *Search*, THE ART LOSS REG., <https://www.artloss.com/search/> [<https://perma.cc/4289-2YMN>] (last visited Oct. 3, 2022).

¹⁴¹ Alexandra Tremayne-Pengelly, *Every Art Collector Needs This Database. But Is It Being Manipulated by Thieves?*, OBSERVER (Sept. 27, 2022, 12:35 PM), <https://observer.com/2022/09/every-art-collector-needs-this-database-but-is-it-being-manipulated-by-thieves/> [<https://perma.cc/3C5A-M48L>].

¹⁴² *Id.*

respectively, issuing, or relying on, an ALR Certificate for items for which there is no record of provenance.

Another prominent private database is Artive.¹⁴³ It too facilitates the reporting of cases of looting or theft for registration on the database, while offering paid services for provenance and due diligence research for actors in the global market for art, antiquities, and other cultural artifacts.

iii. Theme-Specific Databases: Nazi-looted Assets and “Colonial Contexts”

A prominent setting in which national and international norms pertaining to cultural property have been leading to an extensive flow of information through provenance research and digitally accessible databases concerns the growing effort to provide restitution or compensation for property wrongfully seized between 1933 and 1945 from victims of the Nazi persecution. Beyond provenance research conducted in the context of specific disputes by heirs of victims, museums, or administrative agencies charged with such a task—especially in the five European countries that established restitution committees, as discussed in Part III.A above¹⁴⁴—digital databases play an important role in facilitating a broader-based compilation and dissemination of information from various sources about potentially looted artifacts. As stated in the Terezin Declaration:

In particular, recognizing that restitution cannot be accomplished without knowledge of potentially looted art and cultural property, we stress the importance for all stakeholders to continue and support intensified systematic provenance research . . . and where relevant to make the results of this research, including ongoing updates, available via the internet, with due regard to privacy rules and regulations.¹⁴⁵

¹⁴³ *Due Diligence and Research*, ARTIVE, <https://www.artive.org/database/> [<https://perma.cc/9XRT-7MVQ>].

¹⁴⁴ See *supra* notes 113-117 and accompanying text.

¹⁴⁵ *Terezin Declaration on Holocaust Era Assets and Related Issues*, *supra* note 106, ¶ 2.

Consequently, various databases have been set up by national and supranational agencies. A prominent database is the Lost Art Database,¹⁴⁶ operated by the German Lost Art Foundation (*Deutsches Zentrum Kulturgutverluste*), which was formed by the German government in 2015.¹⁴⁷ The Lost Art Database contains “search requests,” in which public institutions or individuals ask for current information about objects taken from them during the Nazi era, as well as “found-object reports” that include details about found cultural objects known to have been illegally taken from their owners, alongside reports on other items with an incomplete or uncertain provenance suggesting the possibility of illegal dispossession between 1933 and 1945.¹⁴⁸ Another key database is the French TED (*tableau et dessin*) database,¹⁴⁹ which lists the paintings and drawings mentioned in files submitted by families to the French restitution committee (CIVS),¹⁵⁰ in order to centralize information on such artworks and make sure it is available to the various stakeholders.

In addition, accessible digital databases have also been constructed for specific collections that have been previously identified as looted or otherwise illicitly removed during the Nazi era. As mentioned in the Introduction, the Louvre’s new database also features the items included in the category of *Musées Nationaux Récupération* (MNR). This is also the case with the Dutch Art Property Collection (*Nederlands Kunstbezit/NK-collectie*), which consists of artwork that was illegally taken during the Nazi era, and then seized and returned to the Dutch government after the war.¹⁵¹ Items for which the rightful owners or their heirs have not been

¹⁴⁶ *Lost Art Database*, GERMAN LOST ART FOUND., <https://www.lostart.de/Webs/EN/Datenbank/Index.html> [<https://perma.cc/LH6C-VBMK>] (last visited Oct. 3, 2022).

¹⁴⁷ *Chronology*, GERMAN LOST ART FOUND., <https://www.kulturgutverluste.de/Webs/EN/Foundation/Chronology/Index.html> [<https://perma.cc/CM4N-WGAB>] (last visited Oct. 3, 2022).

¹⁴⁸ See *Lost Art Database*, *supra* note 146.

¹⁴⁹ *TED Database*, COMM’N FOR THE COMP. OF VICTIMS OF SPOLIATION (CIVS), <http://www.civs.gouv.fr/en/spoliated-cultural-property/ted-database/> [<https://perma.cc/4AR5-8NXE>] (last visited Oct. 3, 2022).

¹⁵⁰ See *supra* note 114 and accompanying text.

¹⁵¹ See *NK-Collections*, ORIGINS UNKNOWN, <http://www.herkomstgezocht.nl/en/infonkcoll> [<https://perma.cc/8WM6-7RQ9>] (last visited Oct. 3, 2022); see also Evelien Campfens, *Bridging the Gap Between Ethics and Law: The Dutch Framework for Nazi-Looted Art*, 25 ART ANTIQUITY & L. 1, 4-6 (2020) (describing the post-war organization of recovery and restitution of looted property in the Netherlands).

identified have been placed under the custody of the Cultural Heritage Agency of the Netherlands. Following research done about the works by the Origins Unknown Agency (*Bureau Herkomst Gezocht*), a digital database was set up and is now publicly accessible—with a key purpose of revealing the identity of the deprived owners or their heirs, and enabling restitution of objects to them.¹⁵²

Other databases have been set up by non-governmental agencies and other organizations working across national borders. The Commission for Looted Art in Europe, which is an international, expert, and non-profit representative body founded in 1999, established *lootedart.com*, the Central Registry of Information on Looted Cultural Property 1933-1945.¹⁵³ This registry includes an “Information Database” containing various types of information and documentation from 49 countries, and an “Object Database” with details coming from over 15 countries about more than 25,000 cultural objects that were looted, missing, and/or identified.¹⁵⁴

Another database, which was launched in a pilot version in 2020, is that of the Jewish Digital Cultural Recovery Project (JDCRP). A joint initiative of the Commission for Art Recovery and the Conference on Jewish Material Claims Against Germany, the JDCRP seeks to “construct a comprehensive object-level database of Jewish-owned cultural assets plundered by the Nazis and their allies and collaborators from 1933 to 1945.”¹⁵⁵ The database will comprise a broad array of inventories, lists, and documents pertaining to Nazi-looted artwork, with the purpose of highlighting multiple facets (i.e., “objects,” “victims,” “perpetrators,” “recyclers,” and “depots”).¹⁵⁶

A different context, in which a reconsideration of legal and public policy is closely intertwined with a commitment to providing transparent and accessible information through provenance

¹⁵² See *NK-Collections*, *supra* note 151; Campfens, *supra* note 151, at 12 (explaining that the results of the work done by the Origins Unknown Agency, made publicly available, “formed the basis of a liberal restitution policy for claims to artefacts in the NK collection”).

¹⁵³ *About Us*, COMM’N FOR LOOTED ART IN EUR., <https://www.lootedartcommission.com/Services> [https://perma.cc/Y4TT-HPU6] (last visited Oct. 3, 2022).

¹⁵⁴ LOOTEDART.COM, <https://www.lootedart.com/home> [https://perma.cc/S6GS-HBG7] (last visited Oct. 3, 2022).

¹⁵⁵ JEWISH DIG. CULTURAL RECOVERY PROJECT, <https://jdcrp.org/the-jdcrp/> [https://perma.cc/6SR9-9PC2] (last visited Oct. 3, 2022).

¹⁵⁶ *Id.*

research and digital databases, is that of collections from “colonial contexts.” This term generally refers to cultural artifacts that had been transferred across territories during the colonial period and are currently located in museums and other cultural institutions, mostly in Western countries.¹⁵⁷

A prominent example for such collections—and a reconsideration of public and legal policy about them—is that of African artifacts looted by colonial powers. Thus, in December 2020, the French Senate voted unanimously to approve a bill that will restore artifacts looted in 1892 by French troops from the palace of Abomey in present-day Benin.¹⁵⁸ In the summer of 2022, the governments of Germany and Nigeria signed an agreement on the unconditional transfer of ownership of 1,130 cultural artifacts that have been part of the collections of German public museums for many decades.¹⁵⁹ These items form a major part of the “Benin Bronzes” —thousands of artifacts that were looted, as a punitive measure, by the British army in 1897 from the royal palace of the then-Kingdom of Benin (located in present-day southern Nigeria) and that ended up in museums and collections in Western countries.¹⁶⁰ According to the “Digital Benin” online database, launched in November 2022, there are overall 5,246 looted historic

¹⁵⁷ See generally ALEXANDER HERMAN, *RESTITUTION: THE RETURN OF CULTURAL ARTEFACTS* (2021) (discussing efforts by former colonial powers to return cultural treasures to former colonial subjects); see also PIERRE LOSSON, *THE RETURN OF CULTURAL HERITAGE TO LATIN AMERICA: NATIONALISM, POLICY, AND POLITICS IN COLOMBIA, MEXICO, AND PERU 2-3* (2022) (documenting efforts by Latin American countries to obtain the return of cultural treasures from colonizing countries).

¹⁵⁸ See Hannah McGivern, *French Senate Votes Unanimously for Restitution to Benin and Senegal in ‘Act of Friendship and Trust’*, ART NEWSPAPER (Nov. 5, 2020), <https://www.theartnewspaper.com/2020/11/05/french-senate-votes-unanimously-for-restitution-to-benin-and-senegal-in-act-of-friendship-and-trust> [<https://perma.cc/U9VZ-HQGN>]; *France to Return Artifacts to Benin and Senegal Within a Year*, ARTFORUM INT’L (Nov. 5, 2020), <https://www.artforum.com/news/france-to-return-artifacts-to-benin-and-senegal-within-a-year-84313#:~:text=The%20French%20Senate%20on%20Wednesday,and%20Senegal%20within%20a%20year> [<https://perma.cc/64SR-Z6N3>].

¹⁵⁹ See Gareth Harris, *‘The Benin Bronzes are Returning Home’: Germany and Nigeria Sign Historic Restitution Agreement*, ART NEWSPAPER (July 4, 2022), <https://www.theartnewspaper.com/2022/07/04/the-benin-bronzes-are-returning-home-germany-and-nigeria-sign-historic-restitution-agreement> [<https://perma.cc/W7MX-HDG5>].

¹⁶⁰ See John Henry Merryman, *Introduction to IMPERIALISM, ART AND RESTITUTION* 1, 6-7 (John Henry Merryman ed., 2006).

Benin objects recorded, located in 131 institutions across twenty countries.¹⁶¹

In other countries outside of Germany, several museums have already initiated their own proceedings to return these items. Thus, while the British government has not yet committed to returning items—including around 900 pieces that are part of the permanent collection of the British Museum and would thus require a legislative amendment to enable such a return—certain British institutions have already taken their own steps. Jesus College at the University of Cambridge was the first British institution to return a Benin Bronze item to Nigeria in 2021.¹⁶² In the summer of 2022, both the University of Cambridge and the University of Oxford announced their intention to return to Nigeria their entire collections of Benin Bronzes, comprising 116 and 97 items, respectively.¹⁶³ In the United States, the Smithsonian Institution in Washington agreed in early 2022 to return most of its Benin Bronze collection to Nigeria.¹⁶⁴

As part of adopting a new public policy on artifacts from colonial contexts, some governments are committing to engage in a systemic

¹⁶¹ See *Catalogue*, DIGIT. BENIN, <https://digitalbenin.org/catalogue?seed=c46262cf-e9d2-4183-8042-810c33997278&page=1> [<https://perma.cc/ZV9G-ZAXV>] (last visited Nov. 11, 2022) (providing information about the 5,246 known objects); see also Gareth Harris, *Benin Bronzes Online Database Goes Live with Details of Thousands of Looted Artefacts*, ART NEWSPAPER (Nov. 7, 2022), <https://www.theartnewspaper.com/2022/11/07/benin-bronzes-online-database-goes-live-with-details-of-thousands-of-looted-artefacts> [<https://perma.cc/KL3A-7R72>].

¹⁶² See Nadia Khomami, *Cambridge College to Be First in UK to Return Looted Benin Bronze*, GUARDIAN (Oct. 15, 2021), <https://www.theguardian.com/education/2021/oct/15/cambridge-college-to-be-first-uk-return-looted-benin-bronze> [<https://perma.cc/3C3C-QXDV>].

¹⁶³ See Craig Simpson, *Oxbridge Agrees to Return Looted Benin Bronzes to Africa*, TELEGRAPH (Jul. 29, 2022, 8:41 PM), <https://www.telegraph.co.uk/news/2022/07/29/britain-agrees-return-looted-benin-bronzes-treasure-africa/> [<https://perma.cc/ZU65-6TQP>].

¹⁶⁴ See Gareth Harris, *Smithsonian to Return Its Collection of Benin Bronzes to Nigeria*, ART NEWSPAPER (Mar. 9, 2022), <https://www.theartnewspaper.com/2022/03/09/smithsonian-to-return-its-collection-of-benin-bronzes-to-nigeria> [<https://perma.cc/BA8S-DTSR>]. In a ceremony held on October 11, 2022, the Smithsonian's National Museum of African Art transferred ownership of 29 items to the National Commission for Museums and Monuments in Nigeria. *Smithsonian Returns 29 Benin Bronzes to Nigeria*, ARTFORUM (Oct. 13, 2022), <https://www.artforum.com/news/smithsonian-returns-29-benin-bronzes-to-nigeria-89430#:~:text=The%20Smithsonian's%20National%20Museum%20of,returned%20its%20one%20Benin%20bronze.> [<https://perma.cc/2BPK-WG6D>].

research of provenance about artifacts and collections with colonial contexts and the presentation of such information in publicly accessible digital databases.

Thus, for example, in their 2019 joint “Framework Principles,” the German federal, state, and local governments declared their commitment to “deal with collections from colonial contexts in a responsible manner in close coordination with the respective countries and societies of origin,” and in so doing, to “create the conditions for the return of . . . cultural objects from colonial contexts which were appropriated in a way which is no longer legally and/or ethically justifiable.”¹⁶⁵ To facilitate this, the Framework Principles “acknowledge the importance of conducting inventories of and digitising collections from colonial contexts” and “call upon cultural heritage institutions and scientific institutions engaged in cultural preservation to present the circumstances surrounding the acquisition of artefacts from colonial contexts in a transparent manner.”¹⁶⁶

In 2020, the German federal, state, and local governments established the “German Contact Point for Collections from Colonial Contexts,” administered by the Cultural Foundation of the German Federal States (*Kulturstiftung der Länder*).¹⁶⁷ The project is “intended to serve as the first, central point of contact for all questions concerning collections from colonial contexts in Germany,” with one of its tasks being that of “collecting, organising, documenting, publishing and evaluating statistically pertinent data and information.”¹⁶⁸ Consequently, the German Lost Art Foundation established a new research database, entitled “Proveana,” which has cultural assets and collections from colonial contexts as one of its four research areas.¹⁶⁹ The Proveana database

¹⁶⁵ AUSWÄRTIGES AMT [FEDERAL FOREIGN OFFICE], FRAMEWORK PRINCIPLES FOR DEALING WITH COLLECTIONS FROM COLONIAL CONTEXTS AGREED BY THE FEDERAL GOVERNMENT COMMISSIONER FOR CULTURE AND THE MEDIA, THE FEDERAL FOREIGN OFFICE MINISTER OF STATE FOR INTERNATIONAL CULTURAL POLICY, THE CULTURAL AFFAIRS MINISTERS OF THE LÄNDER AND THE MUNICIPAL UMBRELLA ORGANISATIONS 1, 2 (2019), <https://www.auswaertiges-amt.de/blob/2210152/b2731f8b59210c77c68177cdcd3d03de/190412-stm-m-sammlungsgut-kolonial-kontext-en-data.pdf> [<https://perma.cc/WGY8-GVTX>].

¹⁶⁶ *Id.* at 4-5.

¹⁶⁷ See GERMAN CONTACT POINT FOR COLLECTIONS FROM COLONIAL CONTEXTS, <https://www.cp3c.org/> [<https://perma.cc/K4LU-ERZZ>] (last visited Oct. 3, 2022).

¹⁶⁸ *Id.*

¹⁶⁹ The other areas of research include “cultural goods confiscated as a result of Nazi persecution” (namely, all data included in the Lost Art Database), “cultural

makes accessible the results of provenance research done by public cultural institutions, private institutions, and private individuals, which is funded by the Lost Art Foundation.¹⁷⁰ Accordingly, the reconsideration of ethical and professional norms pertaining to control and possession of such cultural artifacts is inherently intertwined with access to provenance research via databases.

iv. Academic and Professional Databases for Provenance Research

Digital technology is also having a major impact on the methodology and accessibility of provenance research, documentation, and archiving conducted regularly by academic institutions and professional organizations that deal specifically with cultural artifacts and more generally with cultural heritage. Accordingly, numerous databases and other types of digital resources have been set up over the past few years, including through institutional and cross-border collaborations.

A prominent example is the Getty Provenance Index, which includes the world's largest amalgam of digital records of various items of art-focused information.¹⁷¹ Established by the Getty Research Institute, the Getty Provenance Index provides access to about 2.5 million items, including archival inventories, sales catalogs, dealer stock books, collectors' files, records of payments to artists, and records from public collections. Among these items are over 1.8 million records of sales catalogs from major cities in Belgium, France, Germany, Great Britain, the Netherlands, and Scandinavia from 1650 to 1945, alongside private contract sales through which collectors were able to acquire artworks during an extended period of exhibition.¹⁷² As such, entries included in the database serve as a key tool for provenance research of cultural objects.

Another key database, which is becoming increasingly accessible online, is that of PHAROS—an international consortium

goods displaced as a result of war," and "confiscation of cultural goods in the Soviet Occupation Zone and the GDR." PROVEANA, <https://www.proveana.de/en> [<https://perma.cc/9WK5-9PJU>] (last visited Oct. 3, 2022).

¹⁷⁰ *Id.*

¹⁷¹ *Search the Getty Provenance Index*, GETTY RSCH. INST., <https://www.getty.edu/research/tools/provenance/search.html> [<https://perma.cc/GYL9-KCW6>] (last visited Oct. 3, 2022).

¹⁷² *Id.*

of 14 European and North American art historical photo archives, committed to creating a digital research platform allowing for comprehensive consolidated access to photo archive images of cultural artifacts and their associated scholarly documentation (estimated overall at about 25 million records).¹⁷³ In addition, a multitude of other databases provide public access to an increasing number of auction catalogues and records, dealer records and archives, photo archives, and so forth.¹⁷⁴

Finally, museums and other cultural institutions are increasingly digitizing their collections and making them accessible via open databases—and many of these databases provide details about the provenance research done for such collections. This is the case with the Louvre's database,¹⁷⁵ as well as other prominent museums, galleries, and cultural institutions, such as the V&A Museum in London—with a searchable database of over 1.2 million objects.¹⁷⁶ In May 2021, a new web portal of public numismatic collections was launched, with a consolidated digital database that includes images and data—including provenance information—about more than 90,000 coins held in dozens of German and Austrian public collections.¹⁷⁷ In all of these cases, such digital databases highlight the new focus of provenance research in cultural institutions: seeking to reconstruct an unbroken chain of ownership and possession of cultural items held in their collections.¹⁷⁸

c. Cultural Property Databases as Cross-Border Standard-Setters

The cultural property databases surveyed in the previous section do much more than provide information. Such databases, and particularly those that can be accessed by parties across national

¹⁷³ *About*, PHAROS CONSORTIUM, <http://pharosartresearch.org/about> [<https://perma.cc/34CZ-VB4Z>] (last visited Oct. 3, 2022).

¹⁷⁴ See *Select Resources*, in *PROVENANCE RESEARCH TODAY: PRINCIPLES, PRACTICE, PROBLEMS* 194-209 (Arthur Tompkins ed., 2020) (containing a comprehensive (though not exhaustive) list of such digital resources).

¹⁷⁵ See *supra* text accompanying notes 2-817.

¹⁷⁶ *From the Collections*, V&A, <https://www.vam.ac.uk/collections?type=featured> [<https://perma.cc/RRJ6-S8L7>] (last visited Oct. 3, 2022).

¹⁷⁷ *About*, DIGIT. COIN CABINET IKMK COLLECTIONS, <https://ikmk.net/about?lang=en> [<https://perma.cc/NF9Q-TC8S>] (last visited Oct. 3, 2022).

¹⁷⁸ Schumacher, *supra* note 3, at 35.

borders for purposes of both insertion and retrieval of data, can—and already do—impact professional norms, and consequently legal norms, pertaining to cultural property. While not aiming at cross-border unity, publicly accessible databases can mitigate certain ill-effects of legal disparity among national legal systems, given the currently limited scope of ‘hard law’ international instruments. More broadly, such databases facilitate the establishment of a professional, ethical, and legal common ground among public and private actors located across national borders—without undermining national authority to engage in governing cultural objects. The following paragraphs highlight some of the ways in which accessible cultural property databases play a role in setting professional and legal principles that also have a cross-border effect.

i. Facilitating Fact-Finding in Specific Disputes

The rapid growth in the number of accessible databases and the scope of their coverage, especially in the case of integrative databases that comprise multiple specific databases coming from various sources and across many territories, may aid parties to specific disputes to gain better access to essential pieces of evidence. The nature of proprietary disputes over cultural property is such that the process of fact-finding is cumbersome and expensive, requiring parties to track documentation going back decades or even centuries.¹⁷⁹ The need of such parties to engage in an item-specific provenance research, with the purpose of presenting admissible pieces of evidence to a court or tribunal that adjudicates a specific dispute, may prove prohibitively costly, especially for private parties, such as heirs of dispossessed owners.

Therefore, the digital gathering of data via multiple sources, relating to different points in time and coming from various territories, may substantially lower the costs and other administrative obstacles that parties incur in trying to reconstruct the history of ownership and possession of a cultural object and to provide a comprehensive and reliable evidentiary picture to the court.

¹⁷⁹ See Ruth Redmond-Cooper & Charlotte Dunn, *Original but Not Enduring Title: Issues of Space and Time*, in *MUSEUMS AND THE HOLOCAUST* 14, 14 (Ruth Redmond-Cooper ed., 2d ed. 2021) (pointing to the “undoubted evidential, geographical and time-related difficulties confronting persons seeking to claim the return of artworks looted or otherwise lost during the Nazi era”).

Importantly, such relevant data can relate not only to the specific cultural asset that is the object of the dispute, but also to other artifacts that were or may have been interrelated to the disputed asset. Thus, for example, evidence about the provenance and chain of possession regarding other artifacts that were part of a collection of an allegedly dispossessed owner may provide at least circumstantial evidence about whether the contested artifact also belonged to this collection, or about the trajectory that other items have followed once taken out of the collection. Similarly, reports such as the “Red Lists” published by ICOM,¹⁸⁰ may identify not only types of items that are prone to illicit trading but also the routes that items may have followed until ending up in the hands of the previous or current possessor, such as a museum, trader, or collector.

Thus, while courts and tribunals may apply different rules pertaining to the admissibility of evidence, required standard of proof, etc.¹⁸¹ – the availability of accessible information that can be derived from cultural property databases increases the probability of identifying relevant pieces of evidence and lowering the cost of gaining access to them in the context of a specific dispute. In so doing, cultural property databases may aid in mitigating disparities across different jurisdictions at least in regard to the practical ability of different litigants and courts to engage in factfinding.

ii. Database Use as a Benchmark for “Due Diligence” and Similar Norms

As noted in Section III.a, national legal rules that address proprietary conflicts between an owner who involuntarily lost control over a tangible asset and a current possessor of the item may exhibit materially different approaches. Some legal systems adhere to the *nemo dat* rule that categorically favors the original owner, subject to certain periods of limitation on submitting claims – while other legal systems protect a *bona fide* (good faith) possessor either immediately or after a certain period of time.¹⁸²

¹⁸⁰ See *supra* Section III.a; *supra* text accompanying notes 130-31130131.

¹⁸¹ See, e.g., Kevin M. Clermont & Emily Sherwin, *A Comparative View of Standards of Proof*, 50 AM. J. COMP. L. 243, 243 (2002) (comparing between common-law and civilian standards of proof in civil cases).

¹⁸² See *supra* text accompanying notes 59-60.

These divergences may be grounded in longstanding jurisprudential principles or even in more fundamental concerns, such as cultural attributes of a certain society.¹⁸³ Yet even across the legal systems that focus on the concept of good faith as a key determinant in deciding the proprietary dispute, the particular legal indicators that attest to the meaning of this term, as well as the way in which these indicators are implemented by courts in particular cases, may substantially diverge. This leads to legal disparity that can prove burdensome in the case of cross-border disputes, including in the specific context of cultural property disputes adjudicated before national courts.¹⁸⁴

As shown in Section III.a, the drafters of the 1995 UNIDROIT Convention opted not to use the term “good faith” to avoid ambiguity and disparity among national legal systems—and selected, rather, the term “due diligence” as the norm that applies to a possessor who seeks to be compensated when required to return a stolen object that he or she purchased.¹⁸⁵ Similarly, the drafters of the EU’s 2014 Council Directive (and previously, Council Directive 93/7/EEC) refrained from the term “good faith” and defined the norm as one of “due care and attention.”¹⁸⁶ Both these instruments offer a similar, non-exhaustive list of factors to examine if the possessor meets the burden of proving “due diligence” or “due care and attention,” respectively. Thus, Article 4(4) of the 1995 UNIDROIT Convention provides that:

In determining whether the possessor exercised due diligence, regard shall be had to all the circumstances of the acquisition, including the character of the parties, the price paid, whether the possessor consulted any reasonably accessible register of stolen cultural objects, and any other relevant information and documentation which it could reasonably have obtained, and whether the possessor consulted accessible agencies or took any

¹⁸³ See generally Giuseppe Dari-Mattiacci & Carmine Guerriero, *Law and Culture: A Theory of Comparative Variation in Bona Fide Purchase Rules*, 35 OXFORD J. LEGAL STUD. 543 (2015) (surveying rules on good-faith acquisitions in 126 jurisdictions, and arguing that a “culture of self-reliance” is the key determinant of variations in the doctrine).

¹⁸⁴ See LYNDAL V. PROTT, COMMENTARY ON THE 1995 UNIDROIT CONVENTION ON STOLEN OR ILLEGALLY EXPORTED CULTURAL OBJECTS 73-75 (2d ed. 2021).

¹⁸⁵ See *supra* text accompanying notes 78-90; Schneider, *supra* note 78, at 155.

¹⁸⁶ See *supra* text accompanying notes 97-100.

other step that a reasonable person would have taken in the circumstances.¹⁸⁷

While the multitude of legal norms applying in different national and cross-border settings pertaining to cultural property (e.g., good faith, due diligence, due care and attention—and identifying factors for each one of them) may have originally led to legal disparity and even an increased danger of “legal arbitrage” — this Article suggests that the growing scope of coverage and improved accessibility of digital databases can gradually change this trend. In other words, the fact that these databases allow for both registration/reporting of data on behalf of dispossessed owners or source countries and retrieval of data on behalf of dealers or prospective buyers—alongside the broader-based access to provenance research done by state agencies, cultural institutions, and collectors—is likely to make this amalgam of databases the focal point for interpreting and applying the relevant standards across different legal instruments and scenarios.

Accordingly, although the insertion or retrieval of data may not always be a *sufficient* condition for proving if one meets the relevant standard of care, it can certainly become a *necessary* condition. Even more importantly, beyond the context of resolving a specific dispute, the increasing investment in such databases by various types of public and private actors, and particularly, the growing role of provenance research as an expression of professional and ethical best practice, is likely to generate cross-border norms that may have the effect of approximating different legal terms and preventing certain conflicts.

Moreover, the potential of cultural property databases to become a benchmark for defining and identifying the legal standards of behavior, on the part of the various stakeholders, can also impact other substantive and procedural rules pertaining to cultural property disputes. This is the case, for example, with the implementation of statutes of limitation or other types of time-

¹⁸⁷ 1995 UNIDROIT Convention, *supra* note 79, art. 4(4). The 2014 Council Directive uses the following language: “In determining whether the possessor exercised due care and attention, consideration shall be given to all the circumstances of the acquisition, in particular the documentation on the object’s provenance, the authorizations for removal required under the law of the requesting Member State, the character of the parties, the price paid, whether the possessor consulted any accessible register of stolen cultural objects and any relevant information which he could reasonably have obtained, or took any other step which a reasonable person would have taken in the circumstances.” Directive 2014/60/EU, *supra* note 91, art. 10 § 2.

related rules that govern the rights and duties of parties. Thus, to the extent that an auction house, cultural institution, or collector posts the details of a cultural artifact in its possession in an accessible digital database, then such an act can be viewed as creating at least a presumption of knowledge on the part of potential claimants (consider the 1995 UNIDROIT Convention, by which “[a]ny claim for restitution shall be brought within a period of three years from the time when the claimant knew the location of the cultural object and the identity of its possessor . . .”).¹⁸⁸ Conversely, if a claimant can prove that he or she exercised efforts in searching such databases, but that such searches did not produce results in identifying a missing object, then such an act can create a presumption against starting to ‘run the clock’ of a limitation period or a doctrine of laches. In this respect as well, digital databases can increasingly serve a role that goes beyond a mere source of information into one of constituting a benchmark for setting professional and legal standards. In so doing, globally accessible digital databases can mitigate legal disparities that result from varieties in legal concepts in national and international legislative instruments and in adjudicative proceedings.

iii. Information-Sharing as a Basis for “Just and Fair Solutions”

Alongside the growing influence of cultural property databases on professional and ‘hard law’ rules in various national and supranational settings, such databases may also facilitate collaboration between governments, organizations, and cultural institutions in coming to terms on ethical norms and policy choices.

This is particularly the case with the impact of the comprehensive provenance research, establishment of accessible digital databases, and the thick exchange of information between national governments or agencies in settings such as Nazi-looted assets or “colonial contexts.” As noted in Sections III.a and III.b above, decisions on whether to return such assets to heirs of dispossessed owners or to the source countries are usually done outside of the regular legal regime (e.g., because limitation periods ran out a long time ago or since there is no formal cause of action). Governments, national agencies, or cultural institutions in possession of such artifacts are therefore tasked with embracing

¹⁸⁸ 1995 UNIDROIT Convention, *supra* note 79, art. 3(3).

ethical norms or issuing recommendations to political decision-makers.

As shown in the context of the restitution committees on Nazi-looted artifacts set up in five European countries, the establishment of a “network” attests to the potential of “exchange and sharing of information and know-how” to arrive at some type of a common denominator (even if not unity or harmonization) about the “effectiveness of provenance research and the moral requirement of ‘clean museums.’”¹⁸⁹ This means that in devising “just and fair solutions,” restitution committees across these five countries will be impacted by the broader set of data compiled by committees and agencies in charge of provenance research located in counterpart countries. This collaborative process could have an impact, in turn, on administrative and political decisions on restitution or compensation in other contexts – without necessarily aspiring for wholesale unity.

iv. Accessible Databases as Promoting a General Value of Transparency

The rapid development of digital databases, which enable multiple parties to both register data and retrieve it, while allowing broad access to them, is instrumental in promoting a much broader value: transparency.

In various proprietary contexts, questions arise as to whether practices of secrecy and opacity are normatively legitimate, or do they lead to illegal consequences, such as tax evasion or money laundering, and damage the interests of parties that are deprived of essential information. Such dilemmas arise, for example, in the context of secret and half-secret trusts, the secret buy-out of corporate shares, or the hiding by purchasers of real estate of their identity via shell companies.¹⁹⁰

Moreover, as noted in Part I, a validation of secrecy and opacity can exacerbate cross-border legal disparity. This is the case, for example, when jurisdictions actively engage in tax competition, and in so doing combine low effective tax rates with ensuring financial

¹⁸⁹ See *supra* text accompanying note 122.

¹⁹⁰ For these various case studies, and the broader debate about secrecy in proprietary contexts, see generally Amnon Lehavi, *Property and Secrecy*, 50 REAL PROP. TR. & EST. L.J. 381 (2016).

secrecy for clients, or when sophisticated parties otherwise take advantage of ‘loopholes’ and various forms of legal arbitrage – such as varieties in reporting duties across legal systems – to extract private financial benefits.¹⁹¹

The international art market has been particularly typified by practices of secrecy and opacity, such that it is referred to as a “notoriously insular and opaque world.”¹⁹² These features go well beyond practices of preserving the identity of buyers and/or sellers in secret – as was the case with the world’s highest-ever art transaction: the auctioning off of the painting “Salvator Mundi” to a (then) secret buyer in 2017.¹⁹³ Secrecy and opacity may also be aided by various types of “legal competition” and “legal arbitrage,” such as when jurisdictions otherwise serving as banking hubs and tax havens, like Switzerland, Luxemburg and Singapore, establish “freeports” – high-security warehouses that store valuable items exempt from usual customs rules, which make them ideal for dealers and collectors that look to transport, store, and view artworks without paying customs.¹⁹⁴

The same also holds true for trade in antiquities. As exemplified in Part I, illicit trade in archaeological artifacts is often facilitated by a lack of transparency and accountability, which aids looters, smugglers, and illicit traders in moving such artifacts across borders, often via ‘transit countries’ that may also enable such illicit chains to “whitewash” the title to an object prior to its transfer to

¹⁹¹ See *supra* text accompanying notes 19–23.

¹⁹² See Adrian Horton, *Driven to Abstraction: The Inside Story of a \$60m Art Forgery Hoax*, *GUARDIAN* (Aug. 28, 2020), <https://www.theguardian.com/film/2020/aug/28/driven-to-abstraction-documentary-art-forgery-hoax> [<https://perma.cc/WMR9-63GB>].

¹⁹³ Oscar Holland, *Rare da Vinci Painting Smashes World Records with \$450 Million Sale*, *CNN* (Nov. 16, 2017), <https://www.cnn.com/style/article/da-vinci-salvator-mundi-sale-christies/index.html#:~:text=Rare%20Da%20Vinci%20painting%20smashes%20world%20records%20with%20%24450%20million%20sale&text=Why%20is%20art%20so%20expensive%3F&text=Remember%20when%20Marilyn%20Monroe's%20white%20dress%20made%20movie%20history%3F&text=Leonardo%20da%20Vinci's%20%22Salvator%20Mundi,at%20Christie's%20in%20New%20York> [<https://perma.cc/YFZA-UVLG>]. The buyer was later identified as a proxy of the Crown Prince of Saudi Arabia, Mohammed bin Salman. See source in *infra* note 194.

¹⁹⁴ See Nina dos Santos, *\$1B Feud Involving Leonardo's 'Salvator Mundi' Reveals Dark Side of the Art World*, *CNN* (May 30, 2021), <https://www.cnn.com/style/article/salvator-mundi-scandal-bouvier-rybolovlev-intl/index.html> [<https://perma.cc/W6GF-28KU>]; Stefan Schwarzkopf & Jessica Inez Backsell, *The Nomos of the Freeport*, 39 *ENV'T & PLAN. D: SOC'Y & SPACE* 328, 333–35 (2021).

dealers or collectors in a destination state.¹⁹⁵ Secrecy and opacity may therefore plague the governance of various cultural artifacts, highlighting problems of cross-border legal disparity.

The establishment of digital databases and the broad access thereto have the potential of generally tilting the international market for art, antiquities, and collectibles toward more transparency and more accountability. Going beyond the reporting of past cases of theft or looting into a systematic framework of provenance research for items held or controlled by national agencies, cultural institutions, and collectors, digital databases are essential in unveiling the identity of past and present owners or possessors, and how they came to own or control them. Such digital databases allow for a decentralization of the power embedded in the control over information pertaining to cultural artifacts, and in so doing, help to reconsider and reconstruct professional, ethical, and legal norms that would apply both nationally and supranationally.¹⁹⁶ As such, cultural property databases not only play a significant role in resolving conflicts over past actions, but also serve as a basis for guiding future behaviour committed to transparency.

CONCLUSION

Much attention is paid in current public-policy forums, professional circles, academic literature, and popular discourse to

¹⁹⁵ See *supra* text accompanying note 33; see also Asif Efrat, *A Major Museum Has to Return Another Looted Artifact. Welcome to the Dark Side of the Art World*, WASH. POST (Aug. 7, 2017, 5:00 am), <https://www.washingtonpost.com/news/monkey-cage/wp/2017/08/07/authorities-just-seized-an-ancient-vase-from-the-metropolitan-museum-here-are-the-underlying-politics/> [https://perma.cc/99A3-VC2R].

¹⁹⁶ I do not address here specific problems that may arise in the context of national or supranational legal instruments that deal with the protection of private data, such as the European Union's General Data Protection Regulation (GDPR). Regulation 2016/679, of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation) 2016 O.J. (L 119) 1, <https://op.europa.eu/en/publication-detail/-/publication/3e485e15-11bd-11e6-ba9a-01aa75ed71a1> [https://perma.cc/V9F3-LBCX]. It should be noted, however, that Recital 158 of GDPR empowers Member States to engage in processing personal data for archiving purposes in certain contexts, and more generally requires public and private bodies to "provide access to records of enduring value for general public interest." *Id.* at 29.

the dynamic relations between innovative technology and legal or ethical norms. Various forms of “disruptive technology,” including digital technology, big data analysis, and artificial intelligence, are changing the way that data is generated, compiled, stored, and processed. This new reality has, in turn, profound implications for the process and nature of personal and collective decision-making. Moreover, whereas these new technological realities pose new types of questions and challenges that require law- and policy-makers to reconsider existing solutions and legal doctrines, technology is also impacting the everyday practice of law.¹⁹⁷

This Article highlights a theme that has so far received less attention. It considers the ability of digital technology, and more specifically, publicly accessible digital databases, to mitigate certain types of cross-border legal disparity. This potential not only concerns ‘new’ types of resources or human interactions, but may also offer a new path forward in resolving longstanding issues that have so far lacked a comprehensive policy or legal framework, due to lingering cross-border disparity. This is also the case with the legal field that is the focus of the Article: addressing legal and ethical controversies over past actions regarding the cross-border transfer of cultural property.

The key argument made in this Article is that the natural flow of information through transparent, reliable, and globally accessible databases, which enable public and private actors from different jurisdictions to both register data and retrieve it, can aid in mitigating cross-border legal disparities that may arise in various legal settings. At the same time, the ability of such databases to ‘kickstart’ a process that can lead to better coordination and to increased cross-border efficacy in fact-finding, interpretation of open-ended legal terms, or a reconsideration of legal and ethical principles that affect public and private actors across multiple jurisdictions, does not require such parties to pre-commit to full-scale uniformity. As the case study of cultural property demonstrates, states, professional institutions, and private actors can seek to promote local values, while working together through dynamic, transparent, and accessible information-sharing to mitigate ill-effects of legal disparity in a world typified by ever-growing cross-border interactions.

¹⁹⁷ See, e.g., MARCELO CORRALES, MARK FENWICK & HELENA HAAPIO, *LEGAL TECH, SMART CONTRACTS AND BLOCKCHAIN* 1-16 (2019); Gabriele Buchholtz, *Artificial Intelligence and Legal Tech: Challenges to the Rule of Law*, in *REGULATING ARTIFICIAL INTELLIGENCE* 175, 175 (Thomas Wischmeyer & Timo Rademacher eds., 2019).

The case study of cultural property digital databases entails broader lessons for the potential role of such information-sharing in diverse legal settings. This could be so, for example, in relying on digital protocols signed by debtors and creditors located across jurisdictions to facilitate a coordinated administration of cross-border insolvencies, or in the conversion of digitally accessible databases of asset inventories into legally binding cross-border registries.¹⁹⁸ The task of further developing the theoretical framework concerning globally accessible digital databases—and expanding the scope of legal fields that could benefit from the potential of such databases to mitigate certain types of cross-border legal disparities—will have to be left for future research.

¹⁹⁸ See LEHAVI, *supra* note 9, at 253-72.