

**A CRITICAL ANALYSIS OF THE LEGAL AND  
*QUASI*-LEGAL RECOGNITION OF THE  
UNDERLYING PRINCIPLES AND NORMS OF  
CULTURAL HERITAGE**

**Thesis submitted for the degree of Doctor of  
Philosophy at the University of Leicester**

**by**

**Charlotte Cassandra Woodhead LL.M**

**Department of Law**

**University of Leicester**

**2014**

# Charlotte Woodhead

## **A critical analysis of the legal and *quasi*-legal recognition of the underlying principles and norms of cultural heritage**

---

*Certain things, places and practices are valuable to particular individuals, communities, nations or to mankind to such a degree that the loss or destruction would be a misfortune to the culture, identity, heritage or religious practices of those people(s). For the purposes of this thesis, cultural heritage represents the intangible aspect of these important things, places and practices. It will be argued that despite the existence of various cultural heritage principles which represent the different types of value, public legacy and associated norms with its subject matter, these principles are not always effectively upheld in the governing legal regime, although a body of principles akin to legal ones has developed, from professional practice, codes of ethics and non-legal decision-making bodies. Recent legal intervention has responded to political imperatives at the risk of a clear and consistent regime to effectively meet the underlying principles of cultural heritage.*

*The most effective means of fulfilling these principles and norms is by treating cultural heritage as an intangible legal concept, akin to property which in its English common law form is really a bundle of rights associated with things tangible or intangible rather than simply ownership and possession or the physical things themselves. In this thesis a system is proposed whereby decision-makers take account of the intangible nature in a holistic manner within a legal framework. Consequently it would facilitate the allocation of entitlement to the subject matter of cultural heritage in seemingly conflicting claims and would more effectively uphold the cultural heritage principles and norms*

*The thesis will be tested in the context of cultural heritage objects.*

# Acknowledgements

---

The burden of writing something witty, yet erudite weighs heavily on my shoulders when realising that this may be the only page of my thesis that many people will read. My interest in Cultural Heritage law had humble beginnings: a noticeboard in UCL's Faculty of Laws where I chose a last minute option – The Law of Cultural Property. Since the early discussions in those LL.M classes and my later work with Norman Palmer and Ruth Redmond-Cooper at the Institute of Art and Law (for whose support I am very grateful) my keen interest in this area of law has developed, but so too has the law itself. In an age when legislation now facilitates the return of Nazi Era loot and human remains and where there is increased emphasis on museum codes of ethics, this is an exciting time to be researching in this area.

I give grateful thanks to my employers past and present for financial and pastoral support for these studies: University of Derby, School of Law & Criminology for the former and Warwick Law School for providing a splendid research environment, the space to think about ideas and the opportunity to present my research. I am grateful to colleagues past and present for all their encouragement and support. My supervisors, Dr Dawn Watkins and Professor Janet Ulph, have encouraged me in my development as an academic and provided valuable guidance on both my thesis and related papers – sincere thanks to you both.

Six months before starting this thesis I embarked on another lengthy, yet rewarding venture – married life. Without Robert's love and support this thesis would have been so much more difficult; having encouragement and wisdom from someone with his own thesis experience was invaluable and his logical, no-nonsense, advice often kept me on the straight and narrow!

My parents, Susan and Richard Woodhead, have provided me with such love throughout my life. I am eternally grateful to them both for all the opportunities that they gave me and the enthusiasm with which they have supported me. I am also extremely lucky to have so much support and encouragement from my wider family (the Woodheads, the Scarletts, the Fears and the Todds) – to them all I say thank you.

*To all my family: past, present and future.*

# TABLE OF CONTENTS

Abstract .....	i
Acknowledgements .....	ii
List of figures .....	vii
List of abbreviations .....	viii

## Introduction

Cultural heritage? An object cannot speak for itself .....	1
The thesis .....	7
Scope of the thesis and justification .....	8
Timeliness and originality of project .....	13
Theoretical assumptions .....	14
Methodology .....	19

## Chapter 1 – Definitions and meanings

1.1 Introduction .....	25
1.2 A definitional framework .....	26
1.2.1 Cultural heritage .....	27
1.3 Definitional woes: more terms than meanings? .....	31
1.3.1 ‘Cultural heritage’ and ‘cultural property’: different words – same meaning? ....	34
1.3.2 Common heritage .....	37
1.3.3 Cultural objects and cultural goods .....	47
1.3.4 The case for ‘cultural heritage’ rather than ‘cultural property’ .....	49
1.4 Conclusion .....	52

## Chapter 2 – Cultural heritage: principles and norms

2.1 Introduction: developing a lens .....	55
2.2 The intangible dimensions of the subject matter of cultural heritage .....	57
2.3 The importance of the subject matter of cultural heritage .....	59
2.3.1 Importance of the object, place or practice itself: a freestanding importance .....	59

2.3.2	Associative importance .....	62
2.4	The principles of cultural heritage .....	65
2.4.1	Value .....	65
2.4.2	Public legacy .....	93
2.4.3	The principles of cultural heritage as compared with other concepts .....	99
2.5	Norms of cultural heritage .....	111
2.5.1	Preservation.....	113
2.5.2	Access .....	119
2.5.3	Comparison of these norms with other classifications.....	122
2.6	Conclusion .....	124

### **Chapter 3 – Legal recognition of cultural heritage principles and norms**

3.1	Introduction .....	126
3.2	A single legal definition of cultural heritage?.....	128
3.3	International declaratory statements .....	129
3.3.1	The instrument's underlying purpose .....	131
3.3.2	Statements of commitment and declaratory international norms.....	140
3.3.3	Policies to achieve the cultural heritage norms: under human rights law .....	146
3.3.4	Some concluding thoughts on international efforts.....	149
3.4	Failure of English domestic law to recognise the value .....	149
3.4.1	No recognition of the cultural heritage principles or norms .....	149
3.5	Recognition of value through systems of deterrence .....	174
3.5.1	Recognising value and encouraging preservation of context.....	174
3.5.2	Elevating the status of cultural heritage through sentencing.....	176
3.6	Assuming or constructing value through law in museum collections.....	179
3.6.1	Assuming value and automatically privileging national museum collections ...	179
3.6.2	The public interest in gaining access to national museums.....	203
3.6.3	Articulating value through the use of law .....	206
3.7	A state's moral obligation recognised in law .....	218
3.8	Conclusion .....	219

## **Chapter 4 – Quasi-legal recognition of cultural heritage**

4.1	Introduction .....	223
4.2	The role, nature and hierarchy of codes of ethics and other guidance .....	226
4.2.1	The soft law nature of codes and guidance .....	228
4.3	Codes of ethics: seeking to democratise museums?.....	241
4.3.1	Strong and more nuanced recognition .....	243
4.3.2	Tempering an otherwise unrestricted power .....	249
4.3.3	Impediments on this increased democratisation.....	257
4.4	Enlarging modifications: the development of <i>quasi</i> legal principles .....	259
4.5	Displacement of traditional notion of ownership .....	262
4.6	Valid and moral title.....	271
4.7	Conclusion .....	283

## **Chapter 5 – A scheme to meet the challenges**

5.1	Introduction .....	286
5.2	The need for comprehensive legislation.....	289
5.3	The proposed legal scheme: the (CH(PaN)B).....	292
5.3.1	Developing a system of principles: the codes of practice .....	293
5.3.2	Consultation with stakeholders .....	298
5.3.3	Effecting the principles and norms.....	300
5.3.4	Failure of a decision-making body to take into account principles and norms ..	303
5.4	Critical analysis of the proposal.....	305
5.4.1	Limits of the proposal .....	305
5.4.2	Potential disadvantages .....	306
5.5	The proposed decision-making process in practice.....	308
5.5.1	The Wedgwood Collection .....	310
5.5.2	Spoliation Advisory Panel decisions.....	311
5.5.3	Export Reviewing Committee – Earl of Elgin’s papers .....	312
5.5.4	Local authority museums .....	312
5.5.5	The Maqdala Treasure.....	313
5.5.6	Returning to the silver spoon .....	314
5.6	Reflections on the proposal.....	315
5.6.1	Shifting the focus away from <i>who</i> is claiming or <i>what</i> is claimed.....	315
5.6.2	Not a single-issue approach .....	318
5.6.3	Why only a domestic solution to a matter of international concern? .....	322
5.7	Conclusion .....	322

<b>Conclusion</b> .....	324
<b>Appendices</b>	
Appendix 1: .....	328
Appendix 2: .....	334
<b>Table of cases</b> .....	342
<b>Legislation</b> .....	343
<b>Offical documents</b> .....	349
<b>Bibliography</b> .....	350

# List of figures

---

Figure 1 The Intangible dimension of CHOs.....	58
Figure 2 The typologies of cultural heritage value .....	82
Figure 3 Sign at Yuyuan Gardens, Shanghai.....	112



# List of abbreviations

---

Abbreviation	Meaning
<b>1954 Convention</b>	Convention for the Protection of Cultural Property in the Event of Armed Conflict UNESCO, 1954
<b>1970 Convention</b>	Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property UNESCO, 1970
<b>1993 Council Directive</b>	Council Directive (EC) 7/93 of 15 March 1993 on the Return of cultural objects unlawfully removed from the territory of a Member State
<b>2001 Convention</b>	Convention on the Protection of the Underwater Cultural Heritage, UNESCO 2001
<b>2003 Convention</b>	Convention for the Safeguarding of the Intangible Cultural Heritage UNESCO, 2003
<b>2005 Council Regulation</b>	EC Council Regulation (EC) 116/2009
<b>2007 Declaration</b>	United Nations Declaration on the Rights of Indigenous Peoples
<b>AHD</b>	Authorized Heritage Discourse
<b>AILP</b>	Acceptance in Lieu Panel (UK)
<b>AMAAA</b>	Ancient Monuments and Archaeological Areas Act 1979
<b>Arts Council</b>	Arts Council for England and Wales
<b>BMA</b>	British Museum Act 1963
<b>CA</b>	Charities Act 2011
<b>CHO</b>	Cultural Heritage Object
<b>CoE</b>	Council of Europe

---

<b>COP</b>	Code of Practice
<b>DCMS</b>	Department for Culture, Media and Sport (UK)
<b>DCMS Guidance</b>	<i>DCMS Guidance for the Care of Human Remains in Museums</i>
<b>DCO(O)A</b>	Dealing in Cultural Objects (Offences) Act 2003
<b>ECHR</b>	Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe, Rome 4 November 1950 (as amended)
<b>ECtHR</b>	European Court of Human Rights
<b>EH</b>	English Heritage (the Historic Buildings and Monuments Commission for England)
<b>EU</b>	European Union
<b>Granada Convention</b>	<i>Convention for the Protection of the Architectural Heritage</i> , Council of Europe Granada 3 October 1985, Preamble
<b>H(RCO)A</b>	Holocaust (Return of Cultural Objects) Act 2009
<b>HTA</b>	Human Tissue Act 2004
<b>ICOM</b>	International Council of Museums
<b>ICOMCoE</b>	ICOM Code of Ethics
<b>ITA</b>	Inheritance Tax Act 1984
<b>ITAP</b>	Illicit Trade Advisory Panel
<b>I(UNS)O</b>	Iraq (United Nations Sanctions) Order 2003
<b>IWMA</b>	Imperial War Museum Act 1920
<b>MA</b>	Museums Association (UK)
<b>MAAccGuide</b>	Museums Association Access Guidance
<b>MAAcquGuide</b>	Museums Association Acquisition

---

---

	Guidance
<b>MACoE</b>	UK Museums Association Code of Ethics
<b>MEG</b>	Museum Ethnographers' Group (UK)
<b>MGA</b>	Museums and Galleries Act 1992
<b>MGC</b>	Museums and Galleries Commission (forerunner of the MLA)
<b>MLA</b>	Museums, Libraries and Archives Council (UK)
<b>NAGPRA</b>	Native American Graves Protection and Repatriation Act (USA)
<b>NHA</b>	National Heritage Act 1983
<b>NMDC</b>	National Museum Directors' Conference
<b>OED</b>	Oxford English Dictionary
<b>P(LBCA)A</b>	Planning (Listed Buildings and Conservation Areas) Act 1990
<b>Reviewing Committee</b>	Reviewing Committee on the export of works of art and objects of cultural interest (UK)
<b>SAP</b>	Spoliation Advisory Panel (UK)
<b>Select Committee</b>	Culture, Media and Sport Select Committee (UK)
<b>SPAB</b>	Society for the Protection of Ancient Buildings
<b>TA</b>	Treasure Act 1996
<b>TACoP</b>	Treasure Act Code of Practice
<b>UK</b>	United Kingdom of Great Britain and Northern Ireland
<b>UN</b>	United Nations
<b>UNESCO</b>	United Nations Scientific, Economic and Cultural Organisation
<b>Unidroit Convention</b>	<i>Convention on Stolen or Illegally exported cultural objects</i> , Unidroit 1995
<b>USA</b>	United States of America
<b>Valetta Convention</b>	<i>Convention for the Protection of the Archaeological Heritage of Europe</i> , Council of Europe, Valetta, 1992
<b>Washington Conference Principles</b>	<i>Principles with respect to Nazi- Confiscated Art</i> , Washington Conference on Holocaust-Era Assets, 1998

---

---

**WGHR**

Working Group on Human Remains

**WHC**

*Convention concerning the protection of  
the World Cultural and Natural Heritage*  
UNESCO, Paris 16 November 1972

# Introduction

---



Silver spoon (late 1970s) Hand-made in Birmingham, England, bearing the  
hallmark LHS.♦

---

## **Cultural heritage? An object cannot speak for itself**

In 1979 Leslie Harold Scarlett of Handsworth, Birmingham attended silver smithing classes in the Jewellery Quarter where he made a silver spoon. He registered his hallmark at the Birmingham Assay Office and the spoon was duly stamped. It was presented to his sister's granddaughter on the occasion of her first Christmas and remains in its box covered in Christmas wrapping paper and cherished by the great-niece. It has a functional value (although has never been used to eat with), it has an aesthetic value to many people who see it (its appearance is not purely utilitarian). Its component silver has a financial value, yet the spoon, as an object of craftsmanship, has an enhanced financial value. It is unique, not only in design, but as the sole piece of silverware bearing the hallmark LHS. However, this spoon has a cultural value personal to the little girl (who grew up to write a thesis about cultural heritage law) and to her family extending beyond its financial value. It is part of her culture and inheritance, to

---

♦ Thanks are due to Nigel Scarlett for the photograph.

be passed to future generations. However, the story surrounding the object and its association, once told, might be valued by others. The spoon is recognised as irreplaceable because of its context and association. At its most simple, the spoon is property, but it might more specifically be categorised as ‘property for personhood’, which comprise irreplaceable things,<sup>1</sup> the loss of which would occasion pain.<sup>2</sup> Whilst an object may be important to an individual for sentimental or family history reasons, is this really cultural heritage? When displayed in a museum (perhaps because the maker or the recipient were famous) the spoon may be easier to call ‘cultural heritage’, partly because the public probably trusts curators to have valued it before adding it to the collection. Were the spoon to represent the first or only use of a particular technique this might also render it cultural heritage. Is the fact that it is culturally valuable to a particular individual (or a small group) sufficient to class it as cultural heritage? What does classification or designation as ‘cultural heritage’ mean in practice? If Charles I had used the spoon at his last supper and it were at risk of being smelted, many English people would likely try to prevent its fiery end, effectively ‘saving it for the nation’.<sup>3</sup> This basic instinct to save from harm things, places or practices that are culturally important to groups or more generally to nations or to humanity are given legal weight (to a certain extent) through national and international norms.<sup>4</sup> It is difficult to imagine

---

<sup>1</sup> MJ Radin, ‘Property and Personhood’ (1981) 34 Stan L Rev 957, 960. Radin contrasts such objects with fungibles which are more readily replaceable. Personhood in general is analysed further at p 105 below.

<sup>2</sup> *ibid* 959. Valuation by focusing on the suffering caused by loss will inform the definition of ‘cultural heritage’ used in this thesis, as presented in Chapter 1 and analysed in Chapter 2.

<sup>3</sup> The classic example being the UK’s export licensing system (analysed in Chapter 3).

<sup>4</sup> Discussed below at p 21. The proviso ‘to a certain extent’ is given because neither English common law nor any international legal norms prevent the legal title owner of a culturally valuable object from

any national or international intervention to prevent the destruction of Uncle Leslie's silver spoon were it at risk, but is there scope for some form of legal recognition of cultural importance where the importance is recognised at a more localised level?<sup>5</sup> The telling of this story seeks to achieve two things, first to demonstrate that an object cannot speak for itself. The spoon, without any explanation, will be interpreted by the viewer as being financially valuable (particularly if she sees the hallmark) or aesthetically valuable (if she likes the look of it). The cultural value is silent until the object is set in its context – until its story is told. The spoon's description at the beginning of this chapter gives additional information that may help aid an assessment of cultural value, but it is the story that fully achieves this. The physical object itself does not render it worthy of being saved from destruction; there always needs to be some human reaction to an object, whether it is appreciating the aesthetic value of Monet's *Waterlilies*, the informational, historical and cultural value of the Rosetta Stone or the association of an object with an historical event or person (such as Nelson's shirt<sup>6</sup>). It is because the object, place or practice is valued that it is cultural heritage and consequently it is this which makes it of interest and worth protecting. If the Rosetta Stone were destroyed, its cultural value (historical, aesthetic or evidential) would be lost and irreplaceable, albeit that some of its evidential information may have

---

destroying it, absent any nuisance: see FH Lawson and B Rudden, *The Law of Property* (2<sup>nd</sup> edn, OUP 1982) 116. The title of Joseph L Sax's book *Playing Darts with a Rembrandt* (The University of Michigan Press 1999) reflects the corresponding US approach.

<sup>5</sup> E.g. its cultural heritage value might be relevant when assessing which assets were available for distribution were its owner declared bankrupt.

<sup>6</sup> Caroline Lewis, 'Nelson's Shirt Acquired for the Nation under the Acceptance in Lieu' 28 December 2007 < <http://www.culture24.org.uk/history+%26+heritage/art52714> > accessed 30 December 2012.

been recorded; without this value the Rosetta Stone would simply be a lump of granodiorite. The physical subject matter is utilitarian whilst its intangible cultural value to people, and the desire to pass this on to future generations (both intangible characteristics of the physical form) are of concern. These give rise to strong protective feelings mandating protection of cultural heritage and a desire to engage with it that are seen across the world.<sup>7</sup> This thesis assesses from a legal standpoint the intangible dimension<sup>8</sup> of cultural heritage, since this reflects the current discourse on cultural heritage.<sup>9</sup>

The second aim of telling the story of the spoon is that it highlights the difficulty of definition encountered with any treatment of cultural heritage. Frequently one knows cultural heritage when one sees it: few (if any) would dispute that Stonehenge or a painting by Vermeer are manifestations of cultural heritage. They represent the monumental and correspond with what Westerners have traditionally treated as cultural

---

<sup>7</sup> Chapter 2.

<sup>8</sup> This term, adopted for the purposes of this thesis, is not found generally in cultural heritage discourse. It refers to the intangibility of the subject matter of cultural heritage (the value, desire to pass on to future generations and the resulting norms), whether it is an object, a place or an intangible practice. It is particularly useful when referring to the latter category because of the awkwardness conceptually of the intangibility of intangible practices.

<sup>9</sup>David C Harvey, 'Heritage Pasts and Heritage Presents: temporality, meaning and the scope of heritage studies' (2001) 9 *International Journal of Heritage Studies* 319, 335; Laurajane Smith, *Uses of Heritage* (Routledge 2006) 44 and William Logan, 'Cultural diversity, cultural heritage and human rights: towards cultural heritage management as human rights-based cultural practice' (2012) 18 *International Journal of Heritage Studies* 231, 242. Discussed at pp 45-47.



heritage.<sup>10</sup> Over time, categories expand, demonstrated by more recent designation of places contributing to industrial development rather than traditional monumental sites as World Heritage sites<sup>11</sup> and in the United Nations Scientific, Economic and Cultural Organisation's (UNESCO's) recent concern with intangible practices.<sup>12</sup> The spoon is unlikely to receive immediate acknowledgement as being cultural heritage, but it needs to be clear where the line is drawn between cultural heritage and other property. A working definition of 'cultural heritage' is put forward in the next chapter, together with a justification for its preference over alternatives such as 'cultural property'. Within the definition of 'cultural heritage' there is an acknowledgement of the different types of value of the cultural heritage to certain people(s) and so the types of value identified in Chapter 2 play a role in identifying whether or not something is cultural heritage. More significantly, once identified, the types of value (together with the public legacy aspect of cultural heritage) will form the cultural heritage principles<sup>13</sup> which, together with the norms of preservation and access, provide a lens through which to analyse the legal, ethical and *quasi-legal* regulatory regime and dispute resolution processes in England.

---

<sup>10</sup> This is discussed at p 29 below and corresponds with Smith's notion of the Authorised Heritage Discourse ("AHD"): *ibid* 29.

<sup>11</sup> Convention concerning the protection of the World Cultural and Natural Heritage UNESCO, Paris (adopted 16 November 1972, entered into force 17 December 1975) 1037, UNTS 151 ("WHC"), e.g. the inclusion of the Derwent Valley Mills in 2001.

<sup>12</sup> E.g. Convention for the Safeguarding of the Intangible Cultural Heritage UNESCO, Paris (adopted 17 October 2003, entered into force 20 April 2006) 2368, UNTS 3 ("2003 Convention"). See Yahaya Ahmad, 'The Scope and Definitions of Heritage: From Tangible to Intangible' (2006) 12 *International Journal of Heritage Studies* 292.

<sup>13</sup> The term 'principle' is used to mean 'fundamental truth'. A full justification of this is found at p 55 below.

In this thesis the relevant ethical regime under consideration is the one formed by the codes of ethics published by museum professional bodies.<sup>14</sup> In Chapter 4 it will be analysed how far the regime created by these codes can be categorised as a localised soft law regime internally regulating the members of the professional bodies. The terminology of ‘*quasi-legal*’ is used in two contexts within this thesis. First it is used to refer to certain decision-making bodies which deal with issues of entitlement to property and which advise the Secretary of State about appropriate action to take.<sup>15</sup> In this way their functions and effect can be described as *quasi-legal*<sup>16</sup> in nature. Secondly, the phrase *quasi-legal* is used in the context of the development of *quasi-legal* principles that are developing in the museum practice (specifically valid/moral title and stewardship) which have the effect of displacing the strict reliance on existing legal concepts of ownership.<sup>17</sup>

---

<sup>14</sup> Specifically the Museums Association and the International Council of Museums: Museums Association, *Code of Ethics for Museums* (UK Museums Association, London 2008) (“MACoE”) and the ICOM *Code of Ethics for Museums* (International Council of Museums, Paris 2006) (“ICOMCoE”).

<sup>15</sup> The Spoliation Advisory Panel (SAP), the Reviewing Committee on the export of works of art and objects of cultural interest (“the Reviewing Committee”) and the Acceptance in Lieu Panel (“the AILP”)

<sup>16</sup> This is on the basis of drawing an analogy between documents such as planning circulars that must be taken into consideration by the Secretary of State when making decisions (see Gabriele Ganz, *Quasi-Legislation: Recent Developments in Secondary Legislation* (Modern Legal Studies, Sweet & Maxwell 1987) 16) and the decisions of the Reviewing Committee, the AILP and the SAP which the Secretary of State takes into account when making certain decisions (analysed in Chapter 3).

<sup>17</sup> These are analysed in Chapter 4 below.

## The thesis

The main research question focuses on assessing the effectiveness of the current legal, ethical and *quasi*-legal regimes in England in valuing and caring for important objects, places and practices for present and future generations. To further this aim it is necessary to create a lens through which to analyse the legal, ethical and *quasi*-legal frameworks in England that deal with cultural heritage. The conceptual framework of this lens is created in Chapter 2, based on multi-disciplinary scholarly work and policy documents. This conceptual approach derives much support from the value/significance paradigm found in these writings, specifically in the context of conservation.<sup>18</sup> It is argued that this paradigm can be transposed from conservation practice to the context of dispute resolution.<sup>19</sup> Furthermore, the cultural heritage principles (value and public legacy) and the norms (preservation and access) are reflected in international statements of commitment to caring for cultural heritage.<sup>20</sup> This universal recognition justifiably leads us to ask the question: how effective are legal, ethical and *quasi*-legal mechanisms in recognising and upholding these principles and norms?

This thesis will be tested in the context of objects of cultural heritage (tangible personal property) and so will critically analyse the current legal, ethical and *quasi*-legal regimes.<sup>21</sup> The ethical analysis will focus specifically on museums as the primary custodians of cultural heritage<sup>22</sup> to analyse the development of *quasi*-legal principles.

---

<sup>18</sup> At pp 68-88 below.

<sup>19</sup> At p 124 below.

<sup>20</sup> Discussed at p 21 below.

<sup>21</sup> Chapters 3 and 4 respectively.

<sup>22</sup> This choice is justified at p 224 below.

The effectiveness of these regimes will be assessed to determine whether they meet the identified underlying principles and norms relating to cultural heritage. Effectiveness will be measured by how far the various cultural heritage principles are evident, upheld and affect the treatment of cultural heritage. To this end, particular attention will be placed on determining the extent to which the influences of righting past wrongs and nationalism affect coherence and certainty within these regimes.

The thesis then addresses the question of whether a new legal framework with associated principles might more effectively fulfil those principles and norms. A principal argument in this thesis is that the most appropriate manner to do this is to recognise legally the intangible dimension of cultural heritage rather than focus on the physical manifestations (i.e. the object, place or practice); this approach accords with recent moves towards treating cultural heritage as intangible in nature.<sup>23</sup> Chapter 5 presents a scheme that avoids over-regulation and facilitates resolution of seemingly conflicting disputes. This recognises the availability of multifarious concurrent legal rights in cultural heritage and would be coupled with codes of practice reflecting more fully the principles to be used when making major decisions regarding future curation as well as in determinations by courts or alternative dispute resolution procedures.

### **Scope of the thesis and justification**

This thesis will test the research questions solely in the context of cultural heritage objects (CHOs) in England (tangible personal property - chattels<sup>24</sup>).<sup>25</sup> A future research

---

<sup>23</sup> Text to n 9 above.

<sup>24</sup> FH Lawson and Bernard Rudden, *The Law of Property* (3<sup>rd</sup> rev edn, OUP 2002) 23.

<sup>25</sup> Underwater cultural heritage and cultural heritage involved in direct armed conflict are omitted from discussion, not least because the two principal UNESCO conventions governing these areas are not

project is envisaged which would test the thesis in the context of places or practices. The reason for focusing in the first instance in this thesis on CHOs is that the effectiveness of the legal, ethical and *quasi*-legal regimes in fulfilling the underlying principles of cultural heritage can be tested to a greater degree in the context of objects. The reason for this is threefold. First, the comparative ease by which objects can change hands or cross national borders means that over the years CHOs may have left their countries of origin. Some of these CHOs may have been misappropriated from their original owners at times of unequal power relations, for example, during colonial rule<sup>26</sup> or wartime<sup>27</sup> and may now be located in other countries. Claims may be made by the heirs of the original owners (such as the Jewish claimants for Nazi Era looted art<sup>28</sup>) or

---

ratified by the UK. CHOs owned by the Church of England (subject to ecclesiastical law) also fall outside the scope of this thesis.

<sup>26</sup> See generally Moira G Simpson, *Making Representations: Museums in the Post-Colonial Era* (revised edition Routledge 2001) and David B MacDonald, 'Daring to compare: the debate about a Maori "holocaust" in New Zealand' (2003) 5 *Journal of Genocide Research* 383.

<sup>27</sup> For example the large-scale movement of cultural heritage objects during the Second World War about which see generally Lynn Nicholas, *The Rape of Europa* (Macmillan 1994), Norman Palmer, *Museums and the Holocaust* (IAL Publishing 2000) and Robert K Paterson, 'Resolving Material Culture Disputes: Human Rights, Property Rights and Crimes Against Humanity' (2006) 14 *Willamette Journal of International Law and Dispute Resolution* 155. More recently there was significant concern about the loss of heritage following the 2003 Iraq War: André Emmerich, 'Improving the Odds: Preservation through Distribution' in Kate Fitz Gibbon (ed), *Who Owns the Past? Cultural Policy, Cultural Property and the Law* (Rutgers University Press 2005) 247.

<sup>28</sup> *ibid.* In the UK claims may be heard by the SAP: DCMS, 'Spoliation Advisory Panel Terms of Reference' <<http://webarchive.nationalarchives.gov.uk/20121204113822/http://www.culture.gov.uk/images/publications/SAPConstitutionandTOR11.pdf>> accessed 14 April 2013. The work of the Panel is analysed at p 195 below and its procedural and substantive principles of operation are analysed in

by indigenous communities for whom the CHOs are important for their cultural practices or as part of their identity<sup>29</sup> and these provide opportunities to assess how far the cultural heritage principles and norms (as set out in this thesis) are recognised. Furthermore, the historical events of colonialism and wars may often give rise to a modern-day desire to right the wrongs of the past<sup>30</sup> and this may influence the way in which claims are dealt with.<sup>31</sup> Some national governments may wish to prevent the export of certain CHOs and have put in place export controls.<sup>32</sup> These controls may focus on nationally important CHOs.<sup>33</sup> However where the controls apply to culturally valuable objects, rather than ones which are valuable for the particular nation, the focus

---

Charlotte Woodhead, 'Nazi Era spoliation: establishing procedural and substantive principles' (2013) 18 *Art Antiquity and Law* 167.

<sup>29</sup> Janet Blake, 'On Defining the Cultural Heritage' (2000) 49 ICLQ 61, 84

<sup>30</sup> For example, Thompson, in the context of an intergenerational community, treats the aim of reparation as reconciliation rather than based on restoring people to their original position: Janna Thompson, *Taking Responsibility for the Past: Reparation and Historical Justice* (Polity Press 2002) 50-53 and 153.

<sup>31</sup> This is analysed at p 195 below. In England there is clear political support for redressing the past wrongs of the Nazi Era in the context of spoliated CHOs and the taking of human remains during colonial times as demonstrated by the Holocaust (Return of Cultural Objects) Act 2009 ("H(RCO)A") and section 47 of the Human Tissue Act 2003 ("HTA") respectively which remove statutory restrictions on the power of governing bodies of national museums to transfer objects from their collections (see p 199 below),

<sup>32</sup> In England the applicable regime is the Export Control Act 2002.

<sup>33</sup> The term 'national treasures' is often used, e.g. in the Consolidated Version of the Treaty on the functioning of the European Union (ex Article 30 TEC) [2010] OJ C83/47, 61, art 36 and the General Agreement on Tariffs and Trade (WTO 1947) art XX(f) which permit exceptions to the prohibition on quantitative restrictions between EU states and to prohibitions on international free trade respectively.

is on maintaining a culturally rich nation rather than a nation rich in its own culture.<sup>34</sup>

This preoccupation with national interests over the cultural heritage principles and norms is referred to as nationalism for the purpose of this thesis.<sup>35</sup>

The second reason for focusing on CHOs, is that the legal, ethical and *quasi*-legal regimes are tested to their extremes when assessing the enforceability of competing rights of use and enjoyment. This is because, like all types of personal property, someone will usually need to be in possession of an object in order to make use of it and consequently often use and enjoyment by different people will only be possible consecutively rather than concurrently. In the context of CHOs the various third parties

---

<sup>34</sup> Garrard observes ‘Perhaps recognising our relatively small contribution to the history of the visual arts, and our traditional aptitude for acquiring the artistic riches of other cultures, the UK’s export controls are imposed impartially on all works that happen to find themselves in British ownership’: David Garrard, ‘Monuments versus Moveables’ in G Scarre & R Coningham (eds) *Appropriating the Past: Philosophical Perspectives on the Practice of Archaeology* (CUP 2013) 259.

<sup>35</sup>See Paul M Bator *International Trade in Art* (University of Chicago Press, London 1983) 27 and the approach taken by Flessas who sees ‘nationalism’ as being at the core of arguments about the encyclopaedic museum: Flessas T, ‘The Ends of the Museum’ LSE Law, Society and Economy Working Papers 14/2013 <[http://www.lse.ac.uk/collections/law/wps/WPS2013-14\\_Flessas.pdf](http://www.lse.ac.uk/collections/law/wps/WPS2013-14_Flessas.pdf)> accessed 24 December 2013, 16. The use of the word ‘nationalism’ therefore focuses on the prioritisation of the national interest in maintaining a culturally rich nation in line with these other writers. This differs from other definitions of nationalism such as Smith’s working definition of nationalism as ‘An ideological movement for attaining and maintaining autonomy, unity and identity for a population which some of its members deem to constitute an actual or potential “nation”’: Anthony Smith, *Nationalism* (Wiley 2013) 9 and the notion of ‘inventing’ ‘national cultures and societies’: John Hutchinson, ‘Re-interpreting cultural nationalism’ (1999) 45(3) *Australian Journal of Politics and history* 392, 394. The topic of the influence of nationalism on the legal, ethical and *quasi*-legal regime dealing with cultural heritage is analysed at p 138 below.

who may claim entitlement to such objects include museums, communities of origin, the public (as visitors to museums) and individuals who claim a prior and continuing entitlement. Nations and the international community might also be concerned with the proper treatment of these objects. In the context of intangible practices the only competing claims would be between the communities who exercise the practices and third parties who might wish to perform them. Where cultural heritage places are concerned, the static nature of the land makes it far easier to have concurrent physical use and enjoyment of the land as well as different intangible use of land, evident in the varied third-party rights, for example there can be different owners of the fee simple,<sup>36</sup> the term of years absolute,<sup>37</sup> sub-tenants, holders of easements<sup>38</sup> or profits-à-prendre,<sup>39</sup> a charge,<sup>40</sup> beneficiaries of restrictive covenants<sup>41</sup> and licensees.<sup>42</sup> Having said that, there are some situations where the use of a place by one group can affect the sacred nature of the place for others.<sup>43</sup>

---

<sup>36</sup> Law of Property Act 1925, s 1(1)(a).

<sup>37</sup> *ibid* s 1(1)(b) and *Street v Mountford* [1985] AC 809, 815.

<sup>38</sup> Law of Property Act 1925, s 1(2)(a) and *Re Ellenborough Park* [1956] Ch 131.

<sup>39</sup> *ibid*

<sup>40</sup> Law of Property Act 1925, s 1(2)(c)

<sup>41</sup> Law of Property Act 1925, s 1(30) and *Tulk v Moxkay* (1845) 47 ER 1345

<sup>42</sup> *Street v Mountford* (n 37) 814.

<sup>43</sup> See Kristen A Carpenter, 'A Property Rights Approach to Sacred Sites Cases: Asserting a Place for Indians as Nonowners' (2004) 52 *UCLA Law Review* 1061, 1129 and the discussion of the use of Devils Tower by rock climbers which violates Native American religion in Michael F Brown, *Who Owns Native Culture?* (Harvard University Press 2003) 151.



The third reason for testing the thesis in the context of CHOs is because a strong regime of ethical principles has developed around CHOs, specifically in the context of museums<sup>44</sup> which has given rise to the development of certain *quasi*-legal principles;<sup>45</sup> this provides a regime that can be assessed with a greater degree of particularity than in the context of places or practices.

### **Timeliness and originality of project**

This thesis provides a comprehensive exposition and analysis of the underlying principles and norms of cultural heritage which are built on the foundation of recent research into cultural heritage, and in particular cultural heritage value, from other disciplines. Furthermore, this project is the first attempt to use these as a lens through which to provide a full analysis of the legal, ethical and *quasi*-legal regimes in the context of caring for, and resolving disputes about, CHOs in England. Whilst work has been undertaken regarding value in archaeology law,<sup>46</sup> this differs in significant regards from the current project: first, Carman's work focuses on archaeology, rather than on cultural heritage more widely and secondly he views law itself as primarily adding value to the objects, thereby transforming them from archaeology to heritage.<sup>47</sup> This thesis is the first occasion on which *quasi*-legal principles, as a specific concept, have been addressed both broadly relating to cultural heritage and specifically in English dispute resolution processes and professional codes of ethics. A full analysis of the

---

<sup>44</sup> The two principal sources of ethical principles are found in the codes of ethics, analysed in Chapter 4, which are: MACoE (n 14) and ICOMCoE (n 14).

<sup>45</sup> These are valid/moral title and stewardship and are analysed at p 259 below.

<sup>46</sup> John Carman, *Valuing Ancient Things: Archaeology and Law* (Leicester University Press 1996).

<sup>47</sup> *ibid* 160. Chapter 2 develops this discussion further.

position of CHOs is timely given recent legislative changes affecting the retentive nature of legislation governing national museum collections,<sup>48</sup> the illicit trade<sup>49</sup> as well as other repatriation requests made to museums.<sup>50</sup>

This thesis forms the foundation on which the author can undertake further research in the context of cultural heritage places and intangible cultural heritage. It also provides a basis on which to analyse more fully the international legal regime in this field.

### **Theoretical assumptions**

The author's ontological position is fivefold. First, cultural heritage plays an important role within society and is often met with the moral (if not legal) imperative to preserve and protect it. Whilst this might not initially appear contentious, some cultural practices may be contrary to human rights (used as 'tools to exert political or social pressure'<sup>51</sup>) and/or harm animals, for example bull fighting or bear baiting. Therefore a proviso which runs through this thesis is that where there is direct physical or mental harm to persons, or harm to animals, the norms may be tempered by these humane considerations. Some places may have been the sites of horrific events, such as

---

<sup>48</sup> HTA, s 47 and the H(RCO)A 2009.

<sup>49</sup> Dealing in Cultural Objects (Offences) Act 2003 ("DICO(O)A") and the Iraq (United Nations Sanctions) Order 2003, SI 2003/1519 ("I(UNS)O"). See pp 174-176 below.

<sup>50</sup> E.g. Prince R, 'David Cameron refuses to return Koh i Noor diamond to India' *The Telegraph* 29 July 2010 and, in the context of human remains, a claim was made by the Council for British Druid Orders for the transfer of skeletons from the Alexander Keller Museum in Avebury for reburial: see David Thackray and Sebastian Payne, *Avebury Reburial Request: Summary Report* (English Heritage and National Trust 2010).

<sup>51</sup> Farida Shaheed, *Report of the independent expert in the field of cultural rights* UN General Assembly 21 March 2011, 5.

Auschwitz, or represent hatred and evil such as the statues of former dictators and some people may wish to destroy these; yet it may be appropriate to preserve them as a reminder not to repeat history.<sup>52</sup> Therefore the notion of public legacy (set out in Chapter 2) provides a safety mechanism by which the physicality of such places, practices or things may not be preserved *in toto*; instead the decision making process should take account of these considerations when assessing the extent of the normative imperative to preserve or to provide access.

Secondly this thesis deals with ‘cultural heritage’ rather than ‘cultural property’. The latter has been used in international legal instruments and widely by lawyers, particularly in the USA.<sup>53</sup> Using a term which focuses too much on the legal position (i.e. ‘property’) does little to aid discussion because law then effectively leads the discipline rather than the law facilitating the appropriate treatment of these important objects, places and practices.<sup>54</sup>

Thirdly, cultural heritage will be treated as intangible<sup>55</sup> rather than as the things, places or practices themselves and in this way the functionalist approach to cultural heritage is adopted.<sup>56</sup>

---

<sup>52</sup> Auschwitz Birkenau was inscribed as a World Heritage Site in 1979: <<http://whc.unesco.org/en/list/31>> accessed 3 January 2013.

<sup>53</sup> Chapters 1 and 3.

<sup>54</sup> At pp 49-51 below.

<sup>55</sup> See n 9.

<sup>56</sup> Markus M Müller, ‘Cultural Property Protection: Legitimacy, Property, and Functionalism’ (1998) 7 *International Journal of Cultural Property* 395, 398-399 and Tolina Loulanski, ‘Revising the Concept for

The fourth assumption is that cultural heritage of *all types* has underlying principles and norms to which effect should be given. The same *approach* to assessing and giving effect to these principles and norms can be taken regardless of whether the subject matter is sacred manuscripts, works of art, archaeological objects, Stone Age dwellings or folklore practices. It is the *content* of the particular assessments about these different types of subject matter and the *manner* in which the norms are given effect to that will differ. Nevertheless, the key aspect of concern is how effective the legal, ethical and *quasi*-legal regimes are in addressing these considerations and acting on them. Consequently a single approach can be taken, even when dealing with particular groups who claim objects (for example indigenous groups) and this thesis seeks to avoid what has been described as the ‘myopic view’ of heritage which can result from concentrating on indigenous claims and repatriation<sup>57</sup> at the expense of adopting a more holistic method. This should not be interpreted as showing disrespect towards claims that may be made by indigenous groups, but instead the focus of this thesis is on cultural heritage, regardless of origin. This is with a view to developing a functional proposal that could be used in the context of indigenous cultural heritage as well as cultural heritage originating from other groups or nations.<sup>58</sup> The proposal set out in this

---

Cultural Heritage: The Argument for a Functional Approach’ (2006) 13 *International Journal of Cultural Property* 207, 216.

<sup>57</sup> Derek Fincham, ‘The Distinctiveness of Property and Heritage’ (2011) *Penn State Law Review* 641, 643.

<sup>58</sup> Bienkowski points out that cosmopolitanism discourse in archaeology has unintentionally ‘tended to focus on empowering and involving indigenous communities’: Piotr Bienkowski, ‘Whose Past? Archaeological Knowledge, Community Knowledge, and the Embracing of Conflict’ in Geoffrey Scarre & Robin Coningham (eds) *Appropriating the Past: Philosophical Perspectives on the Practice of*

thesis<sup>59</sup> is a structure which is applicable to all cultural heritage but which provides the flexibility by which the specific considerations relevant to indigenous cultural heritage (such as the importance to identity and community<sup>60</sup>) may be taken into account.

The fifth assumption is to treat law as an instrumental tool<sup>61</sup> to further policy as evidenced by universal recognition of the importance of cultural heritage.<sup>62</sup> Whilst law,

---

*Archaeology* (CUP 2013) 57. In the context of traditional knowledge Tutu takes colonialism out of the equation for the purposes of assessing ‘the protection of the knowledge itself rather than the knowledge as it is understood when linked to the power dynamics that have resulted from the history of colonialism’: ‘J Janewa OseiTutu, ‘A Sui Generis Regime for Traditional Knowledge: the Cultural Divide in Intellectual Property Law’ (2011) 15 *Marquette Intellectual Property Review* 147, 156. Similarly in this thesis the author seeks to take an holistic approach that focuses on cultural heritage without the influences of colonialism in spite of the view expressed by Hamilakis that such an omission is both hypocritical and ‘conceals an undisclosed interest’: Yannis Hamilakis, ‘Responses’ to Alan Audi, ‘A Semiotics of Cultural Property Argument’ (2007) 14 *International Journal of Cultural Property* 131, 160. However, the proposal put forward in this thesis nevertheless allows the circumstances of dispossession and acquisition (which may have taken place during colonial times) to be considered as part of the public legacy of cultural heritage: see the Draft Code of Practice set out at Appendix 2.

<sup>59</sup> For a system by which the cultural heritage principles and norms are taken into account when certain decisions are made. This is set out in the Appendices and the justification for it is set out in Chapter 5.

<sup>60</sup> Discussed at p 62 below.

<sup>61</sup> Support for the treatment of law as a tool can be seen in the context of archaeology and museum practice ‘Law is no longer taken as an institution external to the activities of [archaeology and museum practice], but as a resource that museum professionals and archaeologists exploit in the pursuit of their respective agenda’: Tatiana Flessas, ‘The Ends of the Museum’ LSE Law, Society and Economy Working Papers 14/2013 <[http://www.lse.ac.uk/collections/law/wps/WPS2013-14\\_Flessas.pdf](http://www.lse.ac.uk/collections/law/wps/WPS2013-14_Flessas.pdf)> accessed 24 December 2013, 3).

in the field of cultural heritage, can (and often should) have a regulatory role it also has a protective one, responding to the moral and popular compunction to preserve cultural heritage.<sup>63</sup> Law obviously also has a role to play in dispute resolution, although it has been questioned whether it is a suitable means by which to determine conflicting claims to cultural heritage.<sup>64</sup> The author therefore takes heed of the views that law will not necessarily always provide the optimum solution because over-regulation may stifle appropriate means of resolution<sup>65</sup> but agrees with the sentiment that law ‘provides

---

<sup>62</sup> There is a general consensus of the need to protect cultural heritage: Peter K Yu, ‘Cultural Relics, Intellectual Property, and Intangible Heritage’ (2008) 81 *Temple Law Review* 433, 441. Rendix suggests that ‘the emotional arguments of the right to reclaim and possess original cultural objects in their original geographical context seem to have the majority of people’s sympathy on both sides of the Atlantic’: Mia Rendix, ‘Copyright as Moral Strategy of Reclaiming the Past: The Return of the Icelandic Sagas’ in Helle Porsdam and Thomas Elholm (eds), *Dialogues on Justice: European Perspectives on Law and Humanities* (De Gruyter 2012) 190. Because of the universal concern for cultural heritage, plunder of it has become ‘a crime of international concern’: Helle Porsdam, ‘Epilogue Cultural Heritage and Law: The Case of Cultural Looting’ in Helle Porsdam and Thomas Elholm (eds), *Dialogues on Justice: European Perspectives on Law and Humanities* (De Gruyter 2012) 235. See also John Henry Merryman, ‘The Public Interest in Cultural Property’ (1989) 77 *Cal LR* 339, 343.

<sup>63</sup> As evidenced in Chapter 2.

<sup>64</sup> E.g. Brown advocates the use of ‘civil society strategies’ to resolve disputes: Brown (n 43) 246. This will be analysed at p 266 below.

<sup>65</sup> *ibid* 252. Brown (*ibid* at 215) cites various examples, including the Alaskan silver hand tags which designate objects as ‘Authentic Native Handicraft from Alaska’; which some Alaska Native artists refuse to use, thus raising questions of authenticity. Furthermore, litigation has been described as a ‘flawed medium for resolving Holocaust-related claims’: Palmer (n 27) 49. Cotler suggests that the law was not really designed to deal with Nazi Era claims because ‘the existential character of the evil overtakes the law’s capacity to address it, while the law’s capacity to address it requires us to banalize the evil’: Ian

structure and institutionalizes contemporary values’<sup>66</sup> such that it is ‘a construct that accommodates and embodies social values’.<sup>67</sup> In this regard, any claims procedure for resolving disputes about cultural heritage should avoid simply looking at issues of ownership and possession or strict legal title. Instead, the cultural heritage principles and norms should be at the forefront of any decision-making process. This thesis will assess how feasible it would be to achieve this through concepts which are developing in practice such as valid or moral title and stewardship.

## **Methodology**

A system of cultural heritage principles and norms will be identified in Chapter 2 derived from academic, professional and policy materials relating to the concept of cultural heritage. The corpus for this analysis will be policy documents, statements, guidance and academic and professional literature on cultural heritage from geography, anthropology, archaeology, museum studies and other heritage scholars. The principles and norms derived from this analysis will then form the conceptual framework for the remainder of the thesis and are justified on the basis that they represent universally recognised principles and norms experienced by many people across the globe.<sup>68</sup>

---

Cotler, ‘The Holocaust, ‘Thefticide’ and Restitution: a Legal Perspective’ (1998) 20 *Cardozo Law Review* 601, 603. See also Nicole Bohe, ‘Politics, Leverage, and Beauty: Why the courtroom is not the best option for cultural property disputes’ (2011) 1 *Creighton International & Comparative Law Journal* 100, 110-111.

<sup>66</sup> Hilary A Soderland in ‘Values and the Evolving Concept of Heritage: The first Century of Archaeology and Law in the United States’ in George S Smith, Phyllis Mauch Messenger and Hilary A Soderland (eds) *Heritage Values in Contemporary Society* (West Coast Press 2010) 129.

<sup>67</sup> *ibid*

<sup>68</sup> See p 112 below.

Cultural heritage is a vital part of a community's<sup>69</sup> or nation's identity<sup>70</sup> and it is valued by many people for different reasons, but there is a strong recognition of the need to preserve<sup>71</sup> and provide access to cultural heritage for present and future generations.<sup>72</sup> The way of describing the particular types of value may differ between disciplines (from archaeology, museum studies, anthropology and economics); the extent of these types of value also differs throughout the world and within nations, for example the spiritual or sacred value of an object within a cultural practice might be recognised by one group, but the same object may have an aesthetic value to another. Nevertheless,

---

<sup>69</sup> This includes traditional knowledge which is recognised as important for the identity of communities: *Traditional Knowledge – Operational Terms and Definitions* WIPO/GRTKF/IC/3/9 (20 May 2002) [33].

<sup>70</sup> Amadou-Mahtar M'Bow, former Director-General of UNESCO said that 'One of the most notable incarnations of a people's genius is its cultural heritage' such that 'The men and women of these countries have the right to recover these cultural assets which are part of their being': Amadou-Mahtar M'Bow, 'A plea for the return of an irreplaceable cultural heritage to those who created it' (7 June 1978) Appendix 12 in Elizabeth Simpson (ed), *The Spoils of War* (The Bard Graduate Center for Studies in the Decorative Arts 1997) 301

<sup>71</sup> Prott demonstrates the clear link between the importance of cultural heritage to identity and the need to preserve this: 'Their [people's] cultural heritage represents their history, their community, and their identity. Preservation is sought, not for the sake of the objects, but for the sake of the people for whom they have a meaningful life': Lyndel V Prott, 'Principles for the Resolution of Disputes Concerning Cultural Heritage Displaced during the Second World War' in Simpson (n 70) 225. This shows the importance of the intangible dimension of cultural heritage in terms of the importance, rather than the physical object. In this way there is a distinction between 'preserving the physical integrity of an object and preserving its conceptual integrity' and these two can conflict: Miriam Clavir, *Preserving What is Valued* (UBC Press 2002) xiii. See pp 113-116 below.

<sup>72</sup> See pp 119-122 below. At times the importance to identity can involve the prevention of access because of the need for secrecy and the belief that some objects have particular powers: Clavir (ibid 58).



there is a consistency of recognition across borders and cultural groupings that these objects, places and practices are important and deserve special treatment in a manner different from other more general property, not least because they possess an intangible, cultural heritage dimension.<sup>73</sup> Both Western nations and indigenous peoples ‘recognize the significance of cultural heritage and universally strive to protect what is respectively considered its most important elements’.<sup>74</sup> Primary legal instruments of international law recognise the fundamental importance of culture to human dignity<sup>75</sup> and the need to conserve culture,<sup>76</sup> demonstrating again the universality of concern for cultural heritage.<sup>77</sup>

When the subject matter of concern shares such universally acknowledged characteristics and where there are such ‘normative similarities in our attitudes towards cultural heritage’<sup>78</sup> it is essential to question how far the law, ethical and *quasi*-legal

---

<sup>73</sup> Sarah Harding, ‘Value, Obligation and Cultural Heritage’ (1999) 31 Ariz St LJ 292, 315 and Yu (n 62) 471.

<sup>74</sup> Harding (ibid) and Yu (ibid).

<sup>75</sup> Universal Declaration of Human Rights, General Assembly Resolution 217 A (III) 1948 (adopted 10 December 1948) arts 22 and 27(1).

<sup>76</sup> International Covenant on Economic, Social and Cultural Rights, OHCHR, General Assembly Resolution 2200A (XXI) 1966 (adopted 16 December 1966, entered into force 3 January 1976) art 15(2).

<sup>77</sup> This universal concern can be seen in the context of the destruction of cultural heritage or where it has been at risk of destruction: e.g. ‘The World wept over the wanton destruction of the treasures of the ill-guarded National Museum of Iraq’: André Emmerich, ‘Improving the Odds: Preservation through Distribution’ in Kate Fitz Gibbon (ed), *Who Owns the Past? Culutral Policy, Cultural Property and the Law* (Rutgers University Press 2005) 247 and the case of the Bamiyan Buddhas discussed below at p 129. See also note 62 above.

<sup>78</sup> E.g. Harding (n 74) 302.

regulatory regimes give effect to those very norms which are so forcefully expressed by professionals and the public alike. This thesis aims to answer this question in the context of England by seeking to find these important policy aspects in the regime dealing with cultural heritage.

Carman has suggested that law plays a transformative role, changing archaeological matter into heritage;<sup>79</sup> he identifies that some laws protecting cultural heritage have been appropriated for this purpose<sup>80</sup> whilst others were brought in by specific legislation. An example of appropriation of law, given by Carman, is treasure trove (now superseded by the Treasure Act 1996). Even if this law had a transformative effect (in terms of changing the value of the object) it nevertheless did not take account of the archaeological importance of any objects found with a gold or silver item which was not itself made from either of these precious metals.<sup>81</sup> Consequently, whilst many archaeologists, museum curators, historians or the public would have equally valued the pottery vase in which the precious metal items were found and treated all the objects equally as cultural heritage, the law would only have ‘transformed’ the latter as cultural heritage. In effect it is putting the cart before the horse to say that it is the law that transforms things into cultural heritage or that it is the law itself that values these things. Whilst Carman argues that law transforms archaeological objects into a matter of public concern<sup>82</sup>, it is difficult to see how this argument holds up when one considers how strongly the Bamiyan Buddhas were valued as representing cultural heritage, without

---

<sup>79</sup> Carman (n 46) 157

<sup>80</sup> *ibid* 45.

<sup>81</sup> Under the common law of treasure trove, discussed below at p 172.

<sup>82</sup> Carman (n 46) 131.

the intervention of the law.<sup>83</sup> Indeed, it was only after their destruction that the place in which they were situated was designated by international law as a world heritage site.<sup>84</sup>

The method adopted in the subsequent chapters is ostensibly a doctrinal one although on closer inspection it reveals itself to have an inter-disciplinary nature. The doctrinal approach is evident in the attempt to systematise the current legal regime in respect of CHOs and to analyse the effectiveness of the law at fulfilling the underlying principles and upholding the norms relevant to cultural heritage. Recourse will be had to English domestic law, EU law, international conventions and other international soft law sources. However, the approach is not truly doctrinal because it will involve using material which positivists would certainly exclude from consideration. These sources include, for example, the decisions of the SAP, the Reviewing Committee and the AILP. These non-statutory (*quasi*-legal) bodies make recommendations to the Secretary of State which affect the rights and responsibilities of owners of CHOs.<sup>85</sup> In addition, the professional conduct of museum professionals when dealing with cultural heritage objects is governed by non-statutory codes of ethics and professional practice. There is a clear justification for using both legal, ethical and *quasi*-legal material. Within the field of cultural heritage, most notably in the context of museums which are the primary holders of CHOs, codes of ethics and other guidance are vital sources of information

---

<sup>83</sup> UNESCO highlighted the importance of the Buddhas before their destruction: Agenda for UNESCO, 25<sup>th</sup> Session of the World Heritage Committee, Helsinki, December 2001, WHC-01/CONF 208/23, 22 November 2001. See Francesco Francioni & Federico Lenzerini, 'The Destruction of the Buddhas of Bamiyan and International Law' (2003) 14 EIJIL 619, 625.

<sup>84</sup> UNESCO, 27<sup>th</sup> Session of the World Heritage Committee, Paris, 10 December 2003, 27 COM 8C.43. See pp 133-134 below.

<sup>85</sup> Discussed in Chapters 3 & 4.

norms, playing an educative and regulatory role.<sup>86</sup> It is argued that over time some of the concepts derived from these ethical instruments have formed *quasi*-legal principles. By employing this methodology this thesis will assess the effectiveness of these legal, ethical and *quasi*-legal instruments in upholding the cultural heritage principles and norms.

Whilst in essence this is a thesis in law, regulation and dispute resolution, it also depends on having identified principles and norms derived from other disciplines and consequently forms the type of interdisciplinary research on cultural heritage encouraged by the Faro Convention.<sup>87</sup>

---

<sup>86</sup> At p 230 below.

<sup>87</sup> Council of Europe Framework Convention on the Value of Cultural Heritage for Society (adopted 27 October 2005, entered into 1 June 2011) CETS 199, art 13(c).

# Chapter One

## Definitions and meanings

---

### 1.1 Introduction

A clear and consistently-used definition has eluded the discourse surrounding the treatment of the objects, places or practices that have particular importance to individuals, communities, a nation or humanity. The desire to develop and instigate a global definition of ‘cultural heritage’ or ‘cultural property’ is evident in both heritage and legal practice and scholarship<sup>1</sup>, although some express concerns about the desirability or reality of achieving this; Carman is apprehensive of the ‘insistence on a clear-cut definition’ of heritage, believing that it ‘risks constraining and delimiting both

---

<sup>1</sup> Janet Blake, ‘On Defining the Cultural Heritage’ (2000) 49 *International and Comparative Law Quarterly* 61, 63 argues that a ‘workable definition of the nature of cultural heritage’ is needed due to ‘the increasing global importance of cultural heritage instruments and the ever-expanding scope of the term and the areas in which it is used’. Yahaya Ahmad, ‘The Scope and Definitions of Heritage: From Tangible to Intangible’ (2006) 12 *International Journal of Heritage Studies* 292, 299 advocates a common language and understanding for ‘certain common terms and terminology’. Silberman opines that the definition of intangible cultural heritage in the Convention for the Safeguarding of the Intangible Cultural Heritage UNESCO, Paris (adopted 17 October 2003, entered into force 20 April 2006) 2368, UNTS 3 (“the 2003 Convention”) is one that is appropriate for the 21<sup>st</sup> century in its ‘dynamic conception of cultural heritage rights and social significance’: Neil A Silberman, ‘Heritage interpretation and human rights: documenting diversity, expressing identity, or establishing universal principles?’ (2012) 18 *International Journal of Heritage Studies* 245, 254. This is, in part, because of the focus on transmission of cultural heritage between generations and on the sense of identity and community that cultural heritage provides to them (ibid 254).

analytical efforts and the recognition of particular social scenarios'.<sup>2</sup> Flessas argues that 'each definition of cultural property is so riddled with gaps and allusions to the past and future that both the field and the objects within it cannot be defined 'once and for all'.<sup>3</sup> In the context of 'heritage' the Heritage Lottery Fund avoids defining heritage, preferring instead to encourage 'people to identify their own heritage and explain why it is valued by themselves and others.'<sup>4</sup> The problem of definition has been on such a large scale that a detailed consideration of this and a clear justification for the use of any term in this thesis must be undertaken.

## **1.2 A definitional framework**

The term 'cultural heritage' will be used throughout this thesis rather than 'cultural property', 'cultural goods' or 'cultural objects'. The chosen term will refer to the intangible dimension of objects, places or practices which are of value to particular individuals, a community, a nation or to humanity to such a degree that its loss or destruction would be a misfortune to the culture, identity, heritage or religious practices

---

<sup>2</sup> John Carman & Marie Louise Stig Sørensen, 'Heritage Studies: An outline' in Marie Louise Stig Sørensen & John Carman (eds), *Heritage Studies: Methods and Approaches* (Routledge 2009) 12.

<sup>3</sup> Tatiana Flessas, 'Cultural Property Defined, and Redefined as Nietzschean aphorism' (2003) 24 *Cardozo Law Review* 1067, 1079.

<sup>4</sup> Heritage Lottery Fund, *Strategic Framework 2013-2018: A lasting difference for heritage and people* (HLF 2013) 10. Loulanski acknowledges the evolutionary nature of heritage as a concept (heritage and cultural heritage being treated by her as synonymous) meaning that it can be seen as being 'all things to all people' such that 'the general lack of an accepted theory and ethic in heritage conservation are considered significant problems': Tolina Loulanski, 'Revising the Concept for Cultural Heritage: The Argument for a Functional Approach' (2006) 13 *International Journal of Cultural Property* 207, 208-209.

of those people(s).<sup>5</sup> This definition is clearly applicable to objects, places and practices and therefore since the scope of analysis is restricted to tangible, personal property the term ‘cultural heritage objects’ (CHOs) will be used to indicate the restricted subject matter and ‘cultural heritage’ to refer to the intangible dimension.

### **1.2.1 Cultural heritage**

The term ‘cultural heritage’ has been used in professional practice, in academic discourse<sup>6</sup> and increasingly features in international legal instruments.<sup>7</sup> Over the years the meaning of ‘cultural heritage’ has expanded and these changes, particularly at the international level, will be discussed further below.<sup>8</sup>

In the context of archaeological ethics the term ‘cultural’ has been described as implying ‘that these objects possess a special status which removes them from the ordinary and everyday.’<sup>9</sup> The word therefore elevates the status of the ordinary object. The word ‘heritage’ is closely linked with the concept of inheritance and therefore has legal connotations.<sup>10</sup> The legal origin of the term is acknowledged, but the focus is far

---

<sup>5</sup> Chapter 2 analyses why value/significance to a body of people is essential to this definition of and also how this forms an essential part of the underlying principles of cultural heritage worthy of upholding.

<sup>6</sup> See for example Blake (n 1) and Lyndel V Prott & Patrick J O’Keefe, ‘Cultural Heritage’ or ‘Cultural Property’? (1992) 1 *International Journal of Cultural Property* 307.

<sup>7</sup> At pp 41-45 below.

<sup>8</sup> At pp 41-45 below.

<sup>9</sup> Chris Scarre & Geoffrey Scarre, ‘Introduction’ in Chris Scarre & Geoffrey Scarre (eds), *The Ethics of Archaeology: Philosophical Perspectives on Archaeological Practice* (CUP 2006) 5.

<sup>10</sup> The word ‘heritage’ implies inheritance and is linked to entailed interests: Derek Gillman, *The Idea of Cultural Heritage* (Revised edition, CUP 2010) 82-83.

more on the context of inheritance<sup>11</sup> which is seen as central,<sup>12</sup> in terms of passing on cultural heritage from past generations to future generations. This is evident in the French concept of ‘patrimoine’ and features in general discussions about cultural heritage, bringing with it a sense of inheritance that:

promotes the idea that the present has a particular ‘duty’ to the past and its monuments. The duty of the present is to receive and revere what has been passed on and in turn pass this inheritance, untouched, to future generations.<sup>13</sup>

This treats present generations as the custodians of the tangible indicators of the past (the revered objects or monuments) rather than as outright owners or alternatively, as trustees owing obligations to beneficiaries whether or not alive.<sup>14</sup> Criticism has been

---

<sup>11</sup> Kathryn Last, ‘The Resolution of Cultural Property Disputes: Some Issues of Definition’ in The International Bureau of the Permanent Court of Arbitration, *The Resolution of Cultural Property Disputes: Papers Emanating from the Seventh PCA International Law Seminar*, 23 May 2003 (Kluwer 2004) 60; Susan M Pearce, ‘The Making of Cultural Heritage’ in Erica Avrami, Randall Mason & Marta de la Torre (eds), *Values and Heritage Conservation: Research Report* (The Getty Conservation Institute 2000) 59 and Rodney Harrison, *Heritage: Critical Approaches* (Routledge 2013) 43. Similarly, Murphy highlights the ‘thematic continuity’ with ‘heirship’: Tim Murphy, ‘Legal Fabrications and the Case of ‘Cultural Property’ in Alain Pottage, Martha Mundy and Chris Arup, *Law, Anthropology, and the Constitution of the Social: Making Persons and Things* (CUP 2004) 132.

<sup>12</sup> Blake suggests that the ‘idea of inheritance is central to the force of the term cultural heritage and adds a further set of notions to its meaning’: Blake (n 1) 69

<sup>13</sup> Laura Jane Smith, *Uses of Heritage* (Routledge 2008) 19.

<sup>14</sup> Carpenter talks of the USA having a ‘trust responsibility’ towards Native American tribes: Kristen A Carpenter, ‘Real Property and Peoplehood’ (2008) 27 *Stanford Environmental Law Journal* 313, 356. The responsibilities of museums as holding their collections in trust for future generations is clearly set out in their key codes of ethics: principle 1 of the *Code of Ethics for Museums* (UK Museums



levied at the so-called ‘authorized heritage discourse’ (AHD), an approach to heritage practice relying on power and knowledge claims of relevant professional experts and state and cultural institutions such that it constructs the heritage practices of management and conservation.<sup>15</sup> Smith advocates ‘the development of ‘a more holistic understanding of the uses and nature of heritage in contemporary societies’,<sup>16</sup> viewing heritage as a ‘cultural practice, involved in the construction and regulation of a range of values and understandings’ rather than something promoting ‘a certain set of Western elite cultural values’;<sup>17</sup> she therefore treats heritage as intangible.<sup>18</sup> This shift in focus from traditional Western notions of preservation<sup>19</sup> towards cultural practices is mirrored in museums’ ethical codes which recognise the importance of taking account of the interests of stakeholders.<sup>20</sup> The treatment of heritage as an intangible concept can be seen in the description of heritage, in its many forms, as constituting ‘an influential

---

Association, London 2008) (“MACoE”) and Principle 2 of *ICOM Code of Ethics for Museums* (International Council of Museums, Paris 2006) (“ICOMCoE”). This intergenerational responsibility is analysed further under the heading of the public legacy in Chapter 2 at p 93. The present generations clearly have responsibilities towards the future generations: Thompson takes a diachronic approach based on responsibilities which cross the generations: Janna Thompson, *Taking Responsibility for the Past: Reparation and Historical Justice* (Polity Press 2002) 149.

<sup>15</sup> Smith (n 13 **Error! Bookmark not defined.**) 11-12; Harrison (n 11) 111-112. This is further discussed at p 69 below.

<sup>16</sup> Smith (n 13) 45.

<sup>17</sup> *ibid* 11.

<sup>18</sup> *ibid*

<sup>19</sup> Smith (n 13) 3, 11.

<sup>20</sup> See Chapter 4. The term ‘stakeholders’ is used here to refer to ‘donors, researchers, local and source communities and others served by the museum’: MACoE [6.12].

force in society’<sup>21</sup> and being ‘deeply entwined with other aspects of our lives whether at an individual or a group level’.<sup>22</sup>

Blake treats the word ‘heritage’ as a ‘qualifier’ in the sense that the phrase ‘cultural heritage’ is a smaller category than ‘culture’ which can apply to virtually anything and the phrase ‘allows us to narrow it down to a more manageable set of elements’.<sup>23</sup> However, it may be preferable to treat ‘cultural’ as the qualifying element<sup>24</sup> since that signifies the particular type of heritage, and will often be used to distinguish heritage which relates to cultural life from the natural heritage.<sup>25</sup>

---

<sup>21</sup> Marie Louise Stig Sørensen & John Carman, ‘Introduction’ in Stig Sørensen & Carman (n 2) 3.

<sup>22</sup> Carmen & Stig Sørensen (n 2) 23. ‘Cultural-property policies are also controversial because they focus on moral duties, and sometimes on religious, cultural and political belief systems that are not universally held’: ACCP Editorial Board, ‘Conclusion: Museums at the Center of Public Policy’ in Kate Fitz Gibbon (ed), *Who Owns the Past? Culutral Policy, Cultural Property and the Law* (Rutgers University Press 2005) 310.

<sup>23</sup> Blake (n 1) 68.

<sup>24</sup> Indeed, this is the approach taken by Forrest (n 110) 2 in referencing Blake’s later work: Janet Blake, *Commentary on the UNESCO 2003 Convention on the Safeguarding of the Intangible Cultural Heritage* (IAL 2006) 22 and in Rosemary J Coombe & Joseph F Turcotte, ‘Indigenous Cultural Heritage in Development and Trade: Perspectives from the Dynamics of Cultural Heritage Law and Policy’ in Christopher B Graber, Karolina Kuprecht & Jessica C Lai (eds), *International Trade in Indigenous Cultural Heritage: Legal and Policy Issues* (Edward Elgar 2012 ) 275.

<sup>25</sup> Such a distinction is made in the Convention concerning the protection of the World Cultural and Natural Heritage UNESCO, Paris (adopted 16 November 1972, entered into force 17 December 1975) 1037, UNTS 151 (“the WHC”) article 1 (cultural heritage) and article 2 (natural heritage).

It has been argued that the international definitions of cultural heritage have become more consistent over the years, although national interpretations tend to differ.<sup>26</sup> Whilst formulating terminology is the prerogative of each country,<sup>27</sup> because the ‘finer terminology of “heritage” has not been streamlined or standardised...no uniformity exists between countries’.<sup>28</sup> This lack of uniformity is more than just a consequence of linguistics and translation,<sup>29</sup> but derives from the fact that each country has its own understanding of the remit and use of the term; despite this definitional variation between countries, the term refers primarily to the same things.<sup>30</sup>

### **1.3 Definitional woes: more terms than meanings?**

The question of definition has been described as ‘one of the most recurrent and debated questions’,<sup>31</sup> but this pre-occupation with definition has been said to preclude

---

<sup>26</sup> Ahmad (n 1) 299. The move towards cultural heritage rather than cultural property is discussed below at p 49. The differences in language can be seen in: Carman & Stig Sørensen (n 2) 24 (text in note 1) and Manlio Frigo, ‘Cultural Property v. Cultural heritage: A ‘battle of concepts’ in international law?’ (2004) 86 IRRC 367, 375.

<sup>27</sup> *ibid*

<sup>28</sup> *ibid* 292.

<sup>29</sup> E.g. the different translations of the word ‘national treasure’ in Article 36 (ex Article 30 TEC) Consolidated Version of the Treaty on the Functioning of the European Union [2010] OJ C83/61. Italy, Spain and the Netherlands, for example, have much wider definitions which do not fully reflect the ‘treasure’ aspect of the exception to the prohibition on quantitative restrictions between Member States: Frigo (n 26) 371.

<sup>30</sup> See Ahmad (n 1) 299.

<sup>31</sup> Andrea Biondi, ‘The Merchant, the thief and the Citizen: the circulation of works of art within the EU’ (1997) 34 CML Rev 1173, 1180. Whilst Biondi refers to this in the context of ‘the field of cultural property’, here the term ‘cultural heritage’ could easily be substituted because Biondi used the phrase as a general term, rather than within the context of a legal instrument. Furthermore, she was writing in 1997

‘discussion and agreement on true substantive issues.’<sup>32</sup> When referring to the field of study, in most cases ‘cultural property’ and ‘cultural heritage’ can be, and have been, used interchangeably.<sup>33</sup> It is when the terms ‘cultural heritage’ and ‘cultural property’ are used in legal instruments that the meaning changes significantly for the purposes of the particular instrument. Indeed, the terms ‘cultural objects’, ‘cultural goods’ and ‘national treasures’ have all been used to refer to tangible personal property in international conventions, UK domestic legislation and EU legislation.<sup>34</sup>

In 1984, the development in the UK of a definition of cultural property was described as ‘by accident and implication’.<sup>35</sup> Nearly 30 years later a clear definition of neither ‘cultural property’ nor ‘cultural heritage’ has yet been concretised, not least because the terms are frequently used in discourse in the professional, academic and legal contexts and their meaning and scope overlaps. In fact, even when dealing with the same subject matter the English courts have been unable to use consistent terminology and have interchanged phrases within a single case; two recent Court of Appeal cases

---

when there was a far greater predilection for treating the general topic as ‘cultural property’ rather than ‘cultural heritage’.

<sup>32</sup> *ibid* 1180. It is hoped that the discussion in Chapter 2 demonstrates the necessary concern with the substantive issues at hand.

<sup>33</sup> See p 34-37 below.

<sup>34</sup> ‘Cultural objects’: Convention on Stolen or Illegally Exported Cultural Objects, UNIDROIT (adopted 24 June 1995, entered into force 1 July 1998), 34 ILM 1322 (“Unidroit Convention”) and the Dealing in Cultural Objects (Offences) Act 2003 (“DICO(O)A”) Council Directive (EC) 7/93 of 15 March 1993 on the Return of cultural objects unlawfully removed from the territory of a Member State [1993] OJ L074 (in conjunction with ‘national treasures’); ‘cultural goods’: Council Regulation (EC) 2009/116 of 18 December 2008 on the export of cultural goods. [2009] OJ L 39; and ‘national treasures’; Article 36 (ex Article 30 TEC) EU Treaty (n29).

<sup>35</sup> Richard Crewdson, ‘Cultural Property – A fourth estate?’ (1984) 18 LS Gaz 126-127.

demonstrate this.<sup>36</sup> First, in an appeal relating to preliminary issues about Iran's title to certain antiquities under Iranian law and whether an English court would recognise this<sup>37</sup> Lord Phillips of Worth Matravers CJ focused on the subject matter, in general terms as 'cultural objects', but then called them 'antiquities' as a subset of that category.<sup>38</sup> The judgment then refers to property forming part of a nation's 'cultural heritage', suggesting that cultural heritage is intangible in nature.<sup>39</sup> His Lordship then proceeded to consider the 1970 Convention in which the term 'cultural property'<sup>40</sup> is used.

The second case involved the theft by a renowned scholar of books including maps and illustrations from the British Library and the Bodleian Library.<sup>41</sup> The books were treated as a 'cultural and historical resource'<sup>42</sup>, basically as property, albeit with the qualifying words 'cultural and historical', thereby distinguishing them from resources of a more commercial nature.<sup>43</sup> However, the judge went on to acknowledge the books'

---

<sup>36</sup> *Government of the Islamic Republic of Iran v The Barakat Galleries Ltd* [2009] QB 22 (CA) and *R v Farhad Hakimzadeh* [2010] 1 Cr App R (S) 10 (CA).

<sup>37</sup> *Iran v Barakat* (ibid).

<sup>38</sup> ibid 63.

<sup>39</sup> ibid 63. Discussed at p 57 below. See Smith (n 13) discussed at p 29 above and Blake (n 1) discussed at pp 45-46 below.

<sup>40</sup> *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* UNESCO, Paris 14 November 1970. 'Cultural property' refers to tangible movable property: art 1 and Annex 1.

<sup>41</sup> *Hakimzadeh* (n 36).

<sup>42</sup> ibid [8].

<sup>43</sup> ibid [8]. However, 'cultural resources' provides 'stronger associations with materiality, ownership and usefulness than the word 'heritage' does': Carman and Stig Sørensen (n 2) 12.

status as contributing to the nation's cultural heritage.<sup>44</sup> The courts' focus then shifted to their rarity and specifically their importance far exceeding the value of an easily replaceable shop-bought novel. The Court of Appeal stated:

Cultural property cannot be valued in the same way as cash or readily replicable items, and the gravamen is the damage to rare items of historical, intellectual and cultural importance.<sup>45</sup>

Blake J, giving the judgment of the court, used the above to justify a deterrent approach to sentencing so as to 'deter others from such crimes which diminish the intellectual and cultural heritage of the nation.'<sup>46</sup>

This varied terminology does little to aid a clear recognition of the subject matter and how it should be treated in law.<sup>47</sup>

### **1.3.1 'Cultural heritage' and 'cultural property': different words – the same meaning?**

The terms are occasionally used interchangeably, whilst sometimes 'cultural property' is treated as a sub-group of 'cultural heritage'.<sup>48</sup> It has been suggested that both terms can be regarded as equivalent in so far as 'both notions are incomplete' and must rely on non-law disciplines for particularisation.<sup>49</sup>

In legal instruments the term 'cultural property' tends to be used to refer to physical objects rather than the intangible dimension and only in one international instrument (in

---

<sup>44</sup> *Hakimzadeh* (n 41) [8].

<sup>45</sup> *ibid* [13].

<sup>46</sup> *ibid* [13].

<sup>47</sup> Chapter 3 demonstrates that English domestic law uses other categories to deal with CHOs.

<sup>48</sup> *Blake* (n 1) 66.

<sup>49</sup> *Frigo* (n 26) 376.

the 1954 Convention<sup>50</sup>) has it been used to refer to real property. Frequently it is used in conjunction with ‘cultural heritage’.<sup>51</sup> Prott and O’Keefe<sup>52</sup> argue that the term ‘cultural heritage’ is broader than ‘cultural property’. The latter term can incorporate ‘monuments and sites [and] movable objects’ within its scope and also those elements of intangible rights which would be covered by the intellectual property law.<sup>53</sup> However, they suggest that ‘rituals, ceremonies, oral history and the performing arts’ would not be covered by ‘cultural property’ and they doubt how far it would cover information relating to the preceding categories.<sup>54</sup> Their justification is that ‘cultural

---

<sup>50</sup> Convention for the Protection of Cultural Property in the Event of Armed Conflict UNESCO, The Hague (adopted 14 May 1954, entered into force 7 August 1956) 249 UNTS 240.

<sup>51</sup> See p 42 below.

<sup>52</sup> Prott & O’Keefe (n 6) 312.

<sup>53</sup> *ibid*

<sup>54</sup> *ibid*. Traditional knowledge, traditional practices and genetic knowledge have usually been categorised as forming part of the intangible cultural heritage (see Noriko Aikawa-Faure, ‘From the Proclamation of Masterpieces to the Convention for the Safeguarding of Intangible Cultural Heritage’ in Laurajane Smith and Natsuko Akagawa (eds), *Intangible Cultural Heritage* (Key Issues in Cultural Heritage, Routledge 2009) 15). However it is possible to see in domestic legal provisions the mixed use of both cultural heritage and cultural property (e.g. ‘cultural property’ is used in the context of cultural expressions in Kyrgyzstan, Russian Federation and South Africa: WIPO IGC, *The Protection of Traditional Cultural Expressions/Expressions of Folklore - Factual Extraction* WIPO/GRTKF/IC/12/4(b) (31 January 2008)). The terms ‘cultural property’ and ‘cultural heritage’ have also been used interchangeably in the context of intangible cultural heritage within academic literature: e.g. Michael F Brown, ‘Heritage Trouble: Recent Work on the Protection of the Intangible Cultural Property’ (2005) 12 *International Journal of Cultural Property* 40, although he acknowledges that the concept of ‘cultural heritage’ offers greater hope for ‘more comprehensive management’ of intangible cultural productions: *ibid* 41. Harding treats traditional knowledge separately from cultural property, but cautions about ‘expecting too much from a definition or classification of anything that we may label traditional or cultural’: Sarah Harding, ‘Defining Traditional

complexes often flow across the classifications’ and so do not fall easily under the headings of real, personal or intellectual property.<sup>55</sup> In contrast, ‘Heritage creates a perception of something being handed down; something to be cared for and cherished.’<sup>56</sup> This reminds us of earlier discussions about the link between heritage and inheritance and also the intangible nature of heritage.<sup>57</sup> Ziegler agrees that ‘cultural heritage’ is a wider category, extending beyond merely ‘protecting tangible objects of objectively or universally recognised “high culture”’ and is thus more subjective than ‘cultural property’.<sup>58</sup> Whilst Ziegler restricts this to objects, it seems that cultural property has, at times, be treated as synonymous with high culture, designated by the state or recognised in conventions as worthy of protection. In this way, cultural property may have come to be a ‘synthetic construction’.<sup>59</sup> The phrase is used in legal instruments and by lawyers, rather than by heritage professionals.<sup>60</sup>

‘Cultural property’ (in the context of objects) has been described as a political construct because it ‘is presumed to have a special meaning to the powers that claim it

---

Knowledge – Lessons from Cultural Property’ (2003) 11 *Cardozo Journal of International and Comparative Law* 511, 518.

<sup>55</sup> *ibid* 313.

<sup>56</sup> *ibid* 311. See also Katya S Ziegler, ‘Cultural Heritage and Human Rights’ in A Gentili, *La Salvaguardia Dei Beni Culturali Nel Diritto Internazionale* (Giuffrè 2007) SSRN: <<http://ssrn.com/abstract=1002620>> accessed 3 January 2013, 5.

<sup>57</sup> See p 27 above and also the discussion at p 57 below.

<sup>58</sup> Ziegler (n 56) 5.

<sup>59</sup> Francesco Francioni, ‘The Human Dimension of International Cultural Heritage Law: An Introduction’ (2011) 22 *EJIL* 9, 10.

<sup>60</sup> Analysed in Chapter 2.



(also to the people governed by those powers)’<sup>61</sup> and ‘is intended to support a nation’s nationalist aspirations rather than the stated goal of protecting archaeological sites.’<sup>62</sup> However, Cuno argues that nations themselves identify certain objects as being of particular importance so as to justify a retentionist policy. Yet this ignores the importance that cultural property can have to humanity as well as to a nation and that by treating objects as cultural property (or equally as cultural heritage) it is possible to acknowledge their difference from ordinary personal property. Indeed, this is the case even though Cuno argues that objects which he calls ‘antiquities’ rather than ‘cultural property’ cannot be owned because they represent ‘our common heritage’.<sup>63</sup> What Cuno’s analysis does show, though, is the limitations that the phrase ‘cultural property’ has in terms of connotations with ownership and dominion.<sup>64</sup>

### **1.3.2 Common heritage**

The notion of the common heritage of humanity is evident in several UNESCO legal instruments.<sup>65</sup> Nevertheless, it can be argued that there is an inherent contradiction between, on the one hand, adopting a universalist notion of protecting something as common heritage ‘that sustains human dignity’ and on the other ‘the rights of individual

---

<sup>61</sup> James Cuno, *Who Owns Antiquity? Museums and the Battle over our Ancient Heritage* (Princeton University Press 2008) 9.

<sup>62</sup> *ibid* 6.

<sup>63</sup> *ibid* 20.

<sup>64</sup> Discussed below at p 49.

<sup>65</sup> E.g. ‘world heritage of mankind as a whole’: the WHC (n 24) Preamble; ‘intangible cultural heritage of humanity’: the 2003 Convention (n 1) Preamble and ‘cultural heritage of all mankind’: the 1954 Convention (n 50) Preamble.

states to define their own cultural property consistent with their own needs'.<sup>66</sup> It has been suggested that a universal approach to cultural heritage is 'universal in theory only',<sup>67</sup> and has the potential to benefit 'affluent and powerful nations and groups'.<sup>68</sup> Macmillan highlights the fact that 'History shows us that it is not possible to decouple cultural heritage from particular identities, national, communal or otherwise',<sup>69</sup> consequently common heritage will not always be a useful concept when dealing with cultural heritage that is of significant importance to particular groups.

If one considers this notion of common heritage in legal terms then it should be discussed in the context of *res communis*, which is property which is owned by no one and 'thus not susceptible to exclusive appropriation by any private agent'.<sup>70</sup> Joyner suggests that a legal regime recognising the common heritage of mankind would require that 'all activities in or around the international area should respect the interests of

---

<sup>66</sup> Michael Rowlands, 'Cultural Rights and Wrongs: Uses of the Concept of Property' in Katherine Verdery and Caroline Humphrey (eds), *Property in Question: Value Transformation in the Global Economy* (Berg, Oxford 2004) 223. See also Fiona Macmillan, 'The protection of cultural heritage: common heritage of mankind, national cultural "patrimony" or private property?' (2013) 64 *Northern Ireland Legal Quarterly* 351, 363.

<sup>67</sup> Peter H Welsh, 'The Power of Possessions: The Case Against Property' (1997) 21 *Museum Anthropology* 12, 14. Joyner describes the concept of the 'cultural heritage of mankind' as 'a conceptual ideal, not an international legal reality supported by State practice': Christopher C Joyner, 'Legal Implications of the Concept of the Common Heritage of Mankind' (1986) 35 *ICLQ* 190, 199.

<sup>68</sup> *ibid*

<sup>69</sup> Macmillan, 'The protection of cultural heritage' (n 66) 363.

<sup>70</sup> Joyner (n 67) 194. Rose treats *res communes* as property that is incapable of ownership, rather than simply without an owner: Carol M Rose, 'Romans, roads, and romantic creators: traditions of public property in the information age' (2003) 66 *Law and Contemporary Problems* 89, 93.

future generations’ especially in the context of exploitation of it as a resource.<sup>71</sup> This would demonstrate a very strong recognition of one of the central elements of heritage which is inheritance.<sup>72</sup> *Res communis* can be seen in the context of community resources<sup>73</sup> where indigenous communities require the knowledge about community resources to receive protection rather than the tangible property itself.<sup>74</sup> The notion of *res universitatis* might be more appropriate in the context of cultural heritage which Rose identifies as a property which is available for a particular group (public or private) who could own the property in common with each other, but excluding outsiders.<sup>75</sup> Rose describes *re universitatis* as property that is ‘non-exclusive but also bounded’.<sup>76</sup> Consequently this may prove a useful concept in the context of not only heritage which is important for the identity of indigenous groups, but also for museums who hold cultural heritage in trust for the public.<sup>77</sup>

Rather than treating heritage as being the common heritage of all, there is perhaps scope for identifying the cultural diversity of different communities to the extent that it may

---

<sup>71</sup> *ibid* 195.

<sup>72</sup> Discussed above at p 27.

<sup>73</sup> See Johanna Gibson, *Community Resources: Intellectual Property, International Trade and Protection of Traditional Knowledge* (Globalization and Law, Ashgate 2005) 189.

<sup>74</sup> *ibid*

<sup>75</sup> Carol M Rose, ‘Romans, roads, and romantic creators: traditions of public property in the information age’ (2003) 66 *Law and Contemporary Problems* 89, 105.

<sup>76</sup> *ibid* 108.

<sup>77</sup> The latter being a principle espoused in both the MACoE (n 14) and the ICOMCoE (n 14).

be preferable to treat cultural heritage as a matter of common concern<sup>78</sup> rather than as a concept of common cultural heritage *per se*.

### ***1.3.2.1 The English approach to ‘cultural heritage’ and ‘cultural property’***

The phrases ‘cultural property’ and ‘cultural heritage’ are seldom found in English domestic law but when they are used, the former tends to refer to physical objects and the latter to the intangible dimension of cultural heritage, as demonstrated by the following cases. Revisiting briefly *Hakimzadeh*,<sup>79</sup> it is clear that the Court of Appeal used ‘cultural property’<sup>80</sup> to refer to the books, but ‘cultural heritage’<sup>81</sup> to refer to the importance to the culture and history of the nation (i.e. the intangible dimension).<sup>82</sup> It is this intangible dimension of cultural heritage which is important to emphasise and recalls the suggestions by academics made earlier.<sup>83</sup> This intangible approach to ‘cultural heritage’ was also evident in *Iran v Barakat*<sup>84</sup> and more recently in *Re Wedgwood Trust Ltd (In Administration)*<sup>85</sup> where the judge recognised the Wedgwood collection as ‘part of our cultural heritage and of immense importance’, although this recognition had no bearing on the case’s final outcome.<sup>86</sup>

---

<sup>78</sup> Which has been demonstrated above at p 17. ‘One connection – the one neglected in talk of cultural patrimony – is the connection not through identity but despite difference’: Kwame Anthony Appiah, *Cosmopolitanism: Ethics in a World of Strangers* (Penguin Books 2006 ) 135

<sup>79</sup> n 41

<sup>80</sup> *ibid* [13].

<sup>81</sup> *ibid*

<sup>82</sup> *ibid*. Discussed at p 57 above. See generally pp 26-31 above.

<sup>83</sup> Blake (n 1), discussed at n 115 and Smith (n 13). See generally pp 26-31 above.

<sup>84</sup> *Iran v Barakat* (n 37) 63. See text to n 39 above.

<sup>85</sup> [2012] Pens LR 175 (Ch)

<sup>86</sup> *ibid* [56]. Discussed in Chapter 3.

‘Cultural Property’ is used in Order 8 of the Iraq (United Nations Sanctions) Order 2003<sup>87</sup> with the prefix ‘Iraqi’. The subject matter of the Order is “Illegally removed Iraqi cultural property’ which is defined as ‘Iraqi cultural property and any other item of archaeological, historical, cultural, rare scientific or religious importance illegally removed from any location in Iraq since 6<sup>th</sup> August 1990’.<sup>88</sup> The addition of ‘Iraqi’ to cultural property might be seen as a qualifier such that this refers to cultural property originating from Iraq. This apparently assumes that one knows Iraqi cultural property when one sees it, but by using the phrase ‘any other item of...’ the definition implies that any Iraqi cultural property for the purposes of the Order would need to have one of the particular ‘importances’ listed. This definition therefore looks at the abstract value of the property, rather than particularising for whom it has a value. It certainly does not incorporate the loss to a nation’s cultural heritage as a justification for the property’s importance.

#### ***1.3.2.2 The international meanings: cultural heritage and cultural property***

The concept of ‘cultural heritage’ was used in the 1954 Convention<sup>89</sup> which was adopted by its signatories as a response to the devastation during the Second World War.<sup>90</sup> However the convention’s subject matter is ‘cultural property’ rather than ‘cultural heritage’, albeit that the definition of what constitutes ‘cultural property’ incorporates ‘cultural heritage’.

---

<sup>87</sup> SI 2003/1522,

<sup>88</sup> Iraq (United Nations Sanctions) Order 2003, order 8(4).

<sup>89</sup> 1954 Convention (n 50).

<sup>90</sup> Isabelle Vinson, ‘ICCROM’s Contribution to the Ethics of Heritage’ (2009) 61 *Museums International* 90, 93.

For the purposes of the present Convention, the term ‘cultural property’ shall cover, irrespective of origin or ownership:

- (a) movable or immovable property of great importance to the cultural heritage of every people, such as...<sup>91</sup>

This definition incorporates not only tangible personal property such as works of art and manuscripts, but also real property such as monuments and museums.<sup>92</sup> It also shows that the significance to the heritage of every people is a key part of the concept of ‘cultural property’ for the purposes of the convention. During the debates leading to the finally adopted text of the convention there was a shift in approach towards the preservation of the cultural heritage of mankind due to the influence of representatives of states who were more concerned with destruction of historical sites and monuments caused by environmental influences rather than just armed conflict.<sup>93</sup>

‘Cultural heritage’ features as a term in the 1970 Convention, although again in a supporting role with the operative definition being ‘cultural property’<sup>94</sup> which, unlike the 1954 Convention, applies solely to objects since it deals specifically with the illicit trade. The definition comprises a list of categories of objects that can be designated by each State on religious or secular grounds as ‘of importance for archaeology, prehistory, history, literature, art or science and which belongs to the following categories...’<sup>95</sup>

---

<sup>91</sup> 1954 Convention (n 50), art 1. Examples are then given which include archaeological sites, works of art, manuscripts etc.

<sup>92</sup> *ibid* art 1(b).

<sup>93</sup> E.g. Egypt and the Philippines: Vinson (n 90) 92.

<sup>94</sup> 1970 Convention (n 40).

<sup>95</sup> *ibid* art 1.

The inconsistent use of terms and their interchangeable nature is particularly acute when comparing this definition of ‘cultural property’ with the one used in the Unidroit Convention. The latter Convention uses the same definition to refer to ‘cultural objects’, save for the absence of the requirement that objects need to be designated by the state.<sup>96</sup> One reason why the drafters of the Unidroit Convention<sup>97</sup> rejected the term ‘cultural heritage’ as the main definition was because certain experts considered it to be ‘emotive’ language.<sup>98</sup> Nevertheless, the supporting role of cultural heritage is evident in the preambles to both conventions which recognise that the illicit trade in objects covered by their provisions has a deleterious effect on the cultural heritage of the states of origin and the Unidroit Convention acknowledges the ‘fundamental importance of the protection of cultural heritage...for promoting understanding between peoples, and the dissemination of culture for the well-being of humanity and the progress of civilisation’.<sup>99</sup> Neither convention, though, uses cultural heritage as a substantive term with full legal recognition.

In the WHC<sup>100</sup> ‘cultural heritage’ denotes ‘monuments’, ‘groups of buildings’ and ‘sites’, all of which are ‘of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view’.<sup>101</sup> This definition therefore refers to the

---

<sup>96</sup> Seemingly, the lack of designation was because the convention was aimed at facilitating claims by private owners rather than by states for the return of objects: Lyndel V Prott, *Commentary on the UNIDROIT Convention* (IAL publishing 1997) 26.

<sup>97</sup> n 34.

<sup>98</sup> Prott (n 96) 17.

<sup>99</sup> Unidroit Convention (n 34) Preamble.

<sup>100</sup> WHC (n 25).

<sup>101</sup> *ibid* art 1(1).

tangible subject-matter but also incorporates the intangible characteristics of universal value.

Since 2001 ‘cultural heritage’ has featured more heavily in international conventions. The 2001 UNESCO Convention defined ‘underwater cultural heritage’ as ‘all traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, for at least 100 years...’<sup>102</sup> At first sight this definition could apply to all manner of different things, but it is qualified by requiring these things to have been totally or partially submerged for a specified period of time. In the 2003 UNESCO Convention ‘intangible cultural heritage’ is defined as ‘the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage’.<sup>103</sup> Clearly here intangible cultural heritage can actually incorporate the tangible.

These various conventions show that the meaning of ‘cultural heritage’ has developed so as to incorporate intangible practices within its environs, rather than simply ‘the monumental remains of cultures’<sup>104</sup> as evident in the 1954 Convention<sup>105</sup> and the

---

<sup>102</sup> Convention on the Protection of the Underwater Cultural Heritage UNESCO, Paris (adopted 2 November 2001, entered into force 2 January 2009) 41 ILM 40 art 1(1)(a).

<sup>103</sup> 2003 Convention (n 1), art 1.

<sup>104</sup> UNESCO, ‘Cultural Heritage’ <[http://portal.unesco.org/culture/en/ev.php-URL\\_ID=2185&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/culture/en/ev.php-URL_ID=2185&URL_DO=DO_TOPIC&URL_SECTION=201.html)> accessed 30 December 2012. See also Ahmad (n 1) 296.



WHC.<sup>106</sup> Since the mid-1980s there has been an increased acknowledgement within international law of intangible practices and the fact that they have been ignored.<sup>107</sup> This has been described as both an official and cognitive shift<sup>108</sup> such that those working with cultural heritage as well as the legal instruments ‘recognise the many kinds of cultural products that are part of our construction of heritage and the roles it plays in our lives.’<sup>109</sup> In brief, ‘the UNESCO Conventions rely on the intangible component to give the tangible its cultural context’.<sup>110</sup>

### ***1.3.2.3 The intangible dimension to ‘cultural heritage’***

The term ‘cultural heritage’ might be described as an ‘abstract and ideal concept’ whilst ‘cultural property’ is ‘a more concrete one.’<sup>111</sup> This fits with the approaches taken in the 1954 Convention and the 1970 Conventions<sup>112</sup> as well as the UK Court of Appeal where the concept of cultural heritage was treated as intangible.<sup>113</sup> Various

---

<sup>105</sup> (n 50).

<sup>106</sup> (n 100).

<sup>107</sup> Blake (n 1) 72. More recently Ahmad has acknowledged that at the end of the 20<sup>th</sup> Century there was international agreement that ‘heritage in general’ included ‘*tangible and intangible heritage as well as environments*’: Ahmad (n 4) 298.

<sup>108</sup> Carman & Stig Sørensen (n 2) 23

<sup>109</sup> *ibid*

<sup>110</sup> Craig Forrest, *International Law and the Protection of Cultural Heritage* (Routledge 2010) 28.

<sup>111</sup> Vittorio Mainetti, ‘The 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage: A commentary’ (unpublished) paraphrased in Frigo (n 26) 377.

<sup>112</sup> Discussed at p 42 above.

<sup>113</sup> *Hakimzadeh* (n 41) and *Iran v The Barakat* (n 37) discussed above at 28-29.

commentators support this notion of cultural heritage as being intangible,<sup>114</sup> describing it as ‘less of an objective, physical existence than the range of associations which accompany an object or monument and which provide the sense of being part of a group.’<sup>115</sup> It could therefore be said that ‘cultural heritage *is* value’ such that rather than it being the object or practice it is ‘....the importance itself’ and legal regimes aim to protect this.<sup>116</sup> In essence ‘it is the significance of the expression in the social life of a community that is, or should be, the policy focus of heritage protection, according to contemporary wisdom’<sup>117</sup> Consequently it is the intangible dimension of cultural heritage which is important to preserve and this is seen as particularly important in repatriation claims<sup>118</sup> and where that has been destroyed there is little point to

---

<sup>114</sup> See Smith (n 13) 11 discussed above at p 28 in the context of ‘heritage’.

<sup>115</sup> Blake (n 1) 84.

<sup>116</sup> Forrest (n 110) 3.

<sup>117</sup> Coombe and Turcotte (n 24) 275. Artefacts can ‘often provoke memories’ and are ‘sensed through our bodies’: John Urry, ‘How societies remember the past’ in Sharon Macdonald and Gordon Fyfe, *Theorizing Museums* (Sociological Review Monograph Series, Blackwell Publishers 1996) 50 and ‘seeing certain...artefacts functions to reawaken repressed desires and thereby to connect past and present’: (ibid 55). This seems to suggest then that the intangible dimension of heritage is important with the artefact (or in the terminology of this thesis CHO) being instrumental in the act of memory and recollection. Pantazatos argues that ‘The concept of heritage is central to this understanding of people as relational because it connects people...with the past...and with each other...and it thus contributes to our identity’: Andreas Pantazatos, ‘Does Disapora Test the Limits of Stewardship? Stewardship and the ethics of care’ (2010) 62 *Museum International* 96, 98-99.

<sup>118</sup> Daniel Shapiro, ‘Repatriation: A modest proposal’ (1998-1999) 31 *New York University Journal of International Law and Politics* 95, 105.

repatriation.<sup>119</sup> This intangible element is also important in the context of cultural diversity and biological resources.<sup>120</sup>

This general approach to the intangible dimension of cultural heritage accords with the functionalist approach to cultural heritage, shifting the focus away from the object towards an appreciation of cultural heritage as a construction such that preservation is for the sake of people, which is the approach to be adopted in this thesis.<sup>121</sup> Although cases and international conventions focus on the subject matter at hand, where references are made to ‘cultural heritage’ together with ‘cultural property’ it is usually used to refer to the intangible dimension of the things or places, even if it is the subject matter itself (rather than the intangible dimension itself that is given legal recognition).<sup>122</sup> It effectively acts as justification for action prescribed by the instruments.

### **1.3.3 Cultural objects and cultural goods**

Despite ‘cultural objects’ and ‘cultural goods’ being used in some legal instruments, these phrases are unsuitable for use in this thesis. Both are too restrictive by referring to tangible personal property, since the approach taken in this thesis is to use terminology that can cover objects, places and practices. Furthermore, ‘objects’ and ‘goods’ do not

---

<sup>119</sup> Susan Scafidi, *Who Owns Culture?: Appropriation and Authenticity in American Law* (Rutgers University Press 2005) 107.

<sup>120</sup> ‘it is not necessarily the material form for which protection is sought, but the right to continue to exercise these practices in the continuation of cultural integrity’ Johanna Gibson, ‘Self-Preservation is the First Law of Nature: Conserving the Cultural Diversity in India’s Biological Resources’ <<http://ssrn.com/abstract=1446898>> accessed 12 December 2013, 2.

<sup>121</sup> Loulanski (n 4) 216.

<sup>122</sup> E.g. in the 1970 Convention (n 40) discussed at p 42 above and the 1954 Convention (n 50) discussed at p 42 above.

signify the importance or significance that the subject matter holds for particular people. Such significance can be incorporated by means of an expanded definition within a legal instrument, which is clear in the Unidroit Convention, when compared with the 1970 Convention.<sup>123</sup> In the Unidroit Convention the term ‘cultural objects’ therefore incorporated importance to ‘archaeology, prehistory, literature, art or science’ and also referred to the negative effect on the ‘cultural heritage of national, tribal, indigenous or other communities, and also the heritage of all peoples...’ caused by the illicit trade.<sup>124</sup>

The term ‘cultural object’ is defined in the Dealing in Cultural Objects (Offences) Act 2003 (“DCO(O)A”) as ‘an object of historical, architectural or archaeological interest’.<sup>125</sup> This seemingly wide term relates to something of particular interest, but not necessarily of significance to an identifiable group of people. However, because the object must have been unlawfully removed from a site, monument or building for the object to come under the statute’s jurisdiction, this acts as a qualifier and reduces the category to archaeological objects and fixtures, rather than extending to artistic works more generally.<sup>126</sup>

Wider categories of goods might be classed as cultural objects (or cultural goods) but would not necessarily justify the same degree of protection or access as what we understand by ‘cultural heritage’; large-scale mass produced modern reproductions of artworks as posters might be considered cultural objects or goods, but not necessarily

---

<sup>123</sup> Unidroit Convention (n 34) art 2 and Annex. Discussed at p 43 above.

<sup>124</sup> *ibid* Preamble.

<sup>125</sup> s 2(1).

<sup>126</sup> DCO(O)A, s 2(2). See Chapter 3.

cultural heritage.<sup>127</sup> However, older posters may have a particular value due to their age and rarity and could be considered as cultural heritage, or where they have become part of a collection.<sup>128</sup> Therefore it seems sensible to adopt the notion of ‘culture’ as the qualifier<sup>129</sup> such that ordinary cultural objects are elevated in status by virtue of their value and significance, rather than solely because of any cultural link as cheaply produced reproductions. Furthermore, by adding the word ‘cultural’ to ‘heritage’ this distinguishes it from ‘natural heritage’.<sup>130</sup> The combination of ‘cultural’ and ‘heritage’ may also serve to focus the discussion on that heritage which is ‘nearly indispensable’<sup>131</sup> and Welsh states that ‘In museum parlance, cultural property is usually reserved for things whose loss would be felt most profoundly’.<sup>132</sup> Although this was said in the context of cultural property<sup>133</sup> the author of this thesis argues that the element of misfortune that is stated in the working definition of this thesis justifies the

---

<sup>127</sup> Certainly the way in which some authors treat ‘cultural property’ or ‘cultural heritage’ would exclude copies such as posters from the definition: e.g Harding, ‘Lessons from Cultural Property’ (n 54) 511. Scafidi distinguishes between cultural products which are replicable and traditional cultural property which is unique and ‘copies or counterfeits are of comparatively little value’: Scafidi (n 119) 50.

<sup>128</sup> E.g. the collection of posters returned in 2012 to its pre-war owners: Hans Sachs Poster Collection <<http://www.commartrecovery.org/cases/hans-sachs-poster-collection>> accessed 4 April 2013.

<sup>129</sup> Discussed above at text to n 23.

<sup>130</sup> Lowenthal identifies various divergent concerns for nature and culture in the context of natural heritage and the cultural heritage: David Lowenthal, ‘Natural and cultural heritage’ (2005) 11 *International Journal of Heritage Studies* 81, 86-90.

<sup>131</sup> Sarah Harding, ‘Value, Obligation and Cultural Heritage’ (1991) 31 *Arizona State Law Journal* 292, 345.

<sup>132</sup> Welsh (n 67) 15.

<sup>133</sup> Although in this context the one term could be substituted for the other.

use of the phrase ‘cultural heritage’ more generally since the compunction to preserve and provide access may be less in the case of less important heritage.

#### **1.3.4 The case for ‘cultural heritage’ rather than ‘cultural property’**

Prott & O’Keefe advocate the use of the term ‘cultural heritage’ in preference to ‘cultural property’.<sup>134</sup> Their principal justifications for this are that ‘cultural heritage’ has far less ‘ideological baggage in tow’ and that whilst the fundamental policy behind property was the protection of the rights of the possessor, the fundamental policy behind cultural heritage was the protection of heritage for the enjoyment of present and later generations, coupled with access for non-owners and possible restrictions on the rights of the possessor.<sup>135</sup> The element of Prott and O’Keefe’s analysis focusing on the connotations imported by the term ‘cultural property’ has merit because it strips away any negative connotations associated with a term by choosing a more suitably value-neutral one. Gray describes property as ‘an emotive phrase’<sup>136</sup> and this is perhaps no more so than when it is coupled with ‘culture’. Indeed, this combination may have stifled some of the progress that could have been made in previous discourse about objects with importance beyond their component parts because of the misconceptions that property involves simply ownership and possession.<sup>137</sup> This is despite the legal concept of property as a bundle of rights in respect of things, rather than the things

---

<sup>134</sup> Prott and O’Keefe (n 6).

<sup>135</sup> *ibid* 309.

<sup>136</sup> Kevin Gray, ‘Property in Thin Air’ (1991) 50 CLJ 252, 305

<sup>137</sup> See generally Kristen A Carpenter, Sonia K Katyal & Angela R Riley, ‘In Defense of Property’ (2009) 118 *Yale Law Journal* 1022 and Derek Fincham, ‘The Distinctiveness of Property and Heritage’ (2011) *Penn State Law Review* 641. NB Fincham questioned why Carpenter and other’s used ‘property’ rather than ‘heritage’: at 666.

themselves.<sup>138</sup> By associating these important things with property, there is a tendency to focus on the subject matter itself rather than the intangible value that the object has for culture.

Using the term ‘cultural heritage’ also avoids the ‘paradox’ of cultural property caused by putting together terms with contradictory core concepts<sup>139</sup> to the extent that the property element treats the culture as static<sup>140</sup> and focuses on the notion that ‘cultural objects and practices belong in some fundamental way to a particular culture or state’.<sup>141</sup> By using ‘cultural heritage’ as the term which applies in professional practice and which is unconnected with perceptions of ownership and possession, one can instead focus on the value that it has to people.<sup>142</sup> It is clear that the term ‘cultural property’ is ‘now coming to be recognized [as] inadequate and inappropriate for the

---

<sup>138</sup> *R (the Lord Chancellor) v Chief Land Registrar* [2005] EWHC 176 (Admin) [25] (Stanley Burnton J) and Gray (n 136) 252.

<sup>139</sup> Naomi Mezey, ‘Paradoxes of Cultural Property’ (2007) 107 *Columbia Law Review* 2004, 2005. The cultural property debate has been described as ‘not about content vs. context, or balancing the interests of various factions. It is a political argument with moral roots, in which the West is portrayed as plundering cultural heritage from a defenceless Third World’: ACCP Editorial Board (n 22) 323.

<sup>140</sup> *ibid* 2006. See also Welsh (n 67) 12-13. Cultural heritage is seen as a broader concept as seen in various international conventions relating to something that is worthy of protection to be passed to future generations: Abdulqawi Yusef, ‘Definition of Cultural Heritage’ in Francesco Francioni & Federico Lenzerini, *The 1972 World Heritage Convention: A Commentary* (OUP 2008) 31.

<sup>141</sup> *ibid* 2009. This can cause particular problems in the context of hybrid works: Fiona Macmillan, ‘Copyright, Creativity and Cultural Property Rights: The Case of Arts Festivals’ Cultivate Working Paper No 1 (HERA Joint Research Programme on Copyrighting Creativity: Creative Values, Cultural Heritage Institutions and Systems of Intellectual Property) 17.

<sup>142</sup> Since cultural heritage is seen as ‘based on the diversity of the individual contributions of all human beings’ Jukka Jokilehto, ‘Human rights and cultural heritage. Observations on the recognition of human rights in the international doctrine’ (2012) 18 *International Journal of Heritage Studies* 226, 226.

range of matters covered by the concept of the cultural heritage'.<sup>143</sup> This is clearly demonstrated in Chapter 2 in the context of discourse on cultural heritage value, derived from other disciplines, making no mention of cultural property.

## **1.4 Conclusion**

The foregoing analysis sought to unravel the various definitional woes associated with objects, practices or places which have significance and value to different people. Definitions have been developed in both professional practice and academic discourse. Legal concepts and terminology have been incorporated into international conventions which have been adopted to deal with the world-wide problems of devastation to cultures during armed conflicts, the destruction to our cultural environment and also the illicit trade in objects. More recently the intangible practices of communities are receiving increased legal recognition. The result has been a kaleidoscope of terms, meanings and misconceptions.

Whilst it may be correct, as Cuno has done, to call the term 'cultural property' a political construct,<sup>144</sup> cultural property can also be seen as a legally created construct which can lead to people focussing on the concept of property at the expense of the value and desire to pass these important objects, places and practices on to future generations.<sup>145</sup> Cultural heritage is the discipline that should be used to guide the terminology used, rather than basing protection around a legal designation that imports

---

<sup>143</sup> Prott and O'Keefe (n 6) 319.

<sup>144</sup> Cuno (n 61) 9. See 1.3.4.

<sup>145</sup> It has been suggested that the concept of property has 'acquired a wide range of emotive and value-laden nuances, from the arguments of John Locke to the challenge of Communism in the first two-thirds of this century': Prott & P O'Keefe (n 6) 309.



unhelpful associations.<sup>146</sup> By using the term ‘CHOs’ throughout this thesis the author is not, however, subscribing to the view that property is an inappropriate concept to associate with cultural heritage, since it may well facilitate inappropriate treatment of cultural heritage’s subject matter. This is not purely a semantic point. Using the term heritage means that the primary focus is on the fundamental core of the concept, in particular the valuable link with peoples and the notion of passing something on to future generations.<sup>147</sup> Furthermore, by refraining from using the word ‘property’ one avoids any preconceptions that one may have regarding property as a resource to be exploited or as a legal concept seeking solely to enforce and to justify concepts of possession and ownership.<sup>148</sup>

In light of the above it seems that the subject matter of this thesis (that is to say CHOs) is in effect the same as ‘cultural property’, although more recently things which would have previously been considered as cultural property are increasingly treated as ‘cultural heritage’.<sup>149</sup> The term ‘cultural property’, without more, fails to emphasise the significance or value of the subject matter since frequently the word ‘cultural heritage’ is used in legal instruments with ‘cultural property’ to import the notion that the physical thing (the cultural property) has an importance to the cultural heritage of certain peoples (usually a nation or humanity). On this analysis cultural property is a slightly narrower concept than CHOs. However, this author argues that it is unnecessary to use two concepts when the term ‘cultural heritage’ can be used with relevant suffixes: ‘objects’, ‘places’ or ‘practices’ to denote the nature of the subject

---

<sup>146</sup> Discussed at p 49 above.

<sup>147</sup> See Blake (n 1) 84.

<sup>148</sup> See Prott & O’Keefe (n 6) 310.

<sup>149</sup> E.g. the 2001 UNESCO Convention (n 102) where the concept of underwater cultural heritage deals with physical remnants.

matter. Indeed, the Preamble of the 2003 UNESCO Convention emphasises this inter-relation and states that there is a ‘deep-seated interdependence between the intangible cultural heritage and the tangible cultural and natural heritage’.<sup>150</sup> Cultural heritage, as a term, may cover more material than envisaged by ‘cultural property’, particularly if the latter is construed as referring to high art, or politically designated things. However, it is not an endless category which has the potential to cover anything of importance to anyone. In Chapter 2 it will be seen that the notion of value and public legacy, will act as further qualifiers, rather than simply the addition of the word ‘cultural’ to ‘heritage’.<sup>151</sup>

The adoption of the term ‘cultural heritage’ and more specifically ‘CHOs’ seeks to focus unreservedly on the intangible concept of cultural heritage in the context of the particular subject-matter of study, that is to say, objects. By using this term in preference to ‘cultural property’, one strips away any unnecessary preconceptions regarding the nature and scope of property as a legal concept. In effect, by avoiding the term ‘cultural property’ the focus moves from the functional nature of the object as property to the intangible dimension of these tangible things, notably their importance to people. In effect, cultural heritage objects, practices or places have an intangible bundle of principles and norms<sup>152</sup> in addition to a separate bundle of property rights. It is this former intangible bundle to which the discussion now turns.

---

<sup>150</sup> 2003 Convention (n 1) Preamble.

<sup>151</sup> See pp 48-49 above.

<sup>152</sup> This approach is wider than Fincham’s suggestion that heritage can be seen as ‘a competing, sometimes overlapping metaphor of a different web of interests’: (n 137) 160.

# Chapter Two

## Cultural heritage: principles and norms

---

### 2.1 Introduction: developing a lens

This chapter identifies and categorises the underlying principles of cultural heritage from which to derive norms to determine how cultural heritage should be treated by any regulatory regime and dispute resolution process. These underlying principles and norms<sup>1</sup> form the intangible dimension of the subject matter of cultural heritage.<sup>2</sup> They constitute the lens through which the subsequent analysis of the legal and non-legal regimes concerning cultural heritage objects (CHOs)<sup>3</sup> is undertaken and thereby act as this thesis' conceptual framework.

The word 'principle' is used here in an everyday sense rather than in any legal sense to mean

A fundamental truth or proposition on which others depend; a general statement or tenet forming the (or a) basis of a system of belief, etc.; a primary assumption forming the basis of a chain of reasoning.<sup>4</sup>

The cultural heritage principles include the value of the subject matter to people and its public legacy aspect. The resultant norms are preservation and access.<sup>5</sup> The

---

<sup>1</sup> Defined below at p 111.

<sup>2</sup> I.e. the objects, places and practices of cultural importance.

<sup>3</sup> Chapters 3 and 4 respectively.

<sup>4</sup> principle, n. (meaning II 3) *Oxford English Dictionary Online* (Third edition, June 2007; online version June 2012) <<http://www.oed.com/view/Entry/151459>> accessed 4 August 2012.

identification of principles and norms reflects Russell's position that 'Heritage...is something we have to care about and simultaneously care for'.<sup>6</sup> The underlying cultural heritage principles correspond with what we care *about* heritage in terms of the particular value that we feel towards the subject matter and the norms that flow from it (preservation and access) demonstrate the caring *for* element.

Identifying the cultural heritage principles fulfils two purposes here. First, to identify and categorise whether the necessary intangible attributes exist to recognise it as the subject matter of cultural heritage<sup>7</sup> and secondly to establish what the value of a particular object, place or practice is and how this should frame the corresponding norms (and any subsequent legal, ethical<sup>8</sup> or *quasi*-legal recognition<sup>9</sup>). This derives support from Smith who treats value (argued in this chapter as the principal component

---

<sup>5</sup> These reflect in part, although differ in some significant respects from, Merryman's four elements of a cultural property policy: John Henry Merryman, 'The Public Interest in Cultural Property' (1989) 77 Cal LR 339, 355-362. Discussed below at p 122.

<sup>6</sup> Ian Russell, 'Heritages, Identities, and Roots: A critique of arborescent models of heritage and identity' in George S Smith, Phyllis Mauch Messenger and Hilary A Soderland (eds), *Heritage Values in Contemporary Society* (Left Coast Press, Inc 2010) 30.

<sup>7</sup> This justifies the second element of the definition: at p 26 above.

<sup>8</sup> Through the codes of ethics published by the Museums Association or International Council of Museums: Museums Association, *Code of Ethics for Museums* (UK Museums Association, London 2008) ("MACoE") and *ICOM Code of Ethics for Museums* (International Council of Museums, Paris 2006) ("ICOMCoE").

<sup>9</sup> Whether by any of the *quasi*-legal decision-makers discussed in Chapter 3 (specifically the Reviewing Committee on the export of works of art and objects of cultural interest ("the Reviewing Committee"), the Acceptance in Lieu Panel ("AILP") and the Spoliation Advisory Panel ("SAP")) or in the principles that have been analysed in Chapter 4 in terms of being *quasi-legal* (moral title/valid title and stewardship).

of the cultural heritage principles) as central to ‘both the idea of heritage and in framing conservation policies and practices’.<sup>10</sup> The ‘idea of heritage’ is necessarily entwined with identification and categorisation whilst conservation policies and practices inevitably include determination of the norms (preservation and access).<sup>11</sup>

It is argued in this thesis that those things, places or practices identified as having the intangible cultural heritage principles should, by virtue of that status, be treated differently from ordinary property because of the existence of these principles and that gives rise to norms concerning their proper treatment. This chapter justifies this position in light of the academic and professional research and policies in the field of cultural heritage.

## **2.2 The intangible dimensions of the subject matter of cultural heritage**

As discussed in the context of seeking a clear definition of cultural heritage<sup>12</sup>, it is inescapable that the subject matter has a dual role: as property in law and as being important to certain peoples.<sup>13</sup>

---

<sup>10</sup> Laurajane Smith, ‘Deference and Humility: The Social Values of the Country House’ in Lisanne Gibson and John Pendlebury, *Valuing Historic Environments* (Ashgate 2009) 33.

<sup>11</sup> Discussed below at p 111.

<sup>12</sup> In Chapter 1.

<sup>13</sup> See James Leach, ‘Owning Creativity: Cultural Property and the Efficacy of Custom on the Rai Coast of Papua New Guinea’ (2003) 8 *Journal of Material Culture* 123, 136.

**Figure 1 The intangible dimensions of CHOs**

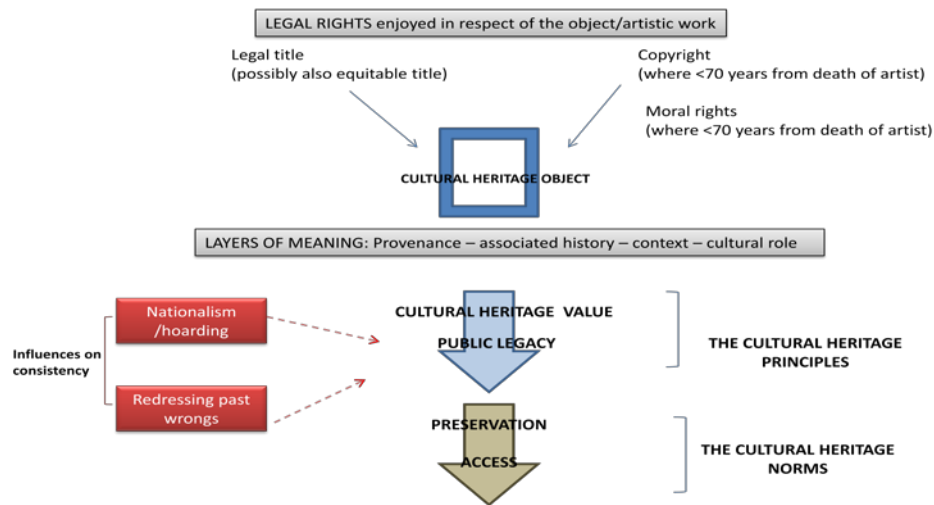


Figure 1 shows the intangible dimensions to CHOs (here a painting). The principal intangible dimension is legal rights and obligations arising from its status as property as well as any intellectual property rights if it is more recently created.<sup>14</sup> The figure shows the non-legal dimensions that have the purpose of making it cultural heritage and informing decisions about how to deal with it to reflect effectively those principles and fulfil the corresponding norms. Different types of value exist, including the cultural,<sup>15</sup> artistic<sup>16</sup> or historical importance,<sup>17</sup> its associated history,<sup>18</sup> the provenance<sup>19</sup> and also context.<sup>20</sup> Any loss of this object, with its corresponding intangible dimension, would cause a significant loss to people and so entangled with this is the public legacy; the

<sup>14</sup> See Chapter 3.

<sup>15</sup> This might be due to the value to a community's or nation's culture. This is discussed at p 60 below.

<sup>16</sup> Discussed at p 59 below.

<sup>17</sup> Discussed at p 60 below.

<sup>18</sup> Discussed at p 60 below.

<sup>19</sup> Discussed at p 116 below.

<sup>20</sup> Defined at p 116 below. This is usually more relevant to archaeological objects than artistic ones.

Discussed at p 64 below.

principles then give rise to the norms of preservation and access. In the museum context these latter duties are underlined by the ethical obligations by which museums conduct themselves.<sup>21</sup>

## **2.3 The importance of the subject matter of cultural heritage**

Certainly possession or ownership is not a pre-requisite for significant feelings that people have towards the varied subject matter of cultural heritage; a person may never have seen Machu Pichu or Nefertitti's bust, but would still strongly desire their safe keeping.<sup>22</sup>

### **2.3.1 Importance of the object, place or practice itself: a freestanding importance**

An object, place or practice may be artistically or aesthetically pleasing to view or might be interesting because it represents a particular style or era of art.<sup>23</sup> Equally, an

---

<sup>21</sup> See Chapter 4.

<sup>22</sup> This latter phenomenon is non-use 'existence value': Timothy Darvill, 'Value Systems in Archaeology' in Malcolm A Cooper, Anthony Firth, John Carman & David Wheatley (eds), *Managing Archaeology* (Routledge 1995) and David Throsby, 'Cultural Capital and Sustainability Concepts in the Economics of Cultural Heritage' in Marta de la Torre (ed), *Assessing the Values of Cultural Heritage: A research report* (The Getty Conservation Institute 2002) 103 (discussed below at p 86).

<sup>23</sup> Aesthetic value is identified by John Carman, *Valuing Ancient Things: Archaeology and Law* (Leicester University Press 1996) (under amenity and use) 150-151; English Heritage, *Conservation Principles: Policies and Guidance* (EH 2008) <[http://www.english-heritage.org.uk/content/publications/publicationsNew/guidelines-standards/conservation-principles-sustainable-management-historic-](http://www.english-heritage.org.uk/content/publications/publicationsNew/guidelines-standards/conservation-principles-sustainable-management-historic-environment/conservationprinciplespoliciesandguidanceapril08web.pdf)

[environment/conservationprinciplespoliciesandguidanceapril08web.pdf](http://www.english-heritage.org.uk/content/publications/publicationsNew/guidelines-standards/conservation-principles-sustainable-management-historic-environment/conservationprinciplespoliciesandguidanceapril08web.pdf)> accessed 4 August 2012 [46], as one of the present-day values: Alois Riegl 'The Modern Cult of Monuments: Its Character and its origins' (1903) (Kurt W Forster & Diane Ghirardo tr) in K Michael Hayes (ed), *Oppositions Reader* (Princeton Architectural Press 1998) 631, as one of the components of cultural value: David Throsby, 'The value of cultural heritage: what can economics tell us?' in Kate Clark (ed) *Capturing the Public*

object, place or practice might be important because of its cultural or religious use, whether past, present or future.<sup>24</sup> An object might be extremely old and representative of a particular era, community or practice, thereby having historical value<sup>25</sup> and a symbol of the past.<sup>26</sup> An object or place might contain useful information for science, archaeology or some other discipline or a practice might be important for cultural or anthropological study. However, uniqueness alone seems insufficient to justify saving it<sup>27</sup>; it must be unique ‘in some valuable respect’,<sup>28</sup> which most likely requires some cultural, historical or religious value. Its uniqueness may, though, enhance its cultural or historical value. Even if the statue of a dictator or a site of a massacre is unique it does not necessarily mean that this should be preserved, instead it must be analysed in terms of the other types of value that exist and whether it is important to memorialise the particular person or event. English Heritage directly addresses this by acknowledging

---

*Value of Heritage: The proceedings of the London conference* (English Heritage 2006) 43 and as one of the sociocultural values: Randall Mason, ‘Assessing Values in Conservation Planning: Methodological Issues and Choices’ in de la Torre (n 22) 10.

<sup>24</sup> E.g. Mason recognises spiritual/religious value: Mason, ‘Assessing Values’ (n 23) 10.

<sup>25</sup> In this thesis no distinction is made between historical and historic value, the former referring to the object pertaining to history rather than the latter which relates to the importance of the object because of its connection to historical events: Carman (n 23) 153. Instead this latter use will be explained in terms of associative value. In part this is because the historical/historic distinction is not widespread.

<sup>26</sup> This notion of cultural heritage as a symbol of the past has been described as ‘traditionally espoused value’: Katsuyuki Okamura, ‘A consideration of Heritage Values in Contemporary Society’ in G Smith and others (n 6) 56.

<sup>27</sup> Saving is linked with the preservation: at p 113 below.

<sup>28</sup> Robin Coningham, Rachel Cooper & Mark Pollard, ‘What value a unicorn’s horn? A study of archaeological uniqueness and value’ in Chris Scarre & Geoffrey Scarre (eds), *The Ethics of Archaeology: Philosophical Perspectives on Archaeological Practice* (CUP 2006) 266.



that places may be important reminders of ‘uncomfortable events, attitudes or periods’, yet important for the ‘collective memory and identity’.<sup>29</sup>

A place, object or practice may have a symbolic, rather than practical, importance, representing an event, person or memory. This symbolic value has been widely recognised as contributing to cultural heritage value.<sup>30</sup> War memorials and statues to famous citizens may have an aesthetic value in terms of the physical structure by which they are memorialised, yet it is the intangible symbol which renders the structure the subject matter of cultural heritage. Without the association the structure may, over time develop a cultural value, but the primary value is its memorial function. This notion of commemorative (or memorial) value is evident in one of the first attempts to classify types of value in monuments (from an art history perspective) by Riegl in 1903. He

---

<sup>29</sup> EH (n 23).

<sup>30</sup> Throsby recognises symbolic value as one of the components of ‘cultural value’: Throsby, ‘The value of cultural heritage’ (n 23) 43. ‘Cultural/symbolic’ value is seen as making up the sociocultural values viz. cultural heritage: Mason (n 23) 10. Remnants of the past provide an important link to the present: Cornelia Vismann, ‘The Love of Ruins’ (2001) 9 *Perspectives on Science* 196, 201. The importance of the symbolic value can be seen in the context of return or repatriation of CHOs to claimants, This act of return or repatriation has a symbolic nature which may be quite apart from any compensation: Jeremy Waldron, ‘Superseding Historic Injustice’ (1992) 103 *Ethics* 4, 6 and Alan Audi, ‘A Semiotics of Cultural Property Argument’ (2007) 14 *International Journal of Cultural Property* 131, 149. Furthermore, where cultural heritage has been destroyed, its reconstruction can have a symbolic value, for example in the case of the Mostar Bridge: Cornelius Holtorf, ‘The Past People Want: Heritage for the Majority?’ in Geoffrey Scarre & Robin Coningham (eds) *Appropriating the Past: Philosophical Perspectives on the Practice of Archaeology* (CUP 2013).

used this as a broad heading of value<sup>31</sup> and then sub-divided it into age value<sup>32</sup>, historical value<sup>33</sup> and intentional memorial value.<sup>34</sup>

## **2.3.2 Associative importance**

### **2.3.2.1 Identity and place**

‘The past is integral to our sense of identity’.<sup>35</sup> Consequently certain places, objects or practices which embody a sense of the past are important for a community’s, a nation’s or humanity’s identity and well-being. The physical manifestations of cultural heritage as well ‘as the meanings they represent’ are often ‘integrally tied to the identifying formations of particular groups or communities’.<sup>36</sup> In times of war, conquerors often focus on the manifestations of cultural heritage, with destruction of heritage being an instrument of oppression<sup>37</sup>. Places may be significant for the identity of a community in the same way that some objects or practices form an integral part of a community’s cultural life.<sup>38</sup>

---

<sup>31</sup> The other being present-day value: Riegl (n 23).

<sup>32</sup> *ibid* 631.

<sup>33</sup> *ibid* 634.

<sup>34</sup> *ibid* 638.

<sup>35</sup> David Lowenthal, *The Past is a Foreign Country* (CUP 1985) 41.

<sup>36</sup> Lianne Gibson and John Pendlebury, ‘Introduction: Valuing Historic Environments’ in Gibson and Pendlebury (n 10) 2.

<sup>37</sup> Claire Smith, ‘Foreword’ in GS Smith and others (n 6) 11. In the context of the destruction of the Bamiyan Buddhas Macmillan describes the act of destruction as an assertion of sovereignty by the Taliban: Fiona Macmillan, ‘The protection of cultural heritage: common heritage of mankind, national cultural “patrimony” or private property?’ (2013) 64 *Northern Ireland Legal Quarterly* 351, 355.

<sup>38</sup> C Smith (n 37) 11; Rosemary Coombe, ‘Possessing Culture: Political Economies of Community Subjects and their Properties’ in Veronica Strang, & Mark Busse (eds), *Ownership and Appropriation*

For some communities the notion of ‘place’ is integral to their cultural life, as is clear from the background to cases such as *Mabo v Queensland*.<sup>39</sup> However, occasionally there are interesting developments with this concept of place. When the hoard of Anglo Saxon gold was found in Staffordshire<sup>40</sup> there was strong support for keeping it within the local area, rather than ‘losing’ it to London. The queues of visitors waiting to see the hoard on its first appearance in Birmingham could be interpreted as demonstrating the link between a community and objects found within its locale, although might equally be seen as an example of hoarding within a local area in a similar way to nations hoarding cultural objects.<sup>41</sup>

### **2.3.2.2 Connection to a particular person**

An object or place may have a particular connection with a person or family and whilst the subject matter may be of interest in its own right for its aesthetic or historical value, it is its association with those people that makes it important. Number 20 Forthlin Road, Liverpool probably has little physical difference from Number 22, yet the former is associated with Paul McCartney and has an importance beyond its bricks and mortar. Here the associative value outweighs the aesthetic or cultural value. Simple ownership

---

(ASA Monographs, Berg 2011) 111; Melissa F Baird, “‘The breath of the mountain is my heart’: indigenous cultural landscapes and the politics of heritage” (2013) 19 *International Journal of Heritage Studies* 327,329. the sense of place ‘comes through the practice of community’: Johanna Gibson, *Community Resources: Intellectual Property, International Trade and Protection of Traditional Knowledge* (Ashgate 2005) 25. The importance of place for indigenous peoples is reflected in the United Nations Declaration on the Rights of Indigenous Peoples (adopted 13 September 2007) ) 61/295 2008, art 12.

<sup>39</sup> (1992) 175 CLR 1.

<sup>40</sup> < <http://www.staffordshirehoard.org.uk/> > accessed 15 August 2012.

<sup>41</sup> R Fear, discussion on a Saumur balcony over a bottle of Crémant de Loire.

of an object can occasionally create a layer of association between the two which persists for many years: the Roman vase made between 5 and 25AD housed at the British Museum is described as the ‘Portland Vase’ even though it was last owned by the Seventh Duke of Portland in 1945.<sup>42</sup> This latter type of association may be subordinate to the cultural, aesthetic and historical importance of the vase as the supreme example of cameo-glass such that the preservation of the association through the continued use of the owner’s name may be unnecessary. Interestingly, when the Burney Relief (named after an earlier purchaser) was purchased to celebrate the 250<sup>th</sup> anniversary of the British Museum’s establishment<sup>43</sup> it was a funding condition that it was renamed;<sup>44</sup> it is now ‘The Queen of the Night’.

### **2.3.2.3 Context**

In addition to any association with a person or a place, an object may have an archaeological context which is lost if the object is removed from its find site, before being fully documented. This can detrimentally affect our understanding of the past because:

coherent information comes about only through the systematic study of context – of the associations of things found within the ground where they were abandoned or deliberately buried.<sup>45</sup>

---

<sup>42</sup> <[http://www.britishmuseum.org/explore/highlights/highlight\\_objects/gr/t/the\\_portland\\_vase.aspx](http://www.britishmuseum.org/explore/highlights/highlight_objects/gr/t/the_portland_vase.aspx)> accessed 16 August 2012.

<sup>43</sup> <[http://www.britishmuseum.org/explore/highlights/highlight\\_objects/me/t/queen\\_of\\_the\\_night\\_relief.aspx](http://www.britishmuseum.org/explore/highlights/highlight_objects/me/t/queen_of_the_night_relief.aspx)> accessed 27 August 2012.

<sup>44</sup> Nigel Reynolds, ‘£1.5m beauty is British Museum’s newest treasure’ *The Telegraph* 9 March 2004.

<sup>45</sup> Colin Renfrew, *Loot, Legitimacy and Ownership* (Duckworth 2000) 19.

The illicit trade in CHOs, encouraging further illegal removal, threatens this further understanding of our past through de-contextualisation.

## **2.4 The principles of cultural heritage**

This thesis argues that the principles of cultural heritage are value and public legacy. The first of these has been a principal component of discourse in the professional and academic fields of cultural heritage. The second component of the cultural heritage principles, public legacy, is more contentious since many people would treat that as part of the value of cultural heritage, rather than as a freestanding notion which is argued in this thesis.

### **2.4.1 Value**

In general all personal possessions ‘invoke an intimate connection with their owners’<sup>46</sup> and so will be valuable or significant to them; but that does not mean that all important possessions should be characterised as cultural heritage. At some stage a line has to be drawn, on one side of which falls the subject matter imbued with cultural heritage principles and thus worthy of norms to fulfil those principles and on the other falls the subject matter which is not so imbued. It seems intuitive that the value should extend beyond that felt by the individual owner; this raises again the question of whether the silver spoon in the Introduction benefits from cultural heritage principles and norms. This section starts by analysing the nature of significance and value and then how they are assessed and by whom. The discussion then seeks to answer three questions. First, what type(s) of value are recognised in respect of an object, place or practice to classify it as the subject matter of cultural heritage? Secondly, how much value is needed?

---

<sup>46</sup> Annette B Weiner, *Inalienable possessions: the paradox of keeping-while giving* (University of California Press 1992) 36.

Thirdly, is there a hierarchy between different types of value in the event that they conflict? It will therefore seek to establish how far such types of value can be categorised to create a functional typology.

Different types of value make up the cultural heritage value of a particular object, place or practice<sup>47</sup> and the sum total of these are the object's, place's or practice's significance. Three significant works on the concept of value in heritage support this. 'Significance' has been described as the umbrella term for the 'different strands of value'.<sup>48</sup> In the introduction to a Report of the Getty Conservation Institute, 'significance' was used to 'encapsulate the multiple values ascribed to be objects, buildings, or landscapes'.<sup>49</sup> Finally, in the context of historic places English Heritage treats 'significance' as 'the sum of the cultural and natural heritage values of a place, often set out in a statement of significance'.<sup>50</sup>

The cover-all term of 'significance' has been described as a 'black box' which has the unfortunate result that by 'collapsing all values to an aggregate statement of significance, the different types of heritage value are mystified or rendered secondary and are thus neglected'.<sup>51</sup> Once an assessment of value has been undertaken, heritage professionals create a statement of significance detailing the reasons for its significance

---

<sup>47</sup> Identified and analysed below at p 82.

<sup>48</sup> Gibson and Pendlebury (n 36) 7.

<sup>49</sup> Erica Avrami, Randall Mason & Marta de la Torre (eds), *Values and Heritage Conservation: Research Report* (The Getty Conservation Institute 2000) 7.

<sup>50</sup> EH (n 23).

<sup>51</sup> Mason, 'Assessing Values' (n 23) 8.

(based on the identified types of value).<sup>52</sup> However, a generalised statement of significance without a full understanding of the specific types of value could act as Mason's black box.

Unsurprisingly, there are notes of caution with 'significance'. First, in the context of the US concept of significance in archaeology, Tainter and Lucas highlight its illogical nature. They treat significance 'as a quality that we assign to a cultural resource based on the theoretical framework within which we happen to be thinking'<sup>53</sup> rather than viewing cultural resources as possessing inherent value or significance, yet they acknowledge the problem that if significance is assigned rather than inherent this can 'vary between individuals and change over time'.<sup>54</sup> However, this changing significance or value is relevant as the composition of a cultural group changes over time and also the appreciation of the existing corpus of CHOs.

Fechner urges prudence with 'significance' because of its subjective nature.<sup>55</sup> However, there are many situations where one has to determine whether or not something is worthy of protection and so therefore an assessment of significance has to be made as a filtering exercise, otherwise everything would be worthy of protection. By focusing on

---

<sup>52</sup> *ibid* 23. Statements of cultural significance originated in *The Burra Charter: The Australia ICOMOS Charter for Places of Cultural Significance* (Australia ICOMOS 1999), art 26.2 which although an Australian document and not directly applicable, has been highly significant in other jurisdictions, including England and Wales, and it influenced the EH principles: Kate Clark, 'Values in Culture Resource Management' in G Smith and others (n 6) 91. EH (n 23) [82] also requires such a statement.

<sup>53</sup> Joseph A Tainter & G John Lucas, 'Epistemology of the significance concept' (1983) 48 *American Antiquity* 707, 714.

<sup>54</sup> *ibid* 714-715. The concept of inherent value is discussed at p 72 below.

<sup>55</sup> Frank G Fechner, 'The Fundamental Aims of Cultural Property Law' (1998) 7 *International Journal of Cultural Property* 376, 380.

the component types of value that comprise significance, this can overcome a simple subjective assessment about whether or not the subject matter has value; instead one can focus on the varying elements that make up the subject matter's value to different people and for different reasons. This thesis adopts this approach.

#### **2.4.1.1 *The move towards a value-based approach***<sup>56</sup>

Often there is general consensus about whether something is the subject matter of cultural heritage and the reason why it is worthy of protection; yet this may differ between people. Sometimes it will be a case of knowing cultural heritage when one sees it and 'in most circumstances, the cultural significance of a certain object is self-evident',<sup>57</sup> yet a more effective way of establishing this is by assessing the various types of value making up the cultural heritage value. Clark recognises that we rarely think about *how we value* cultural heritage because:

A lot of the traditional charters and conservation philosophies seem to assume – as William Morris did – that these are things over which 'every educated gentleman would agree'.<sup>58</sup>

Furthermore, Avrami and others suggest that:

---

<sup>56</sup> In this thesis 'value' is used in the singular and the phrase 'different types of value' is used in preference to 'values' which suggests the meaning attributed to the word in terms of representing the principles or standards of one's actions.

<sup>57</sup> Andrea Biondi, 'The Merchant, the thief and the Citizen: the circulation of works of art within the EU' (1997) 34 CML Rev 1173, 1180.

<sup>58</sup> Kate Clark, 'From significance to sustainability' in Clark (n 23) 59.



The care and collection of heritage objects and places is a universal, cross-cultural phenomenon, part of every social group's imperative...The benefits of cultural heritage have been taken as a matter of faith.<sup>59</sup>

This was, in part, due to the prevailing approach to classification and preservation of cultural heritage being the purview of the elite professionals, something Smith calls the 'Authorized Heritage Discourse' (AHD).<sup>60</sup> This was epitomised by Ruskin's *The Seven Lamps of Architecture*<sup>61</sup> and by William Morris in the manifesto of the Society for the Protection of Ancient Buildings ("SPAB").<sup>62</sup> The former's approach has been described as 'essentialist' in focusing on some objects being worthy of protection because of intrinsic features.<sup>63</sup> This 'dominant paradigm' therefore focused more on assessments of value by professionals rather than communities.<sup>64</sup> More recently there has been a clear move within disciplines connected with heritage conservation towards a values-based approach to dealing with cultural heritage.<sup>65</sup> This means that more account is taken of the differing and potentially conflicting types of value rather than focusing on the former approach identified by Avrami and others:

'The norms dictating what things qualified as heritage were very stable – these were notions like "masterpieces", "intrinsic value", and "authenticity".

---

<sup>59</sup> n 49 10.

<sup>60</sup> Laurajane Smith, *Uses of Heritage* (Routledge 2008) 11.

<sup>61</sup> John Ruskin *The Seven Lamps of Architecture* (Dana Estes & Company Publishers 1849)

<sup>62</sup> SPAB, 'The Manifesto' <<https://www.spab.org.uk/what-is-spab-/the-manifesto/>> accessed 7 August 2012.

<sup>63</sup> Uffe Juul Jensen, 'Cultural Heritage, Liberal Education, and Human Flourishing' in Avrami and others (n 49) 43.

<sup>64</sup> Lisanne Gibson, 'Cultural Landscapes and identity' in Gibson and Pendlebury (n 10) 74.

<sup>65</sup> Clark (n 52) 89.

However, in the last generation, cultural consensus and norms have been replaced by an atmosphere of openly contentious and fractious cultural politics'.<sup>66</sup>

Mason has argued that 'values-based' approaches have several advantages over 'traditional preservation practices'<sup>67</sup> in providing a fuller, 'holistic' understanding of sites which is essential to better stewardship, a greater acknowledgement and appreciation of stakeholders as well as a greater appreciation of the gaps in knowledge.<sup>68</sup> He was referring to places, but in the museum context the concept of stakeholders includes 'donors, researchers, local and source communities and others served by the museum'.<sup>69</sup> The traditional approach privileged historic and aesthetic value at the expense of other types of value, particularly the contemporary value.<sup>70</sup> However, an acknowledgment of the types of value to stakeholders is not necessarily synonymous with full democratisation of the process since this could cause problems for the heritage profession.<sup>71</sup> An expert (usually a museum curator or other heritage professional tasked with ascribing value, e.g. for legal designation) will necessarily have to make a decision regarding the nature of the types of value relevant to the

---

<sup>66</sup> n 49 6.

<sup>67</sup> Described as more 'inward looking' where assessments are considered objective in nature, undertaken by experts with little wider collaboration with supposed 'technical solutions to preservation questions': Randall Mason, 'Theoretical and Practice Arguments for Values-Centered Preservation' (2006) *Cultural Resource Management Journal* 21, 28.

<sup>68</sup> *ibid* 35.

<sup>69</sup> MACoE (n 8) [6.12].

<sup>70</sup> *ibid*. Elsewhere Mason aligns the 'traditional approach' with art historians and the more contemporary values-based approach with the discipline of anthropology: Mason, 'Assessing Values' (n 23) 7.

<sup>71</sup> Gibson & Pendlebury (n 36) 9.

decision-making process.<sup>72</sup> However, the expert can still take account of the full range of types of value experienced by different stakeholders towards the cultural heritage. Public opinion would thereby become ‘a much more central feature of the heritage process’.<sup>73</sup> Lowenthal suggests that museums ‘epitomize what we value’,<sup>74</sup> and curators ‘regard accession as an eternal act’.<sup>75</sup> Presumably the curator, in deciding to accession an object, acts as the public’s agent<sup>76</sup> in valuing the object by preserving it within a museum’s collection; this is reflected in the permanency of museum collections.

The favouring of value-based approaches has occurred primarily in the context of heritage conservation<sup>77</sup> (necessarily associated with the preservation of the subject

---

<sup>72</sup> The act of collecting has a ‘political, or ideological or aesthetic dimension’ and every acquisition ‘means placing a certain construction upon history...’: Peter Vergo, *Introduction* in Peter Vergo (ed), *The New Museology* (Reaktion Books 1989) 2. Museums are therefore signifiers and creators of value: Clavir M, *Preserving What is Valued* (UBC Press 2002) 27. Clavir points out the circularity of logic here in that ‘museums have the power to designate which objects have cultural value’ and then conservators ‘assert that these objects must be preserved’ because they are in the museum and therefore have cultural value (ibid). Bienkowski goes as far as suggesting that there is a public *expectation* of institutionalised authoritative knowledge through the ‘expert’ curator’: Piotr Bienkowski, ‘Whose Past? Archaeological Knowledge, Community Knowledge, and the Embracing of Conflict’ in Scarre & Coningham (n 30) 45.

<sup>73</sup> L Gibson (n 64) 87.

<sup>74</sup> David Lowenthal, ‘Patrons, Populists, Apologists: Crises in Museum Stewardship’ in Gibson and Pendlebury (n 10) 19.

<sup>75</sup> ibid 25-26.

<sup>76</sup> For the problems associated with agency in museum displays, see Charles Saumarez Smith, ‘Museums, Artefacts, and Meanings’ in Vergo (n 72) 17. Welsh suggests that museums ‘have come to serve the important role of transforming commodities into cultural property’: Peter H Welsh, ‘The Power of Possessions: The Case Against Property’ (1997) 21 *Museum Anthropology* 12.

<sup>77</sup> E.g. the Getty Research project (Avrami and others (n 49)) and EH (n 23) [3.4].

matter). This thesis argues that assessments based on these types of value are equally applicable when resolving disputes. This position derives support from Harding's approach to value and obligation, favouring significance over a rights-based approach.<sup>78</sup>

#### **2.4.1.2 *Is value intrinsic and static or extrinsic, plural and dynamic?***

Part of the traditional approach to preservation was that the subject matter was imbued with some inherent value, objectively ascertainable by professional experts.<sup>79</sup> This has now made way for the constructive approach to value.<sup>80</sup> What makes the subject matter significant is 'the symbolic role it is *given* both within and through the processes of remembering and commemoration'<sup>81</sup> to the extent that human participants play a significant role in the heritage process and particularly the valuing itself. These human actors are essential because, '[t]he subject matter of cultural heritage must be valuable or significant *to* someone rather than "significant" or "valuable" intransitively'.<sup>82</sup>

---

<sup>78</sup> Sarah Harding, 'Value, Obligation and Cultural Heritage' (1991) 31 *Arizona State Law Journal* 292, 345; James O Young, 'The Values of the Past' in Scarre & Coningham (n 30) 25; Karen J Warren, 'A Philosophical Perspective on the Ethics and Resolution of Cultural Properties Issues' in Phyllis Mauch Messenger (ed), *The Ethics of Collecting Cultural Property: Whose Culture? Whose Property?* (2<sup>nd</sup> edn, University of New Mexico Press 1999) 21 and Michael F Brown, 'Can Culture Be Copyrighted?' (1998) 39 *Current Anthropology* 193, 205.

<sup>79</sup> Gibson and Pendlebury (n 36) 1 and L Smith, 'Deference and Humility' (n 10) 35.

<sup>80</sup> Gibson and Pendlebury (ibid) 1. This is the basis on which the other contributors to that volume proceed; Carman (n23) 27 and Smith (n 10) 35.

<sup>81</sup> L Smith, 'Deference and Humility' (n 10) 35.

<sup>82</sup> Charlotte Woodhead, 'Cultural heritage principles and interference with property rights' (2011) 42 *Cambrian Law Review* 52, 55. See Dawn Watkins, 'The Value of Art or the Art we value?' (2006) 11 *Art Antiquity and Law* 251, 274.

If value is intrinsic it would be static, making it impossible to reassess the changing importance of something as cultural heritage.<sup>83</sup> An object, when created, might not automatically be culturally or historically valuable; instead this develops over time, due to the object's uniqueness or association. When entering a building on the list of buildings of 'special architectural or historic interest'<sup>84</sup> the Secretary of State (on the recommendation of English Heritage) in effect designates it as imbued with cultural heritage attributes. The Lloyd's Building in London (constructed in 1982) was only listed in 2012.<sup>85</sup> Whilst it has been an iconic London building for 30 years with an aesthetic value to some (but not necessarily all), any cultural heritage value developed over time, perhaps as the public came to appreciate its cultural and architectural contribution. This developing appreciation of heritage value is recognised by English Heritage in that 'strength and complexity' of judgements about this type of value can increase over time.<sup>86</sup> Consequently, one may need to pre-empt this changing value by deciding now to protect something that may only be fully valued in the future.<sup>87</sup> Not only can particular types of value alter because of changing public perceptions, but also because of the association of the subject matter with a particular event or person. A writing desk once used by an author who eventually received critical acclaim would originally be seen as functional furniture. Nevertheless, over time its status might be re-evaluated and recognised as having a historical or cultural value because of its associative history. Similarly, a particular event or the use to which a place was put can

---

<sup>83</sup> Tainter & Lucas (n 53) 714-715.

<sup>84</sup> Planning (Listed Buildings and Conservation Areas) Act 1990, s 1(1).

<sup>85</sup> List Entry Summary: Lloyd's Building <<http://www.english-heritage.org.uk/content/imported-docs/k-o/lloyds-list-entry.pdf>> accessed 2 May 2012.

<sup>86</sup> EH (n 23) [67].

<sup>87</sup> See *ibid.*

add value; the use of St Paul's Chapel in New York by rescuers during September 2001 added historical value, not least because of the physical traces of this use (scratches on the pews) which were preserved rather than removed.<sup>88</sup> By acknowledging that the value and significance of heritage can change over time, this aligns heritage preservation with the prevailing understanding of heritage as a process.<sup>89</sup>

Some approaches to cultural heritage value still favour the notion of intrinsic value, for example, 'the embeddedness of cultural heritage in cultural and aesthetic experiences' is 'the intrinsic value of cultural heritage'.<sup>90</sup> However, simply because engaging with cultural heritage is intrinsically valuable and the subject matter of cultural heritage is a necessary component of that does not lead to the conclusion that it has an intrinsic value, because this approach does not deal with *how* one assesses whether or not something is cultural heritage. Again, human actors are necessary to take part in those cultural and aesthetic experiences and so it is difficult to see how this value is intrinsic to cultural heritage's subject matter. More recently 'intrinsic value' has re-emerged as one of three types of value, the other two being 'instrumental value and 'institutional value'.<sup>91</sup> However, here 'intrinsic' is not intended to refer to some inherent value within the physical manifestations of cultural heritage; instead it is used as 'shorthand' for the significance of cultural heritage to the public<sup>92</sup> in a metaphysical sense.<sup>93</sup> It is appropriate to think in terms of 'the *capacity* and *potential* of culture to affect us, rather

---

<sup>88</sup> Mason, 'Theoretical and Practice Arguments' (n 67) 32.

<sup>89</sup> *ibid*

<sup>90</sup> Harding (n 78) 353.

<sup>91</sup> John Holden, *Cultural Value and the Crisis of legitimacy: why culture needs a democratic mandate* (DEMOS 2006) 15.

<sup>92</sup> Clark (n 52) 94.

<sup>93</sup> Holden (n 91) 19.

than as measurable and fixed stocks of worth'.<sup>94</sup> Unfortunately this recent use is apt to confuse because of the term's previous use referring to innate value and the associations with the AHD.<sup>95</sup> There are still isolated instances of the use of the phrase 'intrinsic value' without further explanation (thereby implying innate value); for example, *Values and Vision: The Contribution of Culture*<sup>96</sup> has 'The intrinsic value of culture' as the first of its 'Values and core principles'. This approach seems at odds with more inclusive conceptions of valuing which take account of wider types of value than purely aesthetic and historical ones.<sup>97</sup>

The types of value relevant to the subject matter of cultural heritage are plural<sup>98</sup>, not only because there is a changing perception of the overall worth of a place, such as the Lloyd's building, but also because different people may recognise entirely different types of value towards the subject matter concurrently or consecutively.<sup>99</sup>

---

<sup>94</sup> *ibid* 15.

<sup>95</sup> However, the term is perhaps 'not the best one, since historic properties do not inherently have values': Christina Cameron, 'Value and integrity in cultural and natural heritage: from Parks Canada to World Heritage' in Clark (n 23) 71.

<sup>96</sup> Arts Council, NMDC, MLA, The Association of Independent Museums, The Group for Large Local Authority Museums, MA and the University Museums Group <[http://www.nationalmuseums.org.uk/media/documents/publications/values\\_and\\_vision\\_no\\_pics.pdf](http://www.nationalmuseums.org.uk/media/documents/publications/values_and_vision_no_pics.pdf)> accessed 3 January 2013.

<sup>97</sup> Such as those of Mason. 'Assessing Values' (n 23), Throsby, 'Cultural Capital' (n 22), English Heritage and Cornelius Holtorf, 'Heritage Values in Contemporary Popular Culture' in G Smith and others (n 6) discussed below

<sup>98</sup> Gibson and Pendlebury (n 36) 1. This plurality relates both to the interpretations and meanings.

<sup>99</sup> English Heritage talks of 'the varied ways in which [the historic environment's] values are perceived by different generations and communities' (n 23) [2.2].

In Canada the historical value of Grosse-Île (an island formerly used as an immigration medical inspection and quarantine station) was officially recognised as important for its connection to immigration and quarantine, but it became apparent that Irish-Canadian groups valued it as the place where 5,000 of their ancestors died from typhus.<sup>100</sup> Accordingly, this further association with a smaller group of people was later recognised.<sup>101</sup>

These different types of value may also conflict with each other, because the recognition of one type in preference to another may subvert one of them. The historical and evidential value of excavating a Bronze Age timber circle known as Seahenge outweighed the spiritual value of the site to some members of the public who believed that ‘it needed to be left to the mercy of the natural forces of the sea’.<sup>102</sup> However, this decision was taken after a ‘long and public debate’.<sup>103</sup> This exemplifies a situation where stakeholders’ views were considered as part of the decision-making process and demonstrates the view that cultural significance should no longer be simply a ‘scholarly construction’ but needs to be ‘an issue negotiated among the many professionals, academics and community members who value the object or place’.<sup>104</sup> Furthermore, the nature of the value (local versus national or global value) might come into conflict as happened with the Bamiyan Buddhas where ‘a lack of connection between global

---

<sup>100</sup> Cameron (n 95) 73. For a history of the Grosse Île quarantine station as a site of suffering for immigrants see Merna M Forster, ‘Quarantine at Grosse Île’ (1995) 41 *Canadian Physician* 841, 848.

<sup>101</sup> Cameron (n 95) 73.

<sup>102</sup> Edward Impey, ‘Why do places matter? The new English Heritage *Conservation Principles*’ in Clark (n 23) 83.

<sup>103</sup> *ibid*

<sup>104</sup> Avrami and others (n 49) 9. The democratisation of the decision-making process of valuing cultural heritage will be addressed below in Chapter 5.



values and local values' led to their destruction.<sup>105</sup> These, at times conflicting, types of value where one gives rise to the norm of preservation and the other to destruction, are seemingly incompatible. However there may still be occasions involving conflicting types of value or the nature of the types of value:

when the public interest – and particularly the interests of future generations – will be best served by professionals using the authority of their expertise to contradict the short-term public will.<sup>106</sup>

This could be described as a safety mechanism with the potential to override public short-termism; this ensures the survival of the subject matter in circumstances where the objection to preservation or the inactivity (risking its destruction) is unsupported by strong types of value (e.g. no group uses the object in its cultural practices which might justify its deterioration). This safety device will be discussed more fully in the context of public legacy.<sup>107</sup>

#### ***2.4.1.3 What is valued - the subject matter or the intangible 'cultural heritage'?***

Previously the primary focus of valuation in Western culture was on the subject matter itself to the extent that it became 'conflated with the cultural and social values it symbolizes'.<sup>108</sup> Throsby suggests that conservationists interpret 'heritage items' as 'stores of cultural value',<sup>109</sup> and this accords with the concern that William Morris and

---

<sup>105</sup> Cameron (n 101) 72.

<sup>106</sup> Robert Hewison and John Holden, 'Public value as a framework for analysing the value of heritage: the ideas' in Clark (n 23).

<sup>107</sup> At p 93 below.

<sup>108</sup> Smith (n 10) 36.

<sup>109</sup> Throsby, 'Cultural Capital' (n 22) 101.

others involved with SPAB expressed towards the damage done to the physical subject matter of cultural heritage through restoration.<sup>110</sup> This primarily focuses on the information stored within the subject matter. However Holtorf treats heritage as more often valued for its metaphorical rather than literal content.<sup>111</sup> This suggests that it is ‘the topics and notions it alludes to and evokes among people’ rather than ‘the information that it contains about the past’<sup>112</sup> and effectively looks at the value that is generated by people’s engagement with the subject matter itself, for *inter alia* cultural, religious or historical reasons. This approach moves the focus from ‘observed qualities of fabric’ to acknowledge the ‘multiple, valid meanings of a particular place’.<sup>113</sup> Altschul views measuring value of the physical manifestation of cultural heritage in ‘any absolute sense’ as ‘a fools’ errand’;<sup>114</sup> consequently, he ‘disentangles’ archaeological heritage, into the physical subject matter and the intangible ‘understanding of the past of our interpretations of how those “things” reflect human behaviour’.<sup>115</sup> This change of focus in practice, according to Altschul, shifts management from ‘a bureaucratic typological exercise’ to an ‘intellectual exercise’.<sup>116</sup> Mason suggests that ‘the emphasis on values and cultural significance as opposed to the traditional emphasis on fabric is an important though subtle shift’.<sup>117</sup> In this way the

---

<sup>110</sup> Clark (n 52) 90.

<sup>111</sup> Holtorf, ‘Heritage Values’(n 97) 43.

<sup>112</sup> *ibid*

<sup>113</sup> Mason, ‘Theoretical and Practice Arguments’ (n 67) 31.

<sup>114</sup> Jeffrey H Altschul, ‘Archaeological Heritage Values in Cross-cultural context’ in G Smith and others (n 6) 82.

<sup>115</sup> *ibid*

<sup>116</sup> *ibid* 83.

<sup>117</sup> Mason, ‘Theoretical and Practice Arguments’ (n 67) 34.

focus is on ‘*why* the fabric is important and *how* to keep it that way’.<sup>118</sup> The intangible nature of value is perhaps best demonstrated by Claire Smith<sup>119</sup> where she sets out various examples of attacks on the subject matter of cultural heritage. These include the deliberate bombing of Dresden,<sup>120</sup> the destruction of the Bamiyan Buddhas,<sup>121</sup> Mostar Bridge<sup>122</sup> and the Twin Towers<sup>123</sup> as well as the toppling of statues of Stalin<sup>124</sup> and Saddam Hussein<sup>125</sup> and says: ‘All of these attacks on material culture were simultaneously assaults on iconic cultural values and associated heritage values’.<sup>126</sup>

---

<sup>118</sup> *ibid*

<sup>119</sup> C Smith (n 37).

<sup>120</sup> In February 1945 Allied bombers raided the German city of Dresden which led to significant loss of life as well as destruction of buildings. Much work has since been undertaken to rebuild the city: see Chris Leadbeater, ‘Dresden: Past glory is revived in this rebuilt wonder’ *The Independent* Sunday 10 February 2013.

<sup>121</sup> In 2001 the Taliban destroyed the 10m standing Buddhas at Bamiyan in Afghanistan: UNESCO, *Cultural Landscape and Archaeological Remains of the Bamiyan Valley* <http://whc.unesco.org/en/list/208> accessed 29 December 2013.

<sup>122</sup> The Bridge in Mostar in Bosnia-Herzegovina was destroyed in 1993 during the 1990s war in Yugoslavia. The bridge was recently rebuilt and, together with the historic city of Mostar, has been inscribed on the World Heritage List: UNESCO, 29th Session of the World Heritage Committee, Paris 9 September 2005, WHC-05/29/COM/22.

<sup>123</sup> The destruction of the twin towers refers to the bombing of the World Trade Center in New York on 11 September 2001 by al-Qadea. Further information is found at: <<http://www.911memorial.org/>> accessed 29 December 2013.

<sup>124</sup> In the 1990s statues of Stalin were torn down in Georgia: BBC News online, ‘Stalin statue taken down in his Georgian hometown’ <<http://www.bbc.co.uk/news/10412097>> accessed 2 January 2014.

<sup>125</sup> During the 2003 Iraq War the statue of former Iraqi dictator, Saddam Hussein was toppled with the aid of a US tank: BBC News online, ‘Saddam’s symbol tumbles down’ 9 April 2003 <[http://news.bbc.co.uk/1/hi/world/middle\\_east/2933105.stm](http://news.bbc.co.uk/1/hi/world/middle_east/2933105.stm)> accessed 29 December 2013.

Another type of value, more concerned with the intangible nature of cultural heritage than the physical subject matter, is the ‘spin off’<sup>127</sup> importance of objects, places or practices. This is the notion that people can derive certain benefits (which can be categorised as a type of value) from engagement with the subject matter of cultural heritage through activities such as conservation or volunteering.<sup>128</sup> It can also involve the role that cultural heritage plays in social development of a community and is what has become recently associated with the London 2012 Olympic Games as ‘legacy’.<sup>129</sup>

#### ***2.4.1.4 Types of value: creating a typology***

There is no one universal typology of values, not least because each discipline has different ways of valuing and a person’s discipline can colour how they view things,<sup>130</sup> although attempts have been made recently to create such a typology.<sup>131</sup> Avrami and others acknowledge that whilst ‘the typologies of different scholars and disciplines vary, they each represent a reductionist approach to examining the very complex issue of cultural significance’.<sup>132</sup> However, several principal typologies exist based on the function of certain types of value and their nature and these will be assessed below.

---

<sup>126</sup> *ibid* 11.

<sup>127</sup> Described at text to n 91 as instrumental value.

<sup>128</sup> Kate Clark, ‘Introduction’ in Clark (n 23) 3. See EH (n 23) [32]; Deborah Mattinson, ‘The value of heritage: what does the public think?’ in Clark (n 23) 89.

<sup>129</sup> See Sean Gammon, Gregory Ramshaw and Emma Waterton, ‘Examining the Olympics: heritage, identity and performance’ (2013) 19 *International Journal of Heritage Studies* 119, 121.

<sup>130</sup> Altschul (n 114) 67.

<sup>131</sup> Mason, ‘Assessing Values’ (n 23) 9 and Young (n 78) 28-36.

<sup>132</sup> n 49 8.

Mason acknowledges that assessing types of heritage value is subjective<sup>133</sup> and it is

difficult to establish a clear framework or even nomenclature of values (akin to a chemist's elements and compounds), this is precisely what is needed to facilitate the assessment and integration of different heritage values in conservation planning and management.<sup>134</sup>

He therefore suggests a provisional typology of values.<sup>135</sup> Essentially he separates sociocultural values from economic ones, with the former category aligning closely with that of the Burra Charter, the only difference being the additional category of scientific value under the Burra Charter.<sup>136</sup> The writers of that charter acknowledge that the categorisation of types of value is not static, but instead is 'one approach to understanding cultural significance. However, more precise categories may be developed as understanding of a particular place increases'.<sup>137</sup> Whilst the Burra Charter does not mention economic value at all, Mason has a separate category since he considers that 'Economic values, in many instances, *do* constitute an additional set of values for most heritage sites (and certainly a different set of stakeholders and constituents)'.<sup>138</sup> It is Mason's sociocultural values (as corresponding with the Burra Charter) which are at the essence of the following discussion.

---

<sup>133</sup> Mason, 'Assessing Values' (n 23) 9.

<sup>134</sup> *ibid* 13.

<sup>135</sup> *ibid* 9.

<sup>136</sup> The Burra Charter (n 52) art 1.2.

<sup>137</sup> *Guidelines to the Burra Charter: Cultural Significance* (Australia ICOMOS 1988) [2.5].

<sup>138</sup> Mason, 'Theoretical and Practice Arguments' (n 67) 33.

**Figure 2 The typologies of cultural value<sup>139</sup>**

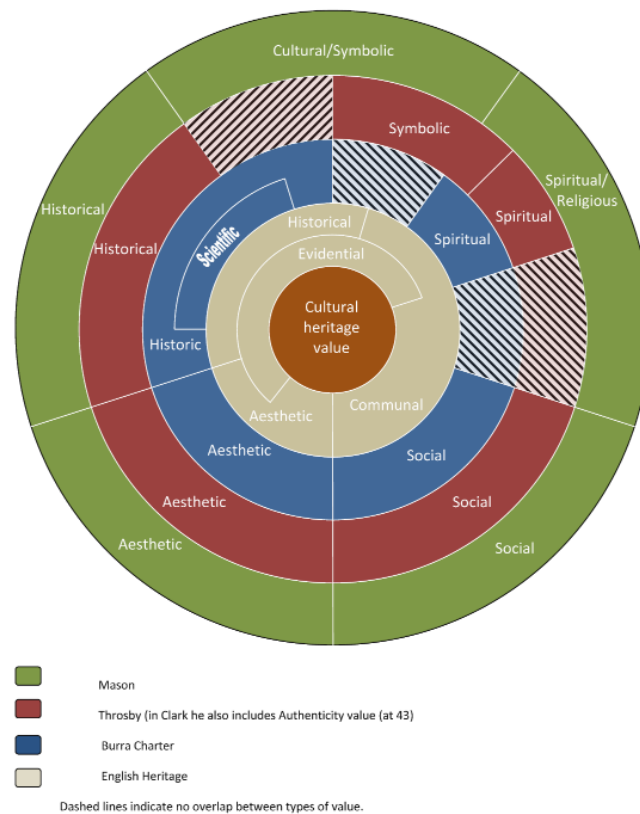


Figure 2 illustrates the mapping of various typologies against each other. Mason's typology is a useful starting point, since his approach perhaps represents in the most detail the different types of value that exist. Both the Burra Charter's classification and Mason's sociocultural values would fall under the category of 'intrinsic' value according to the DEMOS meaning of it being equivalent to significance.<sup>140</sup>

<sup>139</sup> Thanks to Robert Fear for technical assistance with this diagram.

<sup>140</sup> Discussed above at p 75. Whilst the DEMOS categorisation could be placed in the centre of Mason's and the Burra Charter's classifications, there is less overlap with the other categories; therefore the DEMOS categorisation has been omitted from Figure 2. A drawback of DEMOS's 'intrinsic' value is its lack of particularisation such that it would assist very little in comparing the typologies of value in Figure 2.

Throsby's cultural values<sup>141</sup> fit reasonably neatly on to Mason's typology of sociocultural ones, except for Throsby's omission of cultural value; he also subsumes religious value into spiritual value. The absence of cultural value is understandable since he treats cultural value as the umbrella term for these different types of value, distinguishing them from economic value.<sup>142</sup> In later work Throsby suggests authenticity value as an additional cultural value which would have some overlap with English Heritage's evidential value.<sup>143</sup> In this thesis the issue of authenticity is dealt with in the context of public legacy.<sup>144</sup>

The first approach in Figure 2 that starts to look more closely at the *nature* of the value in terms of its function rather than simply its type of value is the typology used by English Heritage.<sup>145</sup> Its categories of historical and aesthetic value fit in with the previous typologies discussed. Historical value is expressly said to cover associative values including associations with families, individuals, events or particular movements as well as developments in the arts.<sup>146</sup> Communal value includes social value<sup>147</sup> and also incorporates the commemorative<sup>148</sup>, symbolic value<sup>149</sup> and spiritual types of

---

<sup>141</sup> See Figure 2.

<sup>142</sup> Throsby, 'Cultural Capital' (n 22) 103. These align with Mason's economic values and are discussed below at p 86.

<sup>143</sup> Throsby, 'The value of cultural heritage' (n 23).

<sup>144</sup> At p 93 below.

<sup>145</sup> EH (n 23).

<sup>146</sup> *ibid* [42]-[43].

<sup>147</sup> *ibid* [56].

<sup>148</sup> *ibid* 55.

<sup>149</sup> *ibid*

value.<sup>150</sup> However, the category of evidential value focuses more on what the particular features can do (i.e. the function) in terms of providing us with evidence about the past. It therefore focuses on ‘the potential of a place to yield evidence about past human activity’.<sup>151</sup>

Other approaches focusing on the function of the subject matter of cultural heritage include the typology used by the Heritage Lottery Fund which appointed Citizens’ Juries to assess the public value of heritage.<sup>152</sup> The four categories, which Mattinson suggests aligns with Holden’s ‘intrinsic values’,<sup>153</sup> are: knowledge value (‘which places heritage as central to learning about ourselves and society, understanding our cultural identities at both personal and community levels’), identity value (assessed at the ‘personal, community, regional or national level’), bequest value (the notion that heritage should be cared for and passed on to future generations – akin to public legacy within this thesis) and distinctiveness value (‘a key spontaneous value for heritage, viewed as extremely important because it is closely linked to personal and cultural identity’).<sup>154</sup> Whilst this typology might assist assessing how valuable an existing cultural heritage project has been, because of its lack of specificity it is less useful for identifying whether something is the subject matter of cultural heritage, how it should be preserved and the competing types of values in the case of dispute.

Figure 2 demonstrates that the typologies developed by Mason, Throsby, the Burra Charter and English Heritage clearly overlap. Most notably Mason’s typology and the

---

<sup>150</sup> *ibid* 59.

<sup>151</sup> *ibid* 35.

<sup>152</sup> Mattinson (n 128) 86.

<sup>153</sup> Holden (n 91) 9.

<sup>154</sup> Mattinson (n 128) 89.



Burra Charter permit a fuller appreciation of the component types of value that are recognised in respect of cultural heritage, rather than the use to which it can be put in terms of what people feel towards it in a generalised sense, such as recognising that it is distinct and to pass it on to future generations. Darvill has adopted a similar approach to the Citizens' Juries' approach with three value systems of use value, option value and existence value.<sup>155</sup> The first of those categories then incorporates the 'interest-based orientations of use'<sup>156</sup> which include archaeological and scientific research, for the creative arts, education and recreation and then the symbolic representation as well as the 'social solidarity and integration', 'monetary and economic gain' and the legitimisation of action.<sup>157</sup> These categories focus on the particular uses to which the subject matter can be put rather than its particular worth as to why it should be preserved. It is unlikely that the category of legitimisation of action is a suitable value that would be recognised as an underlying principle of cultural heritage. Darvill's option value focuses on the potential of the subject matter of cultural heritage<sup>158</sup> on the basis that it is relevant to preserve the subject matter for future generations. However, as discussed below,<sup>159</sup> it may occasionally be appropriate to allow the destruction or deterioration of the subject matter to better preserve the cultural heritage (in its intangible form).

---

<sup>155</sup> Darvill (n 22) 43.

<sup>156</sup> *ibid* 41.

<sup>157</sup> *ibid* 44-45. He gives as an example of the latter category the use of archaeological research by the Nazis as an attempt to show their superiority.

<sup>158</sup> *ibid* 46.

<sup>159</sup> At p 114 below.

The final category of value for Darvill is existence value which he explains in terms of the feelings someone has towards the subject matter of cultural heritage even if they have never seen it before, or may never see it.<sup>160</sup> Darvill's categories are similar to the types of economic value recognised by Mason and Throsby (separate from Throsby's cultural value and Mason's sociocultural value). Both separate economic value into use and non-use value and include existence value, option value and bequest value within this category.<sup>161</sup> The use value corresponds with the market value.<sup>162</sup> It is interesting that the non-use value is categorised as economic rather than cultural since the continued existence of the subject matter and the desire to preserve for the future even when one has never seen or had use of the object would more likely be associated with the cultural role played by the objects. However, Mason acknowledges that there is much overlap with these and the sociocultural value and the distinction is mainly made because those types of value under the economic heading are measured through economic analysis.<sup>163</sup> He suggests that they are economic values because 'individuals would be willing to allocate resources...to acquire them and/or protect them'.<sup>164</sup>

#### 2.4.1.4.1 Which typology to use in this thesis?

The contents of Mason's typology which deals with the sociocultural and the economic value is broadly the general typology which will be used in this thesis, although such a strict distinction will not be made between sociocultural and economic value since the types of value in the latter are also clearly in the former. The reason for adopting these

---

<sup>160</sup> Darvill (n 22) 47.

<sup>161</sup> Throsby, 'Cultural Capital' (n 22) 103 and Mason, 'Assessing Values' (n 23) 10.

<sup>162</sup> Mason, 'Assessing Values' (n 23) 13.

<sup>163</sup> Mason, 'Assessing Values' (n 23) 12.

<sup>164</sup> *ibid*

different types of value, at least as a basis for discussion, is that it clearly shows the *types* of value rather than categorising them more broadly at the risk of losing sight of what is being assessed. However, specific reference will be made to the associative value that the subject matter of cultural heritage may have to people, a place or an event and whilst Mason would include political value within the cultural/symbolic value heading<sup>165</sup>, this will be treated separately for reasons explained later in this thesis. Taking heed from the Burra Charter<sup>166</sup> it is acknowledged that the typology is not set in stone and in some cases other types of value may need to be assessed.

#### ***2.4.1.5 Is there a hierarchy of types of value?***

It has already been suggested in the Seahenge example,<sup>167</sup> that in particular situations one type of value may ultimately be subordinate to another. The notion of enhancing the weight of some types of heritage value is expressly recognised in English Heritage's guidance in the context of individual decision-making and this should be 'proportionate to the significance of the place and the impact of the proposed change on that significance'.<sup>168</sup> However, this does not presuppose that there is any inflexible, general hierarchy favouring certain types of value over others. Instead, it seems that each decision, whether regarding preservation, or dispute resolution, should balance the (at times) competing types of value. If one were to adopt Harding's approach of prioritising cultural value and treating science, educational, economic and political value as

---

<sup>165</sup> Mason, 'Assessing Values' (n 23) 11.

<sup>166</sup> Text to n 137 above.

<sup>167</sup> At 76 above.

<sup>168</sup> EH (n 23) [5.4].

secondary<sup>169</sup> this could create an inflexible approach that would not fully take into account the differing types of value. As Mason suggests:

‘Values have unequal weight, and this will remain the case when it comes to figuring priorities and making decisions for a particular site. Significance, in effect, requires figuring out these priorities. But the task of eliciting values should be distinguished from the task of prioritising them’.<sup>170</sup>

Mason suggests that rather than determining that particular values should have a particular priority, one undertakes ‘an evaluation of the degree of importance of a particular value (unique, important, typical, etc) of a site when compared with that value in related sites’.<sup>171</sup> These degrees of importance: unique, important, typical are helpful in assessing the relative importance whilst not providing absolute, arbitrary hierarchies of types of value.

#### ***2.4.1.6 How to measure the strength of value: looking at the loss***

In the definition set out in Chapter 1, the degree of significance to the particular people is to the extent ‘that its loss or destruction would be a misfortune to the culture, identity, heritage or religious practices of those people(s)’.<sup>172</sup> This provides a measure of the value or significance by, in effect, assessing the gap that would be left by the object,

---

<sup>169</sup> n 78 351.

<sup>170</sup> n 49 36.

<sup>171</sup> Mason, ‘Assessing Values’ (n 23) 24.

<sup>172</sup> cf. Shapiro’s approach which restricts repatriation to situations where the cultural expression is ‘meaningfully missed or whose loss potentially threatens a culture’s continued existence or sense of self’: Daniel Shapiro, ‘Repatriation: A modest proposal’ (1998-1999) 31 *New York University Journal of International Law and Politics* 95, 104. See also Welsh (n 76) 15. For example where cultural heritage is an essential component of the cultural practices of an indigenous community or to a nation.

place or practice were it to be lost or destroyed. This notion of focusing on the loss can be seen in the context of property for personhood such that ‘One may gauge the strength or significance of someone’s relationship with an object by the kind of pain that would be occasioned by its loss’.<sup>173</sup> In the case of cultural heritage, losing the subject matter would affect a wider category of person, even those who have never seen the place or object, e.g. the Bamiyan Buddhas.<sup>174</sup> Occasionally it is only the threat of losing something that truly focuses one’s mind on protecting it and Avery suggests that often the cultural value of the subject matter of cultural heritage will only be articulated by the public and heritage professionals ‘when the existence of places or practices are threatened or celebrated’.<sup>175</sup> Lowenthal observes ‘Nothing arouses affection for a legacy as much as the threat of its loss’,<sup>176</sup> which tends then to presuppose that there is an impetus to protect that which is at risk. The Bamiyan Buddhas provide perhaps the most famed example of the realisation of a threat and the response through valuing and legal designation (albeit too late) as a World Heritage site.<sup>177</sup> The experience of the loss of, and damage to, cultural heritage during the Second World War incentivised legal action in the form of the Convention for the Protection of Cultural Property in the Event of Armed Conflict.<sup>178</sup> Whilst these two examples show legal responses to past threats, it is clear that pre-emptive action can be seen in the context of the Convention for the

---

<sup>173</sup> Radin (n 250) 959.

<sup>174</sup> At 77 above.

<sup>175</sup> Tracey Avery, ‘Values not Shared: The Street Art of Melbourne’s City Laneways’ in Gibson and Pendlebury (n 10) 140.

<sup>176</sup> n 74 19.

<sup>177</sup> World Heritage Convention, ‘Cultural Landscape and Archaeological Remains of the Bamiyan Valley’ <<http://whc.unesco.org/en/list/208>> accessed 3 January 2013.

<sup>178</sup> UNESCO, The Hague 14 May 1954.

Safeguarding of the Intangible Cultural Heritage<sup>179</sup> which has ‘an element of actual or perceived threat to cultural heritage inherent in the concept, hence requiring preservation’.<sup>180</sup>

The appreciation of the potential loss of the subject matter of cultural heritage may cause the valuing process to take place, but it is argued that imagining the threatened imminent loss may aid the valuing process.

#### **2.4.1.7 To whom is cultural heritage valuable or significant?**

The subject matter of cultural heritage may well be valuable to a large number of people to the extent that it is recognised as being of ‘universal value’.<sup>181</sup> However, different people worldwide may value the same thing for different reasons. Gibson and Pendlebury cite Stonehenge (recognised by UNESCO as being of universal value) as perhaps ‘the ultimate monument of a pluralism that unites rather than divides’<sup>182</sup> because different spiritual views about the place exist and different people value it in different ways.<sup>183</sup> It may be idealistic to look for universal values as all stakeholders are

---

<sup>179</sup> UNESCO, Paris 17 October 2003.

<sup>180</sup> Katya S Ziegler, ‘Cultural Heritage and Human Rights’ in Alberico Gentili, *La Salvaguardia Dei Beni Culturali Nel Diritto Internazionale* (Giuffrè 2007) SSRN: <<http://ssrn.com/abstract=1002620>> accessed 3 January 2013.

<sup>181</sup> E.g. the *Convention concerning the protection of the World Cultural and Natural Heritage* UNESCO, Paris (adopted 16 November 1972, entered into force 17 December 1975) 1037, UNTS 151.

<sup>182</sup> n 36 5.

<sup>183</sup> It has a scientific and historic value to the nation: Joseph L Sax, ‘Is Anyone Minding Stonehenge? The Origins of Cultural Property Protection in England’ (1990) 78 Cal LR 1543, 1554; it is of archaeological and public interest: *AG v Antrobus* [1905] 2 Ch 188 (Ch), 199 and 209 respectively. A visitor survey conducted in 2004 by Mason and Kuo revealed that there was a low mean score for the question about whether Stonehenge has a high spiritual or religious value: Peter Mason and I-Ling Kuo, ‘Visitor

unlikely to both articulate and accept just one system of valuing.<sup>184</sup> More often the value of cultural heritage is recognised more locally, either by nations, regions or by communities.<sup>185</sup> This is, in part, due to the importance of cultural heritage to identity.<sup>186</sup> If a community either created or uses the object within practices, either way it is important to make ‘an effort to understand the group’s perspectives of its origins and core traditions upon which the group’s cultural coherency is founded’ to fully understand the particular value of cultural heritage to the group.<sup>187</sup>

This then leads to the question whether something is cultural heritage when only valued by an individual, or a family. Carman suggests that the public are to private people as heritage is to family history.<sup>188</sup> In this way, the silver spoon discussed in the Introduction would not be classed as heritage, but part of the author’s family history. However, the author of this thesis puts forward the view that the notion of public legacy<sup>189</sup> can more fully explain why the silver spoon is unlikely to be classed as

---

Attitudes to Stonehenge: International Icon or National Disgrace?’ (2008) 2 *Journal of Heritage Tourism* 168, 178. The authors suggested that this might have been because of the high proportion of overseas visitors (ibid 178). Nevertheless, Mason and Kuo’s research revealed the ‘uniqueness value’ of the site (ibid 176). See also Simon Jenkins, ‘The curse of Stonehenge will remain until it is handed back to the druids’ <<http://www.theguardian.com/artanddesign/2006/jan/27/heritage.society7>> accessed 29 December 2013.

<sup>184</sup> Susan B Bruning, ‘Articulating Culture in the Legal Sphere: Heritage Values, Native Americans and the Law’ in G Smith and others (n 6) 211.

<sup>185</sup> See Okamura (n 26) 56.

<sup>186</sup> Discussed above at p 62.

<sup>187</sup> Bruning (n 184) 222.

<sup>188</sup> n 25 21.

<sup>189</sup> Discussed at p 93 below.

cultural heritage and that even if it were, any norms and corresponding legal duties would be tempered by the individual nature of the value.

#### ***2.4.1.8 Does the act of valuing add value? Valuing versus valorising***

This discussion about how we measure value raises the related question of whether the act of ascribing value and formally recognising it actually adds to that value. One of the principal ways in which value is officially recognised is through legal designation. This is discussed in full in subsequent chapters, but for our purposes is necessarily tied up in practice with the act of valuing. Did the designation of the Bamiyan Buddhas by UNESCO as being of universal value add value to them? Avrami and others suggest that it does.

‘Simply labeling something as heritage is a value judgment that distinguishes that object or place from other objects and places for particular reasons, and as such, the labeling adds new meaning and value’.<sup>190</sup>

Those authors make the distinction between valuing and valorizing, the former relating to ‘appreciating existing value’ and the latter ‘giving added value’.<sup>191</sup> The subtle distinction between the two is said to speak ‘to the interventionist and interpretative aspects of the simple act of identifying something as heritage’.<sup>192</sup> Recognition can therefore add another type of value to the subject matter of cultural heritage.<sup>193</sup> This

---

<sup>190</sup> n 49 8.

<sup>191</sup> *ibid*

<sup>192</sup> *ibid*

<sup>193</sup> This may be called the ‘legal value’: Craig Forrest, *International Law and the Protection of Cultural Heritage* (Routledge 2010) 19.



might be the public legacy aspect of cultural heritage<sup>194</sup> which recognises that there is a public feeling of paternalism towards cultural heritage and this may be acknowledged more deeply where there is official recognition of the value.<sup>195</sup> Carman takes the notion of adding value even further by suggesting that the role of law is to *give* value rather than to *recognise* existing value.<sup>196</sup>

#### **2.4.2 Public legacy**

Once it has been recognised that a place, object or practice has certain types of value considered important by certain people, there is a feeling of legacy towards the cultural heritage to the extent that there is a realisation that its loss would be a misfortune.<sup>197</sup> This is related to the way in which value is measured<sup>198</sup> and is heightened by imminent loss.<sup>199</sup> This notion is reflected in the following: ‘Heritage is never merely conserved or protected; a heritage must feel truly our own – not something to dispose of as a commodity but integral to our lives’.<sup>200</sup>

---

<sup>194</sup> Discussed below at p 93.

<sup>195</sup> Tim Murphy, ‘Legal Fabrications and the Case of ‘Cultural Property’ in Alain Pottage, Martha Mundy and Chris Arup, *Law, Anthropology, and the Constitution of the Social: Making Persons and Things* (CUP 2004) 123 and Rodney Harrison, *Heritage: Critical Approaches* (Routledge 2013) 14-16.

<sup>196</sup> Carman (n 23) 115, 127. This contention is analysed more fully in the next Chapter.

<sup>197</sup> Discussed above at p 88. For example, the destruction of contents of the Iraq museum (which was valued as collection) was described as an ‘Irreplaceable loss for all humanity’: André Emmerich, ‘Improving the Odds: Preservation through Distribution’ in Kate Fitz Gibbon (ed), *Who Owns the Past? Cultural Policy, Cultural Property and the Law* (Rutgers University Press 2005) 247.

<sup>198</sup> Discussed above at p 86.

<sup>199</sup> Lowenthal (n 74) 19 (quoted at text to n 176).

<sup>200</sup> David Lowenthal, ‘Stewarding the Past in a Perplexing Present’ in Avrami and others (n 49) 23.

The concept of ‘heritage’ originated in law<sup>201</sup> in the context of inheritance and part of the underlying principles of cultural heritage is the notion of passing on heritage to others, whether the present generation, or future generations. It also incorporates the notion that we expect future generations to look after cultural heritage.<sup>202</sup> Whilst in most cases public legacy will include the concept of having been passed heritage and passing it on to the future, cultural heritage can be created in the present and does not necessarily need to be old.<sup>203</sup> In this way it may be recognised that the works of contemporary artists are either currently the subject matter of cultural heritage or have the potential to be so in the future. Similarly, where a new object or place is associated with an important event or person in modern-day times, this could also be considered as the subject matter of cultural heritage, without the need for it to have been passed from our forebears.<sup>204</sup> Pearce suggests that heritage ‘also presupposes an intrinsic relationship between those who went before and those who come after, with concomitant notions of responsibility and “holding on trust”’.<sup>205</sup>

---

<sup>201</sup> Susan M Pearce, ‘The Making of Cultural Heritage’ in Avrami and others (n 49) 59.

<sup>202</sup> Harding (n 78) 324-325.

<sup>203</sup> E.g. Holtorf, adopting an essentialist approach that focuses on ‘the potential for heritage to give pause for personal reflections’ suggests that ‘even something as mundane as a number of car wrecks’ can be heritage: Cornelius Holtorf, ‘The Changing Contribution of Cultural Heritage to Society’ (2011) 63 *Museum International* 8, 14. Furthermore, in the context of traditional knowledge it is clear that ‘traditional’ does not necessarily mean old: *Elements of a Sui Generis System for the Protection of Traditional Knowledge* WIPO/GRTKP/IC/4/8 (30 September 2002) 11. Questions have arisen as to whether street art may be considered to be cultural heritage: Avery (n 175) 151 and John Webster, ‘Should the work of Banksy be listed?’ [2011] *Journal of Planning Law* 374, 378.

<sup>204</sup> For example, the association of Robben Island with Nelson Mandela and its subsequent use as a museum: <<http://www.robben-island.org.za/>> accessed 28 December 2013.

<sup>205</sup> Pearce (n 201) 59.

It is important here to note that it is not necessarily the case that the physical loss of the object or place would be a misfortune, since cultural heritage is treated in this thesis as intangible.<sup>206</sup> It might be that the loss of the use of the object in a cultural process whereby the object is necessarily destroyed is more important than ensuring the continued safety of the object itself. An oft-cited example is the Zuni War Gods.<sup>207</sup> Since cultural heritage can be described as ‘the contents of humanity’s social portfolio’<sup>208</sup> and ‘involves concepts of identity anchored in the past and continuing into the present’<sup>209</sup> there is necessarily a strong engagement with the process of cultural heritage, which will often result in the continued existence and enjoyment of its subject matter, but which is focused more closely on the processes surrounding the subject matter.

The public legacy aspect of cultural heritage is therefore the notion that the public are effectively ‘signing up’ to the idea that this is something worth recognising, protecting and passing on to future generations. Whilst in most Western situations this will involve ensuring the physical protection in the case of tangible manifestations of cultural heritage, the concept does not preclude the recognition of practices that might involve the protection of the cultural heritage (as a process) including the physical destruction of the thing if that is the most important element of the cultural heritage for the individual community. In this way, it represents ‘intergenerational equity’ since the

---

<sup>206</sup> At p 54 above.

<sup>207</sup> This topic is analysed more fully in the context of preservation at p 115 below.

<sup>208</sup> Bruning (n 184) 223.

<sup>209</sup> *ibid* 221.

future generation's interest in the cultural heritage should not frustrate the interest of the present generation.<sup>210</sup>

There is some overlap between this notion of public legacy and what has been described as the economic non-use 'bequest value'<sup>211</sup> since the latter deals with the idea that 'heritage should be cared for in order to hand on things that are valued to future generations'.<sup>212</sup> Public legacy represents the nature of the relationship between the people and the subject matter which may originate in a generalised feeling of the need to keep it and pass it on, but which may be articulated more formally and objectively by those involved in the heritage profession.<sup>213</sup> However, by treating public legacy as a separate principle of cultural heritage and not necessarily equating it with a bequest value (which presupposes that we definitely wish to bequeath the subject matter to future generations) it can act as a safeguard or safety mechanism. This provides a means to reflect on the relationship between the subject matter and the people to whom it is valuable so that if the subject matter is harmful in some way to a particular group, for example, if it is patriarchal,<sup>214</sup> or is harmful to animals, such as bear baiting then

---

<sup>210</sup> 'Museums are the custodians of an intergenerational equity which may extend well beyond local or even national boundaries' and treats stakeholders as 'long dead benefactors and makers to future generations of users, from local audiences to overseas source communities, and from public funding bodies to private sponsors': Tristram Besterman, 'Museum Ethics' in Sharon Macdonald (ed), *A Companion to Museum Studies* (Blackwell Publishing 2006) 435.

<sup>211</sup> Mason, 'Assessing Values' (n 23) 13, Throsby, 'Cultural Capital' (n 22) 103 and Mattinson (n 128) 89.

<sup>212</sup> Mattinson (ibid).

<sup>213</sup> Such as museum curators or those involved in the protection of historic places, such as English Heritage.

<sup>214</sup> See Derek Gillman, *The Idea of Cultural Heritage* (Revised edition, CUP 2010) 94-95.

this can inform decisions regarding the degree to which the norms of preservation and access should be upheld.

A further safeguarding role of public legacy is that it can prevent too much falling within the purview of cultural heritage. The various formal definitions found in the legal texts tend to limit what is considered as cultural heritage or cultural property,<sup>215</sup> rather than admitting too much into the fold of cultural heritage.<sup>216</sup> Often the term is used to refer to subject matter that is particularly important to the extent that it is ‘nearly indispensable’.<sup>217</sup>

As discussed in Chapter 1, by using the word ‘heritage’ in conjunction with ‘cultural’ this avoids the inclusion of ‘any object of any possible or future cultural value’, described by Crewdson as a maximalist approach to what he referred to as cultural property.<sup>218</sup> Whilst Crewdson set at the other end of his spectrum, the minimalist approach, which he described as comprising ‘objects of special cultural value in a national context’,<sup>219</sup> this thesis adopts a middle ground. It would be unrealistic to adopt the maximalist approach since the absurd effect would be to render a poster of a Monet painting, purchased from a museum gift shop, on equal terms with the original painting, thus benefiting from any norms regarding preservation and access. Whilst the poster

---

<sup>215</sup> At pp 41-45 above.

<sup>216</sup> For example, it might be unduly restrictive to subject commercially produced copies of CHOs to export legislation in the same way as CHOs which necessarily have a cultural heritage value and for which the loss would be a misfortune to a community or nation.

<sup>217</sup> Harding (n 78) 345. See p 88 above.

<sup>218</sup> This was in the context of “cultural property” but at a time when the notion was more widely used: Richard Crewdson, ‘Cultural Property – A fourth estate?’ (1984) 18 LS Gaz 126, 126.

<sup>219</sup> *ibid*

(particularly with modern technology) might fully reflect the aesthetic value of the original evident, it would not have the same historical value that the original has in terms of the association with the painter and its place within the history of art. There is something unique about the authentic work itself such that even if a ‘great painting or sculpture’ has been widely reproduced, its destruction is ‘a tragedy of a different order [from the destruction of music or literature]’ since people ‘want to look at the real thing’.<sup>220</sup> This would support the view that the cultural value is connected to (but not necessarily inherently in) the original work which was created. In this way any particular academic attention or legal protection which would normally be bestowed upon cultural heritage would be inappropriate in the context of the reproduction in poster-form, but would be necessary towards the original work since its destruction would otherwise be a tragedy (in terms of a loss to either culture or society). One can see the public legacy (in terms of the relationship between the people and the original painting) regarding the original Monet, but not the reproduction. Having said that, some reproductions, made at the hands of the pupils of a painter or by a famous forger, may hold cultural value as reproductions justifying their recognition as cultural heritage. The pre-eminence of retaining authenticity is also evident in the context of historic places; it is described as ‘those attributes and elements which most truthfully reflect and embody the heritage values attached to it’.<sup>221</sup>

Nevertheless, in adopting Crewdson’s maximalist approach, this fails to address the more subtle role that heritage can play within a specific community or society. Objects, places and practices can have a cultural value because their use during cultural practices

---

<sup>220</sup> John Henry Merryman, ‘International Art Law: from Cultural Nationalism to a Common Cultural Heritage’ (1983) 15 *New York Journal of International Law and Politics* 757, 757.

<sup>221</sup> EH (n 23) [4.3].

or their preservation serve important purposes within that community.<sup>222</sup> The objects will be of a special cultural value, but not necessarily in the macro-sense of the national context. Instead, the special cultural value will be at the micro-level. Nevertheless, such objects would have a heightened cultural value distinguishing them from commercial reproductions of a work and justifying differential treatment in a similar way to the authentic artistic work. It could be said that cultural value, in itself, is insufficient but that more is needed and so perhaps “heritage” elevates it in some way such that an object has greater significance acting, as Blake suggests, as a qualifier.<sup>223</sup>

The middle ground adopted by the definition in this thesis avoids incorporating too many objects but does not restrict the concept of value or significance solely to a nation. Instead, it takes account of the various people to whom the subject matter of the cultural heritage can be of significance and their strong feelings towards it through the principle of public legacy. This effectively restricts the concern of this thesis to ‘Heritage’ rather than ‘heritage’, the latter having the potential to include ‘all material structures and objects and cultural practices of all kinds’<sup>224</sup> whilst the former deals with those of more historical significance.<sup>225</sup>

### **2.4.3 The principles of cultural heritage as compared with other concepts**

One of the main approaches to explaining what it is about cultural heritage that is valued is Merryman’s three sources of the public interest in cultural property;<sup>226</sup> these

---

<sup>222</sup> See generally L Smith, *Uses of Heritage* (n 60) 13, 19 and Chapter 2 of that text.

<sup>223</sup> Janet Blake, ‘On Defining the Cultural Heritage’ (2000) 49 *International and Comparative Law Quarterly* 61, 68.

<sup>224</sup> Peter Malpass, ‘Whose Housing Heritage?’ in Gibson and Pendlebury (n 10) 204

<sup>225</sup> *ibid* 203.

<sup>226</sup> Merryman, ‘The Public Interest’ (n 5) 342-354.

in turn give rise to three elements of a cultural property policy which will be contrasted with the norms of cultural heritage set out in this thesis.<sup>227</sup>

The sources of the public interest are the expressive value of cultural property; the politics and religion of cultural property; and the utility of cultural property.<sup>228</sup> It is argued that first two of Merryman's public interests form part of the value/significance of cultural heritage because each demonstrates value or significance to someone. The expressive value of cultural property, it is argued, is not intrinsic - someone has to be on the receiving end of the expressive value and again the politics and religion of the cultural heritage mean that the subject matter of cultural heritage will have to have some political or religious significance to someone, rather than abstractly. Merryman breaks down the expressive value into seven separate elements: truth and certainty (described as the 'yearn for the authentic' which is present in the original<sup>229</sup>); morality (cultural objects seemingly 'embody and express moral attitudes',<sup>230</sup>); as the basis for cultural memory; survival (the object is 'humanity's mark on eternity' such that one cherishes the object as a mark of our immortality<sup>231</sup>); pathos (such that even religious relics having no significance to us still 'evoke nostalgia for the people, events and cultures that produced them',<sup>232</sup>); identity (to the extent that cultural objects provide a 'legible past',<sup>233</sup> and community (in that cultural objects 'nourish a sense of identity',<sup>234</sup>).

---

<sup>227</sup> See p 111 below.

<sup>228</sup> Merryman, 'The Public Interest' (n 5) 342-354.

<sup>229</sup> Merryman, 'The Public Interest' (n 5) 346.

<sup>230</sup> *ibid*

<sup>231</sup> *ibid* 348.

<sup>232</sup> *ibid*

<sup>233</sup> *ibid* 349.



Although Merryman's analysis was in the context of objects, most of the components of his 'expressive value of cultural property' are relevant to explaining why cultural heritage is important to people (although this author doubts the survival element suggested by Merryman, since whilst the subject matter of cultural heritage can provide a link with the past and the future, it is suggested that few members of the public would necessarily identify with this feeling of 'immortality'). Different objects or places, even if unrelated to our own religions, can still be valued and import an element of 'pathos'. It has already been noted that certain places, objects or practices are important for a group's identity.<sup>235</sup> The moral composition of an object can be doubted because of the following reason. It may be that there is a moral feeling of obligation to care for such objects and to act in a morally appropriate way,<sup>236</sup> but all objects will not necessarily import such moral attitudes. For example, places of battle, sites of massacres or objects of oppression may be indicative of how people should refrain from acting in the future.<sup>237</sup> Merryman's instances of expressive value can be explained as types of value, which, if weighed in the balance can be used to assess overall the significance of a particular place, object or practice.<sup>238</sup> When it comes to the politics and religion of

---

<sup>234</sup> *ibid*

<sup>235</sup> At p 60 above.

<sup>236</sup> This is perhaps most notable in the context of CHOs in museums where there is a strong ethos of ethical treatment of objects due to the codes of ethics published by the principal museum professional bodies: MACoE (n 8) and ICOMCoE (n 8).

<sup>237</sup> Whilst some battlefields or sites of massacres may be places of memory they will not have any intrinsic morality, but may well be important for the act of remembering the loss. As to war commemoration generally see Sharon Macdonald, *Memorylands: Heritage and Identity in Europe Today* (Routledge 2013) 192-193.

<sup>238</sup> Specifically the symbolic value of cultural heritage to a community or its identity.

cultural property, it is argued that the religion of cultural property is, in fact, subsumed within the value-side of cultural heritage. It represents a particular function of cultural heritage within religious practices, but can also be a symbol of that religion or relevant for historical purposes, where it is no longer practised. Merryman's 'politics of cultural property' focuses on the role played by cultural heritage at the ethnic, regional or national level.<sup>239</sup> Whilst the political value of cultural heritage may be instrumental, such that the return of an object may have a political spin-off benefit, identifying this as a separate aspect of the public interest in cultural property unnecessarily elevates the status of this notion.<sup>240</sup> Having said that, Merryman does not have an ideological view of this, since he suggests that the politics of cultural property can hinder nation building.<sup>241</sup> It will later be argued that the concept of nationalism can hinder a coherent approach to treating cultural heritage.<sup>242</sup>

Whilst Merryman effectively covers the same elements that have been identified in the discussion of the different types of value, he does so in language unfamiliar to heritage professionals. Since the types of value discussed above are those used by heritage professionals, it seems appropriate to adopt these as the primary mechanism by which first to assess whether something can be defined as cultural heritage and secondly to determine the degree to which the norms relating to cultural heritage should be engaged

---

<sup>239</sup> Merryman, 'The Public Interest' (n 5) 350.

<sup>240</sup> Despite the views expressed that a failure to acknowledge the colonial impact on indigenous peoples 'conceals an undisclosed interest': Yannis Hamilakis, 'Responses' to Alan Audi, 'A Semiotics of Cultural Property Argument' (2007) 14 *International Journal of Cultural Property* 131, 160.

<sup>241</sup> Merryman, 'The Public Interest' (n 5) 350.

<sup>242</sup> Chapter 3.

through enforceable duties. Also, by focusing on the different types of value that may exist, these can import the necessary flexibility recommended by the Burra Charter.<sup>243</sup>

The cultural heritage principles as set out in the foregoing discussion focus on the varied types of value which comprise the cultural heritage value as well as the links between the cultural heritage and the people involved, particularly in terms of the focus on the desire to preserve cultural heritage for future generations.<sup>244</sup> In this sense an attempt is made to get to the heart of the core of cultural heritage to both identify what amounts to cultural heritage as well as to focus on its fundamental premise. These principles as identified contribute to an understanding of what the fundamental elements of the intangible dimension of cultural heritage are. Laurajane Smith identifies the elements of heritage as including memory, identity, dissonance and the political aspects of heritage<sup>245</sup> yet these are not core elements necessary for heritage to be recognised; dissonance and politics are not prerequisites for establishing that something is cultural heritage. Instead these elements will often be by-products of cultural heritage because of the importance of the different types of value to different people (for reasons related to their identity or memory), coupled with the strong feelings of public legacy. Therefore these concepts are instrumental in nature and are ones that a decision-maker would use when making assessments about the cultural heritage principles.

Johanna Gibson has identified ‘dignity, wisdom and continuity of culture and identity as elements that must be ‘developed and encouraged through the protection of

---

<sup>243</sup> 81 above.

<sup>244</sup> This is central to all types of cultural heritage as discussed at p 93 above.

<sup>245</sup> L Smith, *Uses of Heritage* (n 60) 299-308. Baird agrees that heritage ‘is inherently political, engaging stakeholders and practitioners in sometimes adversarial debate and struggle’: Baird (n 37) 328.

traditional and Indigenous knowledge'.<sup>246</sup> These are frequently key concerns of those for whom cultural heritage is important and are recognised as important for certain indigenous groups for whom colonial times and continued oppression and a lack of a political voice are important as part of their self-determination.<sup>247</sup> Nevertheless, the focus in this thesis is on the key identifying features of cultural heritage. They are termed the cultural heritage principles and they allow the elements set out by Johanna Gibson and Laurajane Smith to be taken into consideration and will usually be given effect by focusing on the cultural, religious or symbolic value to the particular groups for whom cultural heritage is essential for their identity.

Whilst the cultural heritage principles comprise a wide range of sub-elements (particularly in terms of the various types of value that comprise the cultural heritage value) it is clear that these are factors that can be balanced against one another and taken into consideration when reaching decisions.<sup>248</sup> Therefore, whilst 'the cultural heritage principles' is an umbrella term, the focus is nevertheless on those individual elements which make up the cultural heritage value.

---

<sup>246</sup> Gibson J, *Community Resources: Intellectual Property, International Trade and Protection of Traditional Knowledge* (Globalization and Law, Ashgate 2005) 193. See also the aims of the protection of traditional cultural expression: *The Protection of Traditional Cultural Expressions: Draft Articles* WIPO/GRTKF/IC/25/4 (4 April 2013). Annex 3-4 and traditional knowledge: *The Protection of Traditional Knowledge: Draft Articles* WIPO/GRTKF/IC/25/6 (30 May 2013).

<sup>247</sup> Peter K Yu, 'Cultural Relics, Intellectual Property, and Intangible Heritage' (2008) 81 Temple Law Review 433, 441.

<sup>248</sup> This can be seen in the context of the EH Principles (n 52) as well as the Burra Charter (n 137) which are used by heritage practitioners.

#### **2.4.3.1 Personhood and Peoplehood**

In a property context there has been discussion of ‘property for personhood,’<sup>249</sup> whereby a distinction is made between *personal property*, objects having particular connections with certain people that are ‘closely bound up with personhood because they are part of the way we constitute ourselves as continuing personal entities in the world’, and *fungibles*, objects that are ‘perfectly replaceable with other goods of equal market value’.<sup>250</sup> Radin treats a wedding ring as falling into the former category where it is someone’s marital band of commitment, but in the latter category if the wedding ring is in the jeweller’s stock. Money can recompense the jeweller’s loss of the ring, but not the loss to the ‘loving wearer’<sup>251</sup> (based on personhood). By focusing on the ‘continuing character structure encompassing future projects or plans, as well as past events and feelings’<sup>252</sup> one can see how such a concept can be applied to cultural heritage because of the link between the past, the present and the future.<sup>253</sup> Personal property is clearly essential for the identity of what Radin terms ‘the holder’ because ‘its holder could not be the particular person she is without it’.<sup>254</sup> This is equally true of

---

<sup>249</sup> Margaret Jane Radin, ‘Property and Personhood’ (1981-1982) 34 *Stan LR* 957.

<sup>250</sup> *ibid* 959-960. Jones has criticised Radin’s linear approach with personal property being at one end of a continuum with fungible at the other since he sees fungible and personal property values as often competing: Jeffrey Douglas Jones, ‘Property and Personhood Revisited’ (2011) 1 *Wake Forest Journal of Law & Policy* 93, 120. He cites an example from Clouse (Clouse C, ‘Narratives of Value and the Antiques Roadshow: “A Game of Recognitions”’ (2008) 41 *Journal of Popular Culture* 3) in the context of the Antiques Roadshow where there are clearly competing types of value of the object, both financial and otherwise: Jones (*ibid*) 120.

<sup>251</sup> Radin (n 249) 959.

<sup>252</sup> Radin (n 249) 968.

<sup>253</sup> Which is discussed at p 93 below in the context of the public legacy.

<sup>254</sup> Radin (n 249) 972.

some cultural heritage, such as CHOs which are indispensable for a person's or group's identity, even where they do not currently possess the objects.<sup>255</sup> Where personal property is involved (i.e. property for personhood) this gives rise to 'a stronger moral claim than other property',<sup>256</sup> and would provide support for an individual who wished to claim a disputed CHO which is essential for her identity.<sup>257</sup> Nevertheless, it might be more difficult to apply Radin's reasoning where there is less connection between a person and cultural heritage; for example, whilst the loss of Bamiyan Buddhas was of international concern, as demonstrated by the clear statements of view by UNESCO,<sup>258</sup> it is unlikely that those individuals around the world who expressed concern, but who still valued the Buddhas,<sup>259</sup> would consider that they were less of a person than they were before the Bamiyan Buddhas were destroyed.<sup>260</sup> A more attractive interpretation of property for personhood may be found in Jones's analysis for, rather than treating property for personhood as being essential for identity, Jones suggests that the protection of certain socio-cultural meanings is central to the concept of property for

---

<sup>255</sup> For example where the CHO is currently in a museum. This can also be seen in the context of genetic resources where knowledge associated with these resources can be passed from generation to generation (see *Consolidated Document Relating to Intellectual Property and Genetic Resources* WIPO/GRTKF/IC/25/5 (30 May 2013).

<sup>256</sup> Radin (n 249) 978

<sup>257</sup> Indeed, repatriation of CHOs

<sup>258</sup> See Agenda for UNESCO, 25<sup>th</sup> Session of the World Heritage Committee, Helsinki, December 2001, WHC-01/CONF 208/23, 22 November 2001.

<sup>259</sup> In what Darvill calls the option value: see Darvill (n 22) 46.

<sup>260</sup> In terms of what Radin said regarding the importance to the holder: (n 249) 972. Indeed, Radin's analysis does seem to presuppose that because of the importance of the personal property to the individual, they are the holder, or should be the holder: see Jones (n 250) 93. This will obviously not always be situation in cases such as the Bamiyan Buddhas.

personhood.<sup>261</sup> In this way legal protection of certain property is justified, not on the basis that ‘it is constitutive of individual identity’,<sup>262</sup> but rather because of its meaning within society or culture; he gives the example of the justification for the protection of moral rights of authors ‘because of the role art occupies within liberal democratic regimes’.<sup>263</sup> This approach to property for personhood might apply to the situations in which a particular object, place or practice was of particular cultural value but not necessarily constitutive of the identity of a particular individual or group.<sup>264</sup> Jones suggests that this already exists when preserving cultural meanings in the context of museums.<sup>265</sup> The work that he cites in support of this<sup>266</sup> highlights the difficulty of approaching cultural heritage issues from a property perspective particularly in the case of hybrid types of cultural property which do not fit easily with one particular group.<sup>267</sup> The example Mezey gives is sports mascots which are influenced by past stereotypes of Native Americans.<sup>268</sup> However, that paper does not in itself show the means by which cultural meanings are preserved in the context of a personhood doctrine based on socio-cultural meanings.

---

<sup>261</sup> Jones (n 250)128.

<sup>262</sup> *ibid* 135.

<sup>263</sup> *ibid*

<sup>264</sup> Miller also treats an object’s relationship to a particular social group as being critical rather than its particular use: Daniel Miller, *Material Culture and Mass Consumption* (Blackwell 1987) 118. He points out that private property permits individuals to own property ‘in which he or she may have no personal relationship, thus preventing others from realizing their potential for achieving such a relationship’: *ibid* 120.

<sup>265</sup> Jones (n 250) 135.

<sup>266</sup> Naomi Mezey, ‘Paradoxes of Cultural Property’ (2007) 107 *Columbia Law Review* 2004

<sup>267</sup> *ibid* 2044.

<sup>268</sup> *ibid* 2038.

Moving now from focusing on individuals, to groups, the concept of modern peoplehood has been described as ‘an inclusionary and involuntary group identity with a putatively shared history and a distinct way of life’.<sup>269</sup> Peoplehood is particularly relevant in the context of cultural heritage where certain objects, places or practices are important for a group’s identity.<sup>270</sup> The notion of property for peoplehood has been analysed in the context of cultural heritage, specifically in the context of land, resources or expression and is said to be ‘integral to the group identity and cultural survival of indigenous peoples’ and is thereby entitled to legal protection as cultural property.<sup>271</sup> The rationale for this approach is that it ‘inspires us to look beyond the static forbearance of possessive individualism<sup>272</sup> that finds such forceful expression in traditional models of property’.<sup>273</sup>

---

<sup>269</sup> John Lie, *Modern Peoplehood* (Harvard University Press 2004) 1. Religion is seen as providing ‘a potent underpinning of peoplehood, expressing its deepest values and longings’: *ibid* 21. This is particularly relevant in the context of cultural heritage where CHOs may be central to a particular sacred practice which is central to a particular group.

<sup>270</sup> This is particularly the case in the context of sacred objects that are important for indigenous communities as well as traditional knowledge, traditional cultural expressions and genetic knowledge. Lie lists ‘folklore and literature...memory and history’ as ‘central components of culture associated with peoplehood’: *ibid* 35.

<sup>271</sup> Kristen A Carpenter, Sonia K Katyal & Angela R Riley, ‘In Defense of Property’ (2009) 118 *Yale Law Journal* 1022, 1028. The ‘preservation and continuation of traditional practices is...crucial to the integrity and identity of traditional groups and thereby to the self-esteem of individuals’: Johanna Gibson, ‘Self-Preservation is the First Law of Nature: Conserving the Cultural Diversity in India’s Biological Resources’ <<http://ssrn.com/abstract=1446898>> accessed 12 December 2013, 9 .

<sup>272</sup> This focuses on the rights of an individual, whether or not created through intellectual property, rather than on the collective rights, entitlements or obligations of a community. Its basis seems to be in Locke’s Second Treatise in which a person mixing his labour with something from the state of nature thus makes



The notion of both personhood and peoplehood is clearly relevant for much cultural heritage because of the close link that cultural heritage has in many instances to the identity of people.<sup>274</sup> Therefore it is possible to identify the following overlaps between the way in which the conceptual framework for this thesis has developed and the concepts of personhood and peoplehood. These two latter concepts will be relevant where one considers the working definition of cultural heritage used in this thesis in terms of the connection between the heritage and identity. In the case of cultural heritage places, practices and objects, personhood and peoplehood will also be particularly relevant when assessing the public legacy aspect of the cultural heritage principles<sup>275</sup> because this looks at the strength of the relationship between the cultural heritage and the notion of passing on to future generations cultural heritage which is so important to the identity, culture or religion of the particular group of people.<sup>276</sup>

Despite these overlaps, the decision has been taken to analyse the existing legal, ethical and *quasi*-legal regimes from the point of view of the different types of value that exist in respect of cultural heritage. A key reason for adopting this approach is that it is closer to the approach taken in the day-to-day management of cultural heritage and is key to

---

it his property: John Locke, *Second Treatise of Government* (1690) (Public Domain Book 2011) Chapter V *Of Property*, Sections 27 and 29. See Michael F Brown, 'Can Culture Be Copyrighted?' (1998) 39 *Current Anthropology* 193, 203.

<sup>273</sup> Carpenter and others (n 271) 1028. See further James Leach, 'Creativity, Subjectivity and the Dynamic of Possessive Individualism' in Tim Ingold & Elizabeth Hallam (eds), *Creativity and Cultural Improvisation* (ASA Monographs, Berg 2007) 113.

<sup>274</sup> For example when approaching the link between traditional knowledge and identity: *The Protection of Traditional Cultural Expressions: Draft WIPO/GRTKF/IC/25/4* (4 April 2013) art 2.

<sup>275</sup> Discussed at p 93 above.

<sup>276</sup> Which is part of the definition of cultural heritage as set out in Chapter 1 of this thesis.

the working documents such as the EH Principles<sup>277</sup> and the Burra Charter.<sup>278</sup> It is submitted that the merits of adopting an approach that makes explicit the different types of value to different people provides a framework within which to assess the nuances of the English regimes. With greater particularisation of these types of value one can avoid what Mason calls the ‘black box’ of significance where the detail of the different elements under consideration get lost.<sup>279</sup> If one were to adopt an overarching principle of peoplehood or personhood (with the traditional association with identity) to assess the varied treatment of cultural heritage in England there is a risk of losing sight of the detail in a black box similar to the one Mason sought to avoid in the context of significance. In this way it will be possible to analyse the different types of value in order to fully appreciate why cultural heritage is important to different people in different ways, particularly where this value is not necessarily bound up with their identity.<sup>280</sup>

---

<sup>277</sup> EH (n 23).

<sup>278</sup> The Burra Charter (n 52).

<sup>279</sup> Mason, ‘Assessing Values’ (n 23) 8. It is acknowledged that it may be possible to balance competing interests, such as the need to respect genetic resources and associated traditional knowledge at the same time as facilitating innovation and the development of process that may rely on the use of genetic resources, but which may produce social benefits: *Consolidated Document relating to Intellectual Property and Genetic Resources* WIPOGR TKF/IC/25/5(30 May 2013).

<sup>280</sup> Since in some instances decisions may be made about cultural heritage which do not involve such close connections to the identity of a particular group: for example the Bamiyan Buddhas example discussed earlier.

## 2.5 Norms of cultural heritage

In this thesis it is argued that there are two principal norms flowing from the cultural heritage principles; these are preservation and access.<sup>281</sup> ‘A norm is a rule whose meaning is that something *ought* to be or to be done’,<sup>282</sup> with a prescriptive character and is therefore ‘usually expressed linguistically in an imperative.’<sup>283</sup> By using the term ‘norm’ this emphasises the prescriptive character of the compunction to preserve and to provide access to cultural heritage.

Satterfield suggests that

...norms overlap with held values to the extent that a norm is a value that one asserts as more important than others, as something that one should do or act in accordance with, versus something that one enduringly believes matters.<sup>284</sup>

In this regard, it is clear that one of the principal imperatives evident in having valued cultural heritage from the point of view of various stakeholders and the strong feeling of public legacy is the notion of preserving that value and providing means by which to engage with cultural heritage and its subject matter.

Harding suggests that there is a near universal sense of duty (either moral or legal) towards cultural heritage.<sup>285</sup> Whilst Harding uses the word ‘duty’ rather than ‘norm’, it

---

<sup>281</sup> Fechner (n 55) 382-385 describes preservation of material form and original context, public and scientific accessibility and ‘attribution to certain individuals, societies or nations’ as the aims of cultural property law.

<sup>282</sup> Hans Kelsen, ‘What is the Pure Theory of Law?’ (1959) 34 *Tulane Law Review* 269, 269.

<sup>283</sup> *ibid*

<sup>284</sup> Theresa Satterfield, ‘Numbness and Sensitivity in the Elicitation of Environmental Values’ in de la Torre (n 22) 80.

<sup>285</sup> Harding (n 78) 353.

is apparent that there is a consistency with which the norms are articulated towards cultural heritage. This universal desire can be seen across the globe.

**Figure 3 Sign at Yuyuan Gardens, Shanghai<sup>286</sup>**



The term ‘norm’ has been adopted for use in this thesis, rather than ‘duty’ to emphasise the element of what one ‘ought’ to do,<sup>287</sup> so as avoid any connotation that by having identified something as being cultural heritage this gives rise to an automatic, unfettered obligation to act in a certain way. Whilst the norms identified here can certainly be categorised as moral obligations, in their legal form, the problem is that to use the language of duty at this stage has the potential to treat any requirement to act to preserve or to provide access to cultural heritage and its subject matter as absolute. For example, whilst several listed buildings were demolished to build Crossrail,<sup>288</sup> it is unlikely that the Houses of Parliament would have been destroyed to make way for that transport system; different types of values have to be weighed in the balance and so cultural heritage ones will not necessarily trump all others. The level of value will need to be assessed, to see how strongly something is valued and this may impact on the

---

<sup>286</sup> Photograph: Robert Fear.

<sup>287</sup> Kelsen (n 282) 269 and George C Christie, *Laws Norms and Authority* (Duckworth 1982) 2. ‘duty’ therefore corresponds with being obligated under a specific law: JC Smith, *Legal Obligation* (The Athlone Press 1976) 66.

<sup>288</sup> Crossrail Information Paper, D18 – Listed Buildings and Conservation Areas (v3 20 November 2007) <<http://www.crossrail.co.uk/assets/library/document/d/original/d18listedbuildingsandconservationareas.pdf>> accessed 3 January 2013.

level of any imperative flowing from that. Therefore the language of norms can, it is suggested here, have more nuances and be assessed more carefully before being given legal effect. Harding suggests that duties can exist independently of rights and are foundational rather than contingent on pre-existing rights.<sup>289</sup> Her position is that what she identifies as the intrinsic value of cultural heritage<sup>290</sup> ‘provides a normative basis for the duty’ towards cultural heritage.<sup>291</sup> Nickel, in response to Harding, opines that ‘Value and duty are different categories, and the transition from one to the other is far from automatic’.<sup>292</sup> He expresses concern that if all things which generate intrinsic value (which he sees as potentially more than just objects of cultural heritage) were to give rise to duties there would be a ‘practical and conceptual gridlock’.<sup>293</sup> The position put forward in this thesis is that the cultural heritage principles give rise to norms, rather than immediately to legal or moral duties; this prevents such a gridlock and the public legacy element prevents too many things, places or practices falling within the purview of cultural heritage protection through professional moral obligations or legal ones.

### **2.5.1 Preservation**

The duty of preservation stems from the existence of the different types of value of cultural heritage and the public legacy (the cultural heritage principles). The aim of preservation is to sustain the different types of heritage value.<sup>294</sup> As the duty of

---

<sup>289</sup> Harding (n 78) 325.

<sup>290</sup> i.e. the notion that ‘Respect for intrinsically valuable goods [including cultural heritage] is itself constitutive of human flourishing’: *ibid* 327.

<sup>291</sup> *ibid* 326.

<sup>292</sup> James W Nickel, ‘Intrinsic Value and Cultural Preservation’ (1999) 31 *Arizona State Law Journal* 355, 360

<sup>293</sup> *ibid* 357.

<sup>294</sup> EH (n 23) [25].

preservation focuses on the intangible dimension of the subject matter (in terms of the cultural heritage values/significance and public legacy aspect of the things, places or practices) it is argued in this thesis that the preservation of the intangible dimension of cultural heritage should be the primary aim of this norm.<sup>295</sup> This involves one or more of the following. The preservation of:

- (a) (and protection from destruction or deterioration) the subject matter of cultural heritage (individual objects, places or intangible practices);
- (b) the context of the subject matter of cultural heritage;
- (c) the association of the subject matter with a particular person, community or place;
- (d) the role of the object or place within cultural practices; and
- (e) collections of objects intact and the avoidance of their dispersal (combined value/significance).

Category (a) is perhaps the most frequently cited instance of preservation, found in many legal instruments<sup>296</sup> and is what one associates with Smith's AHD.<sup>297</sup> It naturally focuses on the subject matter itself rather than the role it plays within a cultural process.

---

<sup>295</sup> 'preservation is a primary mandate of most museum policies': Clavir (n 72) 27.

<sup>296</sup> E.g. Declaration concerning the Intentional Destruction of Cultural Heritage, UNESCO (adopted 17 October 2003), European Convention on the Protection of the Archaeological Heritage (Revised) Council of Europe, Valetta (adopted 16 January 1992, entered into force 25 May 1995) 1992 ETS 14 and Planning (Listed Buildings and Conservation Areas) Act 1990. See generally Chapter 3.

<sup>297</sup> n 60 11-12.

In the context of objects this is what Fechner calls the *primauté d'objet*.<sup>298</sup> By focusing on this category without keeping in mind the overarching need to preserve cultural heritage (in its intangible form) this can frustrate this norm, therefore category (d) is needed to ensure that where the natural deterioration of an object is part of the cultural process, a balancing of (a) and (d) is undertaken to ensure that cultural heritage is preserved. Such practices may include leaving the Ghost Dance Shirts worn by the Lakota Indians on the battle field to disintegrate<sup>299</sup> and the Zuni War gods which are placed in a shrine to decompose once they have acted as guardians for a year.<sup>300</sup> In the context of the latter example Lowenthal suggests that codes of ethics stressing the integrity of the object can fetishize it since cultural heritage 'involves replacement as well as retention'.<sup>301</sup> Whilst in different terms from that expressed in (d) above, Harding suggests that neglect or destruction is sometimes central in order to protect 'the spirit of the object'.<sup>302</sup> Again, this highlights that physical preservation ((a) above) is not always appropriate. In the context of modern art, Lowenthal recognises that some artists envisage that their artworks should be left to decompose but that this is occasionally ignored by curators who 'regard accession as an eternal act', consequently frustrating that artistic purpose 'lest their loss violate the public trust and jeopardize museum

---

<sup>298</sup> n 55 379.

<sup>299</sup> Seventh Report of the Select Committee on Culture, Media and Sport, 'Cultural Property: Return and Illicit Trade' HC (1999-2000) 371-III Memorandum Submitted by Glasgow City Council, Evidence 18 May 2000 [2.2.2].

<sup>300</sup> Adele Merenstein, 'The Zuni Quest for Repatriation of the War Gods: An alternative basis for claim' (1992) *American Indian Law Review* 589, 590.

<sup>301</sup> n 200 21.

<sup>302</sup> n 78 312. See also Clavir (n 72) 59.

funding'.<sup>303</sup> Similar criticisms have been expressed about preserving graffiti as cultural heritage where it was intended to be ephemeral.<sup>304</sup> Having said that, few would dispute how fortunate it was that graffiti left by two Viking crusaders in Maes Howe in the Orkney Islands<sup>305</sup> was preserved since it represents the best collection of Viking runes outside Scandinavia<sup>306</sup> with high levels of historical and cultural value warranting continued preservation.

Category (b) ensures that the context<sup>307</sup> of archaeological finds is preserved since 'an antiquity without a provenance – even if perfectly preserved – is of limited historical significance.'<sup>308</sup> This ensures the evidential value of the object is retained so that the historical and cultural value can be more fully appreciated. This is obviously the preservation of something intangible through means of keeping the link between CHOs and the place in which it was found. Similarly, category (c) focuses on the intangible element of association between the subject matter and the places or people with which it is associated.<sup>309</sup> Preservation may include the physical location of the subject matter and the place, but can equally involve acknowledging the link between the two in situations through information boards and the like. This latter method of preservation of the link may be more appropriate when dealing with the connection to a particular

---

<sup>303</sup> Lowenthal (n 74) 26-27.

<sup>304</sup> Avery (n 175) 151.

<sup>305</sup> Maes Howe Chambered Cairn <[http://www.historic-scotland.gov.uk/propertyoverview/propertyabout.htm?PropID=pl\\_205&PropName=Midwinter%20at%20Maeshowe](http://www.historic-scotland.gov.uk/propertyoverview/propertyabout.htm?PropID=pl_205&PropName=Midwinter%20at%20Maeshowe)> accessed 27 August 2012.

<sup>306</sup> *ibid*

<sup>307</sup> Discussed at 64 above.

<sup>308</sup> Paul M Bator *International Trade in Art* (University of Chicago Press, London 1983) 25.

<sup>309</sup> Discussed above at p 62.



individual. Finally, category (e) deals with the notion of collections, whether large public museum collections or those of a smaller-scale private collector. O’Keefe suggests that:

A collection is a new creation; it illustrates the ideas and ideals of the collector conceived in time...there comes a point at which the public is perceived as also having an interest in the continuation of the collection of an entity.<sup>310</sup>

An object’s scholarly value may be enhanced where it is kept together with another object.<sup>311</sup> Consequently, if a collection is separated it ‘may be the aesthetic equivalent of physical dismemberment’.<sup>312</sup> Whether or not the norm of preservation is engaged regarding a private collection will depend on the sufficiency of its cultural, historical or aesthetic value and the public legacy. However some objects will be ‘inalienably associated with their collector, donor, or benefactor’.<sup>313</sup> It seems that the norm of preservation in the context of a collection may be a matter of degree, for Bator points out that some objects forming part of a collection will have enhanced aesthetic qualities as a whole to a greater degree than others.<sup>314</sup> It seems that this aspect of the norm of preservation is less important than where the physical integrity of an object is at stake.<sup>315</sup> The norm of preservation is not necessarily translated into a legal duty on the state to preserve every private collection *in toto*, perhaps by purchasing it, particularly

---

<sup>310</sup> Patrick J O’Keefe, ‘The Heritage Value of a Private Collection’ in MA Rénold & Q Byrne-Sutton, *La libre circulation des collections d’objets d’art* (Schulthess Polygraphischer Verlag 1993) 182.

<sup>311</sup> Bator (n 308) 22.

<sup>312</sup> *ibid*

<sup>313</sup> Samuel JMM Alberti, ‘Objects and the Museum’ (2005) 96 *Isis* 599, 565.

<sup>314</sup> *ibid*

<sup>315</sup> *ibid*

because this would put a heavy financial burden on the state. However, this norm of preservation might be translated into a duty in certain circumstances where the preservation of a collection is at risk.<sup>316</sup>

Russell identifies a further type of preservation, which he describes as the core concept of cultural heritage: ‘preservation and sustainability of lineages – paths upon which things are passed to future generations’.<sup>317</sup> This notion, if referring widely to the notion of passing on the subject matter of cultural heritage to future generations, falls under the public legacy heading in this thesis and so would, in any event, be upheld as a principle of cultural heritage. This would most likely involve the major custodians of heritage such as museums (objects) and heritage professionals such as English Heritage (places). However if, although unlikely, this is referring to an inviolable right of certain successors to inherit cultural heritage from their forefathers and pass it on, then this is not an appropriate part of the preservation norm within cultural heritage discourse.

The norm of preservation may also involve pre-emptive or precautionary action where there might be a future, but not yet manifested, risk of harm to the cultural heritage.<sup>318</sup> In this way, it may be necessary to adopt the precautionary approach that can be seen in

---

<sup>316</sup> E.g. the Wedgwood collection, discussed at p 213 below.

<sup>317</sup> n 6 34. This can be seen in the context of the protection of traditional knowledge and traditional cultural practice: see the draft articles from the 25<sup>th</sup> Session of the IGC *The Protection of Traditional Knowledge* WIPO/GRTKF/IC/25/6 (30 May 2013), *The Protection of Traditional Cultural Expressions: Draft* WIPO/GRTKF/IC/25/4 (4 April 2013).

<sup>318</sup> For example, to the physical destruction of the tangible cultural heritage such as the risk to the Bamyian Buddhas (discussed at p 132 below) or to the intangible cultural heritage through the use of traditional knowledge (as to which see p 63 above).

international environmental law.<sup>319</sup> One definition of this is that a ‘lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation’.<sup>320</sup> At times, the need to protect people in the future has to be balanced with the current financial interests.<sup>321</sup> Furthermore, there may be significant cost implications for developing countries in putting in place precautionary measures.<sup>322</sup>

### 2.5.2 Access

Since cultural heritage is such an integral and essential part of people’s identity, an opportunity to have access to and share in that culture seems to be a normative imperative flowing from the identified principles of value and public legacy.

It is, however, unclear to what extent individuals within a community or nation should have direct, unfettered access to the subject matter, for the purpose of engaging fully with their own cultural heritage. Access could therefore take a variety of forms, from

---

<sup>319</sup> Consolidated Version of the Treaty on the Functioning of the European Union [2010] OJ C83/61, art 191(2). More recently the *Bergen Statement*, Ministerial Meeting of the OSPAR Commission, Bergen 23-24 September 2010 [25].

<sup>320</sup> Rio Declaration on Environment and Development, United Nations Conference on Environment and Development (1992) Principle 15. This Declaration is made in the context of seeking to ‘conserve, preserve and restore the health and integrity of the Earth’s Ecosystem’ (principle 7)

<sup>321</sup> See Sabrina Shaw and Risa Schwartz, ‘*UNU-IAS Report: Trading Precaution: The Precautionary Principle and the WTO*’ (UNU-IAS 2005), 10.

<sup>322</sup> There are clear parallels here with the difficulties encountered by ‘source nations’ which are rich in archaeological cultural heritage (particularly developing countries) which are unable to fund the fight against the illicit excavation of CHOs or to provide necessary compensation under the 1970 Convention,, art 7: Janet Ulph and Ian Smith, *The Illicit Trade in Art and Antiquities: International Recovery and Criminal and Civil Liability* (Hart Publishing 2012) 57.

use of it in the form of full engagement (for cultural or research purposes) to the viewing of it, by booking an appointment or by visiting it in a freely accessible place. Where the subject matter is state-controlled there may be stronger arguments for providing fuller public access, not least in situations where public money supports its upkeep. Whilst the logical extension of an unfettered norm of access would be to require private owners to make available the physical objects or places or intangible practices for others to either use or view, it is unlikely that there would be wholehearted agreement for this and this has certainly not found support in the research undertaken for this thesis.

The norm of access seems to have a stronger need for someone to have an entitlement to access than preservation since the former is a two-way process, requiring it to be available for someone to access it.

#### **2.5.2.1 *Restricted access***

In some cases the information about the subject matter of cultural heritage, or the object, practice or place itself can be sacred to a community or religion such that its disclosure either to other members of the group or to outsiders frustrates the cultural heritage.<sup>323</sup> In this regard Bruning suggests ‘A heritage value, in this context, can be identified as restricted access to powerful information’ and goes on to say that the present-day cultural value can be destroyed by a loss of control where that information is revealed.<sup>324</sup> Some museums have separated sacred materials from other objects and restricted access to them without approval from the people to whom the object is sacred. An example of this has been Ethiopian Tabots that are believed to represent the

---

<sup>323</sup> E.g the Tarahumra, discussed in Michael F Brown, *Who Owns Native Culture?* (Harvard University Press 2003) 31-34. See Clavir (n 72) 58.

<sup>324</sup> Bruning (n 184) 216.

Ark of the Covenant and which can only be viewed by the clergy<sup>325</sup> and the British Museum's decision to restrict access to them in accordance with the religious beliefs of their origin. Jenkins has criticised such restrictions, suggesting that this prevents visitors from using museums freely as they ought to be able to.<sup>326</sup> Lowenthal has also doubted in this context whether museums should be 'instilling faith' rather than helping us to understand.<sup>327</sup>

Brown talks about few people objecting to the rights of the Pueblo people to restrict the information that is gathered about them, yet acknowledges that secrecy has been seen as contrary to the democratic process.<sup>328</sup> This is arguably equally applicable to other groups for which secrecy is important. Current UK government policy demonstrates a clear support for providing access to heritage sites<sup>329</sup> and museums and galleries.<sup>330</sup>

---

<sup>325</sup> British Museum, *Taobots* <[http://www.britishmuseum.org/research/search\\_the\\_collection\\_database/search\\_object\\_details.aspx?objectid=607047&partid=1&output=People%2F!!%2FOR%2F!!%2F120788%2F!%2F120788-3-7%2F!%2FCollected+by+Sir+Richard+Rivington+Holmes%2F!%2F%2F!!%2F%2F!!%2F&orig=%2Fresearch%2Fsearch\\_the\\_collection\\_database%2Fadvanced\\_search.aspx&currentPage=1&numpages=10](http://www.britishmuseum.org/research/search_the_collection_database/search_object_details.aspx?objectid=607047&partid=1&output=People%2F!!%2FOR%2F!!%2F120788%2F!%2F120788-3-7%2F!%2FCollected+by+Sir+Richard+Rivington+Holmes%2F!%2F%2F!!%2F%2F!!%2F&orig=%2Fresearch%2Fsearch_the_collection_database%2Fadvanced_search.aspx&currentPage=1&numpages=10)> accessed 22 August 2012.

<sup>326</sup> Tiffany Jenkins, 'The censoring of our museums' *New Statesman* 11 July 2005.

<sup>327</sup> Lowenthal (n 74) 28.

<sup>328</sup> Brown, 'Can Culture Be Copyrighted?' (n 272) 198.

<sup>329</sup> DCMS, *Protecting, conserving and providing access to the historic environment in England* <<https://www.gov.uk/government/policies/protecting-conserving-and-providing-access-to-the-historic-environment-in-england>> accessed 28 December 2013.

<sup>330</sup> Specifically, free access to national museums and galleries: DCMS, *Providing free public access to national museums and galleries* <<https://www.gov.uk/government/policies/maintaining-world-leading-national-museums-and-galleries-and-supporting-the-museum-sector/>>

Consequently, where secrecy is important this will need to be balanced against the desire for public access.

### **2.5.3 Comparison of these norms with other classifications**

Following on from his classification of the three sources of the public interest in cultural property, Merryman developed three elements of a cultural property policy, which he identified as preservation, truth and access<sup>331</sup>, although he also alludes to a fourth - cultural nationalism. Merryman treats preservation as that of the physical subject matter (rather than as cultural heritage in an intangible sense which is the argument in this thesis), although he does acknowledge the problem raised by those situations where the cultural intention is to destroy the object through ceremonial use.<sup>332</sup> The second element of the policy, that of truth, focuses on the concerns that we have for accuracy and authenticity of cultural objects and the information contained within them<sup>333</sup> and Merryman cites a lack of information and counterfeits as the principal impediments to truth.<sup>334</sup> This thesis has not identified truth as a separate norm. Throughout the notion of value there have been instances of references to authenticity,<sup>335</sup> but this desire for the authentic can be reflected in the underlying principles of cultural heritage, rather than as a separate norm. Merryman suggests that

---

supporting-pages/providing-free-public-access-to-national-museums-and-galleries>

accessed 28 December 2013.

<sup>331</sup> Merryman, 'The Public Interest' (n 5) 355.

<sup>332</sup> *ibid* 356.

<sup>333</sup> *ibid* 359.

<sup>334</sup> *ibid*

<sup>335</sup> pp 93 and 98 above.

occasionally access by different people can be at odds with one another.<sup>336</sup> He suggests a solution to this to be the ordering of preservation, truth and access in a descending order of priority, suggesting that:

Most would think it reasonable if extremely delicate works were made available only to scholars under controlled conditions, with access to them completely denied to the general public.<sup>337</sup>

The creation of an automatic hierarchy of norms does not provide scope for the nuanced approach that needs to take place with such norms. In some cases it may be more appropriate to prioritise access over preservation (of the subject matter) where access facilitates use within a cultural practice. Whilst Merryman acknowledges that preservation-truth-access is ‘a persuasive framework for policymaking’ he suggests that on the international stage ‘cultural nationalism’<sup>338</sup> is an important consideration such that it frequently takes precedence over the triad of his cultural property policy.<sup>339</sup> It is acknowledged that cultural nationalism is an influence in certain policies relating to cultural heritage<sup>340</sup> and these will be addressed in subsequent chapters. However, since it is not argued in this thesis that cultural nationalism is a norm which should be pursued, it does not form part of the discussion regarding norms.

---

<sup>336</sup> Merryman, ‘The Public Interest’ (n 5) 360.

<sup>337</sup> *ibid*

<sup>338</sup> *ibid*

<sup>339</sup> *ibid* 361.

<sup>340</sup> An ‘unhelpful complication [is] that divisive, nationalist policies are in many instances the first avenue of discussion in issues of *human* heritage’: ACCP Editorial Board, ‘Conclusion: Museums at the Center of Public Policy’ in Fitz Gibbon K (ed), *Who Owns the Past? Cultural Policy, Cultural Property and the Law* (Rutgers University Press 2005) 321.

Yu recognises that preservation and conservation ‘provide the main objectives of the protection of cultural relics’,<sup>341</sup> and that access is ‘often mentioned along with conservation’.<sup>342</sup> Macmillan interprets Yu as suggesting that ‘preservation and conservation is a value to which Western Society tends to subscribe’.<sup>343</sup> Here, although the word value appears to be used more in the sense of corresponding to standards of behaviour rather than in the sense of value being something of worth which is the sense in which it has been used above as one of the cultural heritage principles. Nevertheless, this language of objectives or values does not reflect the normative element of the desire to act to preserve or provide access to cultural heritage.

## 2.6 Conclusion

An assessment of the different types of value of cultural heritage has featured in the conservation of cultural heritage, most notably in respect of places by English Heritage and is being developed by the Getty project in relation to objects. The different types of value are essential to identifying cultural heritage and to appreciating the public legacy feeling towards its subject matter. These are the principles of cultural heritage which explain the *what* and *why* (in terms of what is cultural heritage and why it is important to us) and help to inform us about what ought to be done to preserve cultural heritage and to facilitate access. These principles and corresponding norms are important not only to the conservation process (which is their current role) but are also vital to dispute

---

<sup>341</sup>Yu (n 247) 471.

<sup>342</sup>ibid 474.

<sup>343</sup> Fiona Macmillan, ‘The protection of cultural heritage: common heritage of mankind, national cultural “patrimony” or private property?’ (2013) 64 *Northern Ireland Legal Quarterly* 351, 354.



resolution. The subsequent chapters will analyse and assess the effectiveness of the non-legal and legal regimes in upholding these principles and norms and how far they have been translated into duties in the form of moral and legal obligations.

# Chapter Three

## Legal recognition of the cultural heritage principles and norms

---

### 3.1 Introduction

This chapter assesses how far English law effectively upholds the principles and norms of cultural heritage as identified in the preceding chapter. To this end, international conventions ratified by the UK, other international instruments and relevant English domestic laws will be analysed. This chapter will focus on how the law deals with cultural heritage objects (CHOs) in general within English law. Consequently it will look at how CHOs are treated when they are found, cared for and when disputes arise about them. These various situations raise important, yet quite different, concerns. First, issues of title and allocation of rights arise, particularly where archaeological objects are found. Occasionally it is difficult to escape the reality that these important CHOs are property and this status may also influence how the different types of value and the norms are fulfilled. Consequently, when dealing with privately owned and publicly owned CHOs in subsequent discussions, this more mundane approach to dealing with objects will need to be analysed. To this end it will be assessed whether the usual property rights permitting an owner to deal with his property at will (albeit without causing a nuisance) are retained even when dealing with objects that are culturally valuable not only to the owner, but also to others. Since there is no minimum age requirement for something to be classified as a CHO<sup>1</sup> some may also be the subject

---

<sup>1</sup> The research undertaken for Chapter 2 does not reveal any age limit below which something cannot be considered as the subject matter of cultural heritage. Indeed, sometimes recently created graffiti may be treated as cultural heritage: at p 116 above and specifically Tracey Avery, 'Values not Shared: The Street

matter of copyright protection as artistic works.<sup>2</sup> Questions also arise as to whether the cultural heritage principles are more fully realised when its subject matter is publicly rather than privately owned and so one will assess how the law treats such objects differently.<sup>3</sup> However, to quote a well-known comic book ‘With great power comes great responsibility’<sup>4</sup> and so it will be assessed whether the ownership of these important CHOs which may be valuable to many more people than simply the owner will give rise to responsibilities towards the cultural heritage (and towards those who value it). Finally, disputes concerning cultural heritage necessarily involve a variety of different, and often conflicting, viewpoints because of the plural and dynamic nature of the types of value.<sup>5</sup> Some disputes involve claims from abroad with originating communities having seemingly incompatible notions of entitlement to cultural heritage or where countries have legislation prescribing state ownership of cultural heritage. Such claims may therefore raise conflict of laws questions.<sup>6</sup> It is argued that to reflect fully the cultural heritage principles and norms a valuing exercise necessarily needs to take place when determining what should happen to an object. This chapter will analyse

---

Art of Melbourne’s City Laneways’ in Lisanne Gibson and John Pendlebury, *Valuing Historic Environments* (Ashgate 2009).

<sup>2</sup> Copyright, Designs and Patents Act 1988, s 4 (CDPA) which provides rights to the owner of copyright where the author of the work died less than 70 years ago: s 12(2) CDPA.

<sup>3</sup> At p 149 below.

<sup>4</sup> Spiderman 2002 < <http://www.imdb.com/title/tt0145487/quotes> > accessed 3 January 2013 – a nod to popular culture rather than cultural heritage.

<sup>5</sup> Lisanne Gibson and John Pendlebury, ‘Introduction: Valuing Historic Environments’ in Gibson and John Pendlebury (n 1) . See p 69 above.

<sup>6</sup> The specific conflict of laws rules within English law are outside the substantive scope of this thesis, although they have formed the basis of some decisions relating to CHOs e.g. *Government of the Islamic Republic of Iran v The Barakat Galleries Ltd* [2009] QB 22 (CA).

how far this is undertaken in English law and whether this upholds the corresponding cultural heritage norms. A further aspect to the discussion will be the use of government-appointed bodies which recommend, within a legal framework, how the Secretary of State should act: these are the Reviewing Committee on the Export of Works of Art and Objects of Cultural Interest (the Reviewing Committee), the Acceptance in Lieu Panel (the AIL Panel) and the Spoliation Advisory Panel (the SAP). These bodies are *quasi*-legal in nature, but will be discussed in this chapter in the context of the legal processes in which they function.<sup>7</sup>

### **3.2 A single legal definition of cultural heritage?**

Neither international law nor English domestic law provides a single term to refer to cultural heritage. Further, both fail to provide an overarching legal definition which would map directly on to the working definition used in this thesis.<sup>8</sup> Indeed, in international law even where consistent terminology of ‘cultural property’ or ‘cultural heritage’ is used, the definitions of either of these alter according to the particular legal instrument.<sup>9</sup> In English domestic law a variety of context-specific terminology is used with individual definitions which may involve a particular decision-maker assessing the particular types of value relevant to the subject matter, or on other occasions simply treating an object as being within a category because of its context.<sup>10</sup> Consequently,

---

<sup>7</sup> A discussion of the recommendations of the SAP will also be relevant in Chapter 4 in the context of the overall development of *quasi*-legal concepts (specifically moral title) deriving from professional codes of ethics at p 262 below.

<sup>8</sup> At p 26 above.

<sup>9</sup> At p 41 above.

<sup>10</sup> E.g. culturally valuable objects with enhanced legal protection within national collections are given that protection purely because of their status as part of that collection: at p 179 below.

within this chapter terminology such as ‘cultural object’<sup>11</sup> ‘treasure’<sup>12</sup>, ‘pre-eminent object’<sup>13</sup>, an object satisfying the ‘Waverley Criteria’<sup>14</sup>, ‘tainted cultural object’<sup>15</sup> and ‘illegally removed Iraqi cultural property’<sup>16</sup> is used. Therefore, as well as being property, some of these culturally important objects will also have a legal designation setting them apart from the ordinary and elevating them to a privileged status, in certain contexts and for certain purposes. It is these varied contexts and purposes which form the focus of this chapter when discussing the various legal provisions.

### **3.3 International declaratory statements recognising the cultural heritage principles and norms**

Whilst some international legal instruments, such as conventions, impose legally binding obligations on state parties, others, such as declarations, impose on those parties universally recognised moral obligations requiring action by the states to encourage or discourage certain behaviour to recognise the cultural heritage principles and uphold the corresponding norms. These instruments do not, in themselves, place any legal duties (corresponding with cultural heritage norms) on individual owners of CHOs, on those who care for them or on those who find them; instead, this is the purview of English domestic law. Nevertheless, some states enact domestic law to impose duties on individuals to fulfil their international obligations under these

---

<sup>11</sup> Holocaust (Return of Cultural Objects) Act 2009 (“H(RCO)A”) (undefined in the Act); Council Directive (EC) 7/93 of 15 March 1993 on the Return of cultural objects unlawfully removed from the territory of a Member State [1993] OJ L074, art 1.

<sup>12</sup> Treasure Act 1996 (“TA”).

<sup>13</sup> Inheritance Tax Act 1984 (“ITA”).

<sup>14</sup> At pp 156-157 below.

<sup>15</sup> Dealing in Cultural Objects (Offences) Act 2003 (“DICO(O)A”), ss2(1)-(2).

<sup>16</sup> Iraq (United Nations Sanctions) Order 2003, SI 2003/1519 (“I(UNS)O”) art 8(4).

instruments.<sup>17</sup> International instruments unratified by the UK are omitted from discussion, since the primary analysis is of English law as it stands today and how effective it is in upholding the cultural heritage principles and norms.<sup>18</sup>

A distinguishing feature of the international instruments dealing with cultural heritage (and a justification for treating them separately from the English domestic law of cultural heritage) is that the principles and norms are often clearly articulated. An instrument's wording frequently demonstrates the clear link between a specific type of value or the public legacy and on the other hand, a particular norm. This is unsurprising since these documents were drafted to deal specifically with cultural heritage, usually in the context of protection from some particular harm.<sup>19</sup> Therefore, unlike English domestic law (with its hotchpotch nature), international law has a more clearly articulated plan, recognising the importance of cultural heritage in an instrument's preamble and acting on this in its operative provisions.<sup>20</sup> It is, in the view of the author

---

<sup>17</sup> E.g. the DCO(O)A was enacted in part to fulfil the duties of the UK under the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property UNESCO, Paris (adopted 14 November 1970, entered into force 24 April 1972) 823, UNTS 231 ("the 1970 Convention").

<sup>18</sup> As identified in Chapter 2.

<sup>19</sup> See below, Declaration concerning the Intentional Destruction of Cultural Heritage, UNESCO (adopted 17 October 2003) ("the 2003 Declaration") and 1970 Convention (n 17).

<sup>20</sup> Discussions at the drafting meetings also reveal the concerns of different nations regarding cultural heritage and the particular types of value expressed towards the subject matter. e.g. Isabelle Vinson, 'ICCROM's Contribution to the Ethics of Heritage' (2009) 61 *Museums International* 90, 92 talked about the different agenda of various states when drafting the 1954 Convention. In this way, the various types of cultural heritage value, the public legacy and the desire to uphold norms are more clearly articulated in this preparatory material than in Hansard when dealing with a statute having limited scope and effect (e.g. the TA or the DCO(O)A).

of this thesis, important at this juncture to analyse the measures taken by key international organisations such as the United Nations Economic, Social and Cultural Organisation (“UNESCO”), the Council of Europe (“CoE”) and the European Union (“EU”) to address the cultural heritage principles and norms which are binding on the United Kingdom (“UK”) and consequently form part of the legal environment in which the English domestic legal system sits.

The first category of international instrument under consideration is those having a clear underlying purpose corresponding with a cultural heritage norm. The second category is those recognising a commitment to one or more of the cultural heritage principles and presenting declaratory norms. Finally, this section will assess the jurisprudence developed by the European Court of Human Rights (ECtHR) which make declaratory statements about the value of cultural heritage justifying states in pursuing particular aims to achieve the cultural heritage norms which would otherwise interfere with human rights.

### **3.3.1 The instrument’s underlying purpose corresponds with a cultural heritage norm**

Some international instruments were drafted and came into effect with the purpose of achieving the fulfilment of a particular cultural heritage norm; because the norm is part of an overall agenda, it necessarily influences the way in which the instrument works and its ambit. Two UNESCO instruments demonstrate this, one of which is a declaration (and therefore a statement of universal principles under which states are morally bound to conduct themselves) and the second is a convention which has legally binding effect once ratified.

The importance of cultural heritage for the identity of individuals, communities, nations and mankind has been identified<sup>21</sup> and destruction of the physical manifestation of cultural heritage such as the Bamiyan Buddhas simultaneously attacks the intangible dimension of cultural heritage (i.e. its value).<sup>22</sup> This link between individual, community and group identity and the deleterious effect of destruction is seen clearly in the Declaration concerning the Intentional Destruction of Cultural Heritage.<sup>23</sup> This instrument, made in the wake of the destruction of the Buddhas, is firmly rooted in the norm of physical preservation and seeks to prevent the cultural harm resulting from the intentional destruction of the physical manifestations of cultural heritage. Whilst recognising the link between cultural heritage and identity the Declaration reiterates its universal importance, evident in the 1954 Hague Convention<sup>24</sup>, that the damage to one person's cultural property<sup>25</sup> 'means damage to the cultural heritage of all mankind'.<sup>26</sup>

---

<sup>21</sup> At p 62 above.

<sup>22</sup> Claire Smith, 'Foreword' in George S Smith, Phyllis Mauch Messenger and Hilary A Soderland (eds), *Heritage Values in Contemporary Society* (Left Coast Press, Inc 2010): discussed at p 79 above.

<sup>23</sup> n 19. The recognition of the link with communities in the 2003 Declaration supports the view that seeing the debate regarding cultural heritage as internationalism versus nationalism may be too simplistic. John Henry Merryman, 'Two Ways of Thinking about Cultural Property' (1986) 80 *American Journal of International Law* 831, 846) since the concerns of communities are equally important in decision-making about the proper treatment of CHOs.

<sup>24</sup> Convention for the Protection of Cultural Property in the Event of Armed Conflict UNESCO, The Hague (adopted 14 May 1954, entered into force 7 August 1956) 249 UNTS 240 ("the 1954 Convention").

<sup>25</sup> The term cultural property is the one used in the Convention but not in the remainder of the Declaration.

<sup>26</sup> 2003 Declaration (n 19) Preamble.



The universal importance seemingly represents the non-use (existence<sup>27</sup>) value and was brutally evident in the worldwide condemnation of the Buddhas' destruction and the feeling of loss experienced by those who may never have seen the actual statues. This Declaration therefore seeks to uphold the social or communal value as well as the cultural and historical value of cultural heritage,<sup>28</sup> thereby showing a clear link with peoples rather than recognising any intrinsic value.<sup>29</sup>

The 2003 Declaration links its overarching aim of upholding the norm of preservation with its commitment to the ethos of passing cultural heritage on to future generations,<sup>30</sup> thereby fully upholding the notion of the public legacy. To further this end, the Declaration indicates that it and other international instruments concerning cultural heritage should be governed *inter alia* by 'the principles of humanity and the dictates of public conscience';<sup>31</sup> it seems that any present use of the subject matter of cultural heritage must necessarily take into account the risk of its availability for future generations. The instrument appears to treat public legacy simply as the impetus to pass on the physical manifestation of cultural heritage to future generations because it focuses on the prevention of physical destruction, without accounting for any current

---

<sup>27</sup> Timothy Darvill, 'Value Systems in Archaeology' in Malcolm A Cooper, Anthony Firth, John Carman & David Wheatley (eds), *Managing Archaeology* (Routledge, 1995) 47; at p 82 above.

<sup>28</sup> This can be inferred from the general wording of the Preamble of the 2003 Declaration (n 19) as well as paragraph I. As set out in Chapter 2, figure 2.

<sup>29</sup> As to which see p 86 above.

<sup>30</sup> 2003 Declaration (n 19) I.

<sup>31</sup> *ibid* Preamble.

use.<sup>32</sup> Some current use of objects may result in physical deterioration (and therefore preventing it from being passed on), but this might serve to develop associated cultural practices and thereby cultural heritage (in an intangible sense).<sup>33</sup> The instrument's approach, whilst not applying the notion of public legacy in this nuanced way, has clearly been influenced by the particular standpoint from which the legal instrument was called for and subsequently drafted. The aim was manifestly to prevent future intentional physical destruction of cultural heritage and only impliedly the destruction of cultural heritage (in an intangible sense) in the form of a direct reaction to the destruction of the Buddhas. It was not then a proactive statement of international norms<sup>34</sup> setting out an holistic approach to the preservation of cultural heritage (in its intangible sense). Instead it was a narrowly construed instrument intending to prevent future wanton physical destruction of cultural heritage that is linked to identity, whilst simultaneously mindful of the universal recognition of its importance. It does not therefore fully take account of cultural heritage as an intangible concept.

---

<sup>32</sup> 2003 Declaration (n 19) III(1). No mention is made in the Declaration of balancing the current use of the cultural heritage, presumably because the Declaration is aimed at avoiding the intentional destruction of the physical object which is necessarily at odds with any use.

<sup>33</sup> E.g. the Zuni War Gods discussed at p 115 above.

<sup>34</sup> Although UNESCO had expressed concern at the Taliban's threatened destruction of the Buddhas in advance of 2001: Agenda for UNESCO, 25<sup>th</sup> Session of the World Heritage Committee, Helsinki, December 2001, WHC-01/CONF 208/23, 22 November 2001. See also Roger O'Keefe, 'World Cultural Heritage: Obligations to the International Community as a whole?' (2004) 53 ICLQ 189, 196-198. It was only after the destruction of the Buddhas that the site on which they were situated was designated by UNESCO as a World Heritage site: UNESCO, 27<sup>th</sup> Session of the World Heritage Committee, Paris 10 December 2003, 27 COM 8C.43

To fulfil its more narrow purpose, the 2003 Declaration recognises the consequential norm of preservation, expressed as one of the ‘universal principles’ bringing ‘a strong expectation that Members of the international community will abide by [them]’.<sup>35</sup> State parties are thereby strongly expected to take measures ‘to prevent, avoid, stop and suppress’ the intentional destruction of cultural heritage<sup>36</sup> and to ‘promote the elaboration and adoption of legal instruments providing a higher standard of protection of cultural heritage’.<sup>37</sup> Although these are moral rather than legal universal statements of requirement they are supported by strong words of culpability towards states. The Declaration imposes on states the responsibility for the destruction where a state ‘intentionally fails to take appropriate measures to prohibit, prevent, stop, and punish any intentional destruction of cultural heritage of great importance for humanity’.<sup>38</sup> Whilst lacking legal sanctions for non-compliance, the force of this statement comes from the embarrassment of a state who failed to meet the challenge of preventing intentional destruction in circumstances where it knew of the destruction but failed to act.<sup>39</sup> This deterrent effect for states works in much the same way as the professional

---

<sup>35</sup> Although over time these may become recognised as custom and thereby binding on states: ‘General introduction to the standard-setting instruments of UNESCO’ <[http://portal.unesco.org/en/ev.php-URL\\_ID=23772&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html#name=3](http://portal.unesco.org/en/ev.php-URL_ID=23772&URL_DO=DO_TOPIC&URL_SECTION=201.html#name=3)> accessed 30 August 2012.

<sup>36</sup> n 23 art 3(1).

<sup>37</sup> *ibid* art 3(4)(b).

<sup>38</sup> *ibid* art 6.

<sup>39</sup> Roger O’Keefe states that whilst this, and other international legal instruments, does not place on a state an obligation to the international community as a whole regarding cultural heritage located within its borders, ‘the international community as a whole, jointly and severally, is permitted by general international law to subject a State’s peacetime treatment of such heritage to scrutiny, comment and, where appropriate, criticism’: R O’Keefe (n 34) 207.

embarrassment that comes with a serious breach of museum profession codes.<sup>40</sup> However, it is suggested that this international instrument, had it been in force before 2001, may neither have prevented the Buddhas' destruction nor provided any direct sanction against the Taliban. Whilst many states who respect both the cultural heritage of their nationals as well as that of other states will uphold these universal principles, a few, with fixed ideologies, may nevertheless act with force and determination to destroy the cultural heritage of others.

A second instrument, designed with the pursuance of a particular aim in mind, is the 1970 Convention, ratified by the UK in 2002 subject to certain reservations.<sup>41</sup> Its aim is to stem the illicit trade in CHOs<sup>42</sup> ('cultural property' for the purposes of the Convention). The Convention requires its state parties to undertake various measures to protect cultural property against the illicit trade in it,<sup>43</sup> thus seeking to preserve the context of archaeological finds which are illicitly excavated, but also extending to the illicit trade in other types of CHO. It makes illicit the import, export or transfer of

---

<sup>40</sup> Discussed in Chapter 4.

<sup>41</sup> This included substituting the meaning of 'cultural property' for that used in the Annex to Council Directive (EC) 7/93 (n 11): UNESCO 1970 Convention – Declarations and Reservations <[http://portal.unesco.org/en/ev.php-URL\\_ID=13039&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html#RESERVES](http://portal.unesco.org/en/ev.php-URL_ID=13039&URL_DO=DO_TOPIC&URL_SECTION=201.html#RESERVES)> Accessed 5 September 2012.

<sup>42</sup> The illicit trade is the trade in: (1) objects illegally exported by their rightful owners, (2) stolen objects from their identified owner and (3) illicitly excavated archaeological objects: Seventh Report of the Select Committee on Culture, Media and Sport, 'Cultural Property: Return and Illicit Trade' HC (1999-2000 HC 371-I) [8].

<sup>43</sup> These relate, *inter alia*, to exporting, educational measures and ethical principles for museums: *ibid* arts 5-6.

ownership in contravention of the Conventions.<sup>44</sup> The primary operable provisions are in Article 7 which requires state parties to take ‘necessary’ measures to prevent museums from acquiring the illegally exported cultural property<sup>45</sup> and to prohibit the import of institutionally inventoried cultural property of a museum, similar institution or religious or secular monument.<sup>46</sup> As Prott and O’Keefe observe, this latter provision is narrowly drafted and would not include ‘clandestinely excavated archaeological objects’,<sup>47</sup> since it would not have been included on any inventory.<sup>48</sup> There is also provision for inter-state requests for the return of cultural property which has, as its purpose, the aim of restoring the objects to their nation for whom it is considered part of their cultural heritage.<sup>49</sup>

The guiding types of cultural heritage value that the 1970 Convention recognises and seeks to preserve are therefore not only the cultural, historical or religious value of objects but also the associative value of CHOs. First, this is seen in terms of the association with a place by the archaeological context of the objects, which is lost through illegal excavation. Secondly, the Convention recognises the association between the objects and the country in which the objects were considered part of the nation’s cultural property.<sup>50</sup> Unlike the universal approach adopted in the 2003

---

<sup>44</sup> 1970 Convention (n 17) art 3.

<sup>45</sup> *ibid* art 7(a).

<sup>46</sup> *ibid* art 7(b)(i).

<sup>47</sup> Patrick J O’Keefe and Lyndel V Prott (eds), *Cultural Heritage Conventions and other instruments: A compendium with commentaries* (IAL publishing 2011) 65.

<sup>48</sup> However, the DCO(O)A would cover this situation as importing falls within the definition of ‘deals in’ (s 3(1)) and an object is tainted if it is excavated in contravention of the law (s 2(2)(b)).

<sup>49</sup> 1970 Convention (n 17) art 7(b)(ii).

<sup>50</sup> *ibid* Preamble. Context is discussed at p 64 above.

Declaration,<sup>51</sup> the 1970 Convention primarily focuses on the value of cultural heritage to nations. It refers to cultural property as constituting ‘one of the basic elements of civilization and national culture’<sup>52</sup> and states ‘that the illicit import, export and transfer of ownership of cultural property is one of the main causes of the impoverishment of the cultural heritage of countries of origin’<sup>53</sup> but acknowledges the importance of respecting not only one’s own cultural heritage, but also that of other nations.<sup>54</sup> Merryman views the 1970 Convention as the epitome of ‘cultural nationalism’ which is used to legitimise a state’s retention of cultural property.<sup>55</sup> Whilst it now seems over simplistic to view cultural heritage purely from these diametrically opposed nationalist and internationalist viewpoints<sup>56</sup> there is nevertheless strength in the argument that this Convention primarily focuses on cultural heritage value at the national level and its protection *for* the nation. The loss here is not from outright destruction and suffered universally (as with the Buddhas); instead it is the loss to a nation, specifically the intangible cultural heritage loss through de-contextualisation or exportation in contravention of the law.<sup>57</sup> The focus on retaining things for a nation is continued in the wide definition of a cultural property which forms part of a country’s cultural heritage

---

<sup>51</sup> 2003 Declaration (n 19) Preamble and I.

<sup>52</sup> 1970 Convention (n 17) Preamble,

<sup>53</sup> *ibid* art 2.

<sup>54</sup> *ibid*

<sup>55</sup> Merryman (n 23) 846. This will be discussed further in the context of the norm of preservation.

<sup>56</sup> E.g. Francesco Francioni, ‘The Human Dimension of International Cultural Heritage Law: An Introduction’ (2011) 22 EJIL 9, 9.

<sup>57</sup> A similar approach is taken in Directive (EC) 7/93 (n 11) focusing on cultural objects classed as ‘national treasures’.

(and thereby covered by the Convention).<sup>58</sup> It includes cultural property created within the country,<sup>59</sup> that found within the country<sup>60</sup> and objects that did not originate within the country, but which either came from approved archaeological digs in other countries,<sup>61</sup> objects that were gifts or purchased from abroad ‘with the consent of the competent authorities in the country of origin’<sup>62</sup> and intriguingly ‘cultural property which has been the subject of a freely agreed exchange’.<sup>63</sup> Since the definition extends to objects purchased from abroad (without a need for any particular association between the object and the nation in which it resides) one can interpret these provisions as focusing on maintaining a nation that is rich in cultural heritage rather than a nation rich in its *own* cultural heritage. This Convention disproportionately benefits those nations with large museum collections where the objects designated by them as ‘cultural property’ under the 1970 Convention originate from abroad. In this way, the concept of the universal museum<sup>64</sup> is reinforced by its operative provisions.<sup>65</sup> Merryman suggests that the Convention’s use of the term ‘protection’<sup>66</sup> is a euphemism for retention<sup>67</sup> by prioritising the culture of particular nations over international appreciations of culture. Therefore, both the wide definition and the notion of ‘protection’ within national

---

<sup>58</sup> 1970 Convention (n 17) art 4.

<sup>59</sup> 1970 Convention (n 17) art 4(a).

<sup>60</sup> *ibid* art 4(b).

<sup>61</sup> *ibid* art 4(c).

<sup>62</sup> *ibid* art 4(e).

<sup>63</sup> *ibid* art 4(d).

<sup>64</sup> The strongest manifestation of this concept is found in the Declaration on the Importance and Value of Universal Museums [2004] *ICOM News* 4. This concept is further analysed below at p 257.

<sup>65</sup> As to which see p 257 below.

<sup>66</sup> n 17, Preamble and art 5.

<sup>67</sup> Merryman (n 23) 844.

borders contribute to this ethos of nationalist retention to stay culturally rich with encyclopaedic collections at the expense of other nations.<sup>68</sup>

Even though both the 2003 Declaration and the 1970 Convention demonstrate a clear link between the cultural heritage value and the norm of preservation (either physical or protection from loss to a country) the specific normative action of both instruments is clearly restricted by their narrow foci.<sup>69</sup> Neither of these instruments extends to recognising the norm of access because of their limited scope in dealing with intentional destruction and destruction particularly of context, lost through illicit trade. Whilst the instruments fail then to provide a comprehensive approach to recognising the varied types of cultural heritage value, the public legacy and imposing corresponding norms of both preservation and access, it is difficult to see how access could be mandated in circumstances where the main risks are threats by intentional destruction and the illicit trade.

### **3.3.2 Statements of commitment and declaratory international norms**

Even where an international instrument is not premised on the protection of the norm of preservation, it is clear that preservation of CHOs is the most frequently articulated

---

<sup>68</sup> See Tatiana Flessas, 'The Ends of the Museum' LSE Law, Society and Economy Working Papers 14/2013 < [http://www.lse.ac.uk/collections/law/wps/WPS2013-14\\_Flessas.pdf](http://www.lse.ac.uk/collections/law/wps/WPS2013-14_Flessas.pdf)> accessed 24 December 2013, 16. Marceau also acknowledges the national dimension to universalism: Cécile Marceau, 'The Ethics of Collecting: universality questioned' (2007) 59 *Museum International* 80, 82.

<sup>69</sup> Cf. The Return of Cultural Objects Regulations 1994 (UK), art 3(4)(b) which places a duty on the Secretary of State to take necessary steps to physically preserve a cultural object from another state where it has been unlawfully removed, in cooperation with that other state.



norm.<sup>70</sup> Preservation is clearly seen as central to UNESCO's work, since the concepts of assuring protection and conservation (specifically viz. 'works of art and monuments of history and science') are found in UNESCO's Constitution<sup>71</sup> in terms of fulfilling its purposes and functions of contributing 'to peace and security by promoting collaboration among nations through education, science and culture'.<sup>72</sup> Consequently, UNESCO's various conventions and declarations should be read in light of this statement.<sup>73</sup>

UNESCO is not the only international organisation with a clear commitment to preserving cultural heritage. As far back as 1954 the Council of Europe required its member states to 'take appropriate measures to safeguard...its national contribution to the common cultural heritage of Europe'.<sup>74</sup> This is coupled with a requirement of 'reasonable access' to objects that are an integral part of the 'common heritage of Europe'.<sup>75</sup> Unlike the 1970 Convention, rather than having nationalist tones of

---

<sup>70</sup> 2003 Declaration (n 19); Constitution of the United Nations Education, Scientific and Cultural Organization, (adopted 16 November 1945) (entered into force 4 November 1946) art 1(2)(c) and European Convention on the Protection of the Archaeological Heritage (Revised) Council of Europe, Valetta (adopted 16 January 1992, entered into force 25 May 1995) 1992 ETS 14; ratified by the UK 19 September 2000 ("Valetta Convention").

<sup>71</sup> UN Constitution (ibid) art 1(2)(c).

<sup>72</sup> ibid art 1(1).

<sup>73</sup> Most notably for our purposes the 1970 Convention (n 17), the 2003 Declaration (n 1923) the 2001 Declaration (n 77) and the 1997 Declaration (n 82).

<sup>74</sup> European Cultural Convention, Council of Europe, Paris (adopted 19 December 1954, entered into force 5 May 1955) CETS 018 (UK ratification 5 May 1955) art 1.

<sup>75</sup> ibid art 5. 'Reasonable' clearly indicates the absence of an unfettered right of access given to individuals. Instead it is a measured and facilitatory requirement of access to these important things which is placed on states.

preservation, this Convention seeks to protect the European heritage, presumably in the context of seeking to forge interdependence between European nations in a post-war context.<sup>76</sup>

Like the 2003 Declaration, the Universal Declaration on Cultural Diversity (the 2001 Declaration)<sup>77</sup> links preservation<sup>78</sup> with public legacy, showing a commitment not only to current, but also to future generations. The 2001 Declaration describes cultural heritage as the ‘wellspring of creativity’, emphasising its importance ‘as a record of human experience and aspirations, so as to foster creativity in all its diversity and to inspire genuine dialogue among cultures’.<sup>79</sup> Whilst not specifying the particular types of value found in cultural goods<sup>80</sup> there is a clear recognition of the value of culture more widely as acknowledged in the Declaration’s Preamble by restating part of UNESCO’s Constitution that the wide diffusion of culture ‘constitute[s] a sacred duty which all nations must fulfil in a spirit of mutual assistance and concern’. In this way, the Declaration treats the state parties as having not only duties to future generations,

---

<sup>76</sup> ‘The adoption of the European Cultural Convention within the framework of the Council of Europe reflected the hope of future unity and a belief in the power of the humanistic spirit of education and culture to heal old and new divisions, prevent conflicts, and cement the democratic order’: *Fifty years of the European Cultural Convention* <[http://www.coe.int/t/dg4/CulturalConvention/Source/Bilan50\\_EN.pdf](http://www.coe.int/t/dg4/CulturalConvention/Source/Bilan50_EN.pdf)> accessed 10 December 2013 39. The Council of Europe and European Union have both sought to use cultural heritage as a means of fostering a sense of European identity: Janet Blake, ‘On Defining the Cultural Heritage’ (2000) 49 *International and Comparative Law Quarterly* 61, 84.

<sup>77</sup> UNESCO (adopted 2 November 2001).

<sup>78</sup> ‘heritage in all forms must be preserved’: *ibid* art 7.

<sup>79</sup> *ibid* art 7.

<sup>80</sup> *ibid* art 8.

but also concurrent duties to other states who engage in a common enterprise to secure cultural diversity for each other as well as for future generations.

Unlike the 2003 Declaration, the 2001 Declaration can be interpreted more widely to take into account passing practices down the generations (rather than just physical objects). This could cover the situation where it is appropriate to let the physical subject matter deteriorate, because it says ‘heritage *in all its forms* must be preserved’.<sup>81</sup> A similar expansive approach and an overall strong demonstration of public legacy is found in UNESCO’s 1997 Declaration on the Responsibility of the Present Generations Towards Future Generations<sup>82</sup>. Here present generations have ‘the responsibility to identify, protect and safeguard tangible and intangible cultural heritage and to transmit this common heritage to future generations’.<sup>83</sup> Whilst this reference to common heritage is sufficiently wide to take account of the process of cultural heritage (and potentially purposeful deterioration), there is a clear commitment to the present generations making use of the cultural heritage, but also a proviso that the use should ‘not entail compromising it irreversibly’.<sup>84</sup> This indicates a narrower understanding of public legacy than the one argued for in this thesis. It translates into an obligation to protect and safeguard, which clearly upholds preservation as the key normative action, rather than extending to access. It is, though, the strongest possible international declaration of the public legacy and duties owed to future generations.

---

<sup>81</sup> *ibid* (emphasis added).

<sup>82</sup> UNESCO (adopted 12 November 1997).

<sup>83</sup> *ibid* art 7.

<sup>84</sup> *ibid* art 8.

The Council of Europe's Valetta Convention<sup>85</sup> comprehensively recognises the principles of cultural heritage and declares states to be under an obligation of normative action for both preservation and access. This requires state parties to undertake to regulate archaeological activities to prevent illegal excavation and ensure that excavations are undertaken in an appropriate manner in order 'to preserve the archaeological heritage and guarantee the scientific significance of archaeological research work'.<sup>86</sup> This focus on preserving the archaeological record through appropriately executed excavations coupled with the requirement to acquire sites, where necessary, to retain archaeology in situ<sup>87</sup> shows the importance of context, despite it in any event being an intrinsic part of the definition of archaeological heritage in the Convention.<sup>88</sup> The Convention is mindful of the need to combat the illicit circulation of antiquities by requiring state parties to undertake to make practical efforts to stem the trade.<sup>89</sup> It provides for the protection of the context of archaeological heritage, acknowledging the evidential value<sup>90</sup> of archaeological heritage<sup>91</sup> as well as the historical value, specifically to mankind.<sup>92</sup>

The Valetta Convention also mandates the norm of access (albeit restricted in scope to archaeological objects rather than more widely to all CHOs such as works of art). It requires states to promote public access to sites and encourage public displays of

---

<sup>85</sup> Valetta Convention (n 70)

<sup>86</sup> *ibid*, art 3.

<sup>87</sup> Valetta Convention (n 70) art 4.

<sup>88</sup> *ibid* art 1(3).

<sup>89</sup> *ibid* art 10.

<sup>90</sup> *ibid* Preamble.

<sup>91</sup> *ibid* art 1(3).

<sup>92</sup> *ibid* Preamble.

objects.<sup>93</sup> However, it treats access as subordinate to the preservation of archaeological sites<sup>94</sup> (thereby corresponding to Merryman's hierarchy of preservation – truth – access<sup>95</sup>).

More fundamental recognition of the importance of culture to people can be found in human and cultural rights instruments. Engagement with one's culture is seen as being a human right in that everyone has 'the right freely to participate in the cultural life of the community, to enjoy the arts...'<sup>96</sup> Cultural rights are 'indispensable for [a person's] dignity and the free development of his personality'.<sup>97</sup> Specifically, in the context of indigenous peoples article 12(1) of the United Nations Declaration on the Rights of Indigenous Peoples (the 2007 Declaration)<sup>98</sup> states that indigenous peoples have 'the right to the use and control of their ceremonial objects' and that states should 'seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms...'<sup>99</sup> This suggests that indigenous peoples have an enhanced status (viz. access), which may be translated into an entitlement to restitution of the object. However, there exists in general a norm of preservation of culture, applying equally to physical culture and practices, evident in the

---

<sup>93</sup> *ibid* art 9.

<sup>94</sup> *ibid* art 5(1).

<sup>95</sup> John Henry Merryman, 'The Public Interest in Cultural Property' (1989) 77 Cal LR 339, 360. Discussed at p 122 above.

<sup>96</sup> Universal Declaration of Human Rights, General Assembly Resolution 217 A (III) 1948 (adopted 10 December 1948) art 27(1).

<sup>97</sup> *ibid* art 22.

<sup>98</sup> United Nations Declaration on the Rights of Indigenous Peoples, (adopted 13 September 2007) 61/295 2008.

<sup>99</sup> *ibid* art 12(2).

International Covenant on Economic, Social and Cultural Rights.<sup>100</sup> This recognises that everyone has the right to take part in cultural life<sup>101</sup> and that the Covenant's state parties should take necessary steps to conserve culture.<sup>102</sup> A similar sentiment is expressed in article 8 of the 2007 Declaration,<sup>103</sup> in that Indigenous Peoples and individuals (indicating both individual and group rights) 'have the right not to be subjected to forced assimilation or destruction of their culture'. Whilst not amounting to prescription of normative action, Article 11 of the 2007 Declaration gives indigenous peoples the right to protect their culture, demonstrating the importance of protection and preservation of culture (both physical and intangible).

### **3.3.3 Policies to achieve the cultural heritage norms: a legitimate aim under human rights law**

Both the norm of preservation (physical and retention within national borders) and the norm of access have been recognised by the ECtHR as legitimate aims for states to pursue, justifying interference with an individual's right to peaceful enjoyment of their property under the European Convention on Human Rights.<sup>104</sup> The dual nature of CHOs (as manifestations of heritage and as property) is clearly identified by the court and the object's status *qua* cultural heritage rather than *qua* property belonging to an

---

<sup>100</sup> OHCHR, General Assembly Resolution 2200A (XXI) 1966 (adopted 16 December 1966, entered into force 3 January 1976). Ratified by the UK 20 May 1976.

<sup>101</sup> art 15(1)(a).

<sup>102</sup> *ibid* art 15(2).

<sup>103</sup> n 98.

<sup>104</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe, Rome (as amended) (adopted 4 November 1950, entered into force 3 September 1953) ETS 177 art 1 of the First Protocol: UK ratification 8 March 1951.

individual is prioritised.<sup>105</sup> Seemingly the community value of the cultural heritage value is afforded greater respect than any individual personal or cultural value to the individual property owner.<sup>106</sup>

According to *Beyeler v Italy* a state is justified in controlling the market in art (thereby interfering with property rights) ‘for the purposes of protecting a country's cultural and artistic heritage...’<sup>107</sup> In this way, the decision’s central focus was on retaining the object (a Van Gogh painting located in Italy) within national borders through a right of pre-emption and whether this was a legitimate policy to pursue.<sup>108</sup> Legitimacy was found even though the painting did not originate in the country.<sup>109</sup> National concern outweighed any wider cultural heritage value that could be enhanced by exporting the object abroad and like the 1970 Convention, the decision demonstrates a clear

---

<sup>105</sup> *Beyeler v Italy* (2001) 33 EHRR 52 and *Kozacioğlu v Turkey* 2334/03 19 February 2009 (Grand Chamber), both discussed below.

<sup>106</sup> Similarly community value is prioritised over financial value.

<sup>107</sup> *Beyeler* (n 105) [112]. In the recent case of *Albert Fürst von Thurn und Taxis v Germany* (Application No 26367/10 the ECtHR emphasised that in the context of determinations under Article 1 of the First Protocol the State has a wide margin of appreciation ‘particularly where environmental and cultural heritage issues are concerned’ [23]. The court treated the property (in the particular case, an archive) as having a ‘social function...which must be put into the equation to determine whether the ‘fair balance’ has been struck between the demands of the general interest of the community and the individual’s fundamental rights’ (ibid).

<sup>108</sup> *Beyeler* (n 105) [112]. The court did, though acknowledge that the CHO belonged to the cultural heritage of all nations and linked the preservation within national borders with the provision of public access of the CHO ‘in the interest of universal culture’: *Beyeler* (n 105) [113].

<sup>109</sup> *Beyeler* (n 105) [113]. NB the comments at p 111 above regarding the types of property that can form the cultural heritage of nation under the 1970 Convention (n 17).

nationalist concern with maintaining culturally rich nations.<sup>110</sup> Like the norm of preservation, the facilitation of public access was also recognised in *Beyeler* as a legitimate activity, justifying an interference with the owner's right to peaceful enjoyment of his possessions under article 1 of the First Protocol.<sup>111</sup> The court treated the painting as 'belonging to the cultural heritage of all nations'; therefore facilitating access through a scheme of state purchase was 'in the general interest of universal culture'.<sup>112</sup>

The Grand Chamber of the ECtHR has expressly recognised the particular nature of value that justifies state intervention in the preservation of cultural heritage. Whilst the particular case arose in the context of cultural heritage places not objects, the clear recognition of this 'essential value', contributing to quality of life, is strong judicial recognition of the significance of cultural heritage.<sup>113</sup> This recognition of the 'essential value' to historical, artistic and cultural well-being supports the notion that cultural heritage serves a legitimate societal purpose.

In both of these cases the court recognised that rights of pre-emption and compulsory purchase of cultural heritage are justified in light of the policies of preserving and providing access to them, but did not translate this into specific duties on the state either to preserve or provide access. In this way, the ECtHR jurisprudence recognises access and preservation are worthy norms to pursue, yet fails to proactively enforce them at the local level.

---

<sup>110</sup> This notion is further discussed at p 162 below in the context of export licensing.

<sup>111</sup> *Beyeler* (n 105) [113].

<sup>112</sup> *ibid*

<sup>113</sup> *Kozacioğlu* (n 105) [54].



### **3.3.4 Some concluding thoughts on international efforts**

The various international instruments demonstrate strong recognition of the principles and norms, whether at the fundamental level of human and cultural rights, or in response to more specific matters of concern such as the intentional destruction of cultural heritage or the illicit trade. However neither these, nor the decisions of the ECtHR, place direct legal obligations on the decision-makers who determine the fate of cultural heritage objects in England. Therefore the discussion now turns to how far English domestic law does this.

## **3.4 Failure of English domestic law to recognise the value of cultural heritage for its own sake with a view to passing it on**

### **3.4.1 No recognition of the cultural heritage principles or norms for privately owned CHOs**

Many CHOs of national or universal importance may, nevertheless, be privately owned; English domestic law, unlike some European counterparts, does not require private owners to sell culturally important objects to the state through a system of pre-emptive rights.<sup>114</sup> From Old Masters to archaeological finds, these objects have a value to people other than their owners, but English domestic law does little to recognise this. A painting by Titian sold at Christie's for £20,000,000 would not be valued (in terms of its cultural heritage value) by the law or designated as anything other than property for which the consignor would need to have passed good title to the purchaser and for which consideration of the purchase price was given in return. The ownership of the painting, as a CHO, does not, by itself, place on the owner any duties resulting from

---

<sup>114</sup> E.g. Italian law: see 147 above.

that status.<sup>115</sup> Therefore, the eccentric new owner could leave the auction house with the Titian rolled up under his arm and either accidentally or intentionally drop it in the river without any legal repercussion when it is washed away and forever lost. The loss may be felt by others, who may never have seen the painting before, but would be certain never to see it in the future. This non-use or (existence<sup>116</sup>) value, which focuses on the value to the people to whom the object is significant and to whom the loss would be a misfortune, is felt by others irrespective of whether the object is privately or publicly owned. Consequently, English domestic law leaves a lacuna in the recognition of cultural heritage value and the respect for present and future generations for whom preservation and access might otherwise be facilitated.

The limited circumstances in which value is recognised and where the norms may be upheld are where CHOs are covered at the periphery of legislation, specifically in the context of objects which are attached to listed buildings and therefore fall under the purview of the relevant legislation<sup>117</sup> and where the uniqueness of the CHOs may mean that common law remedies are inappropriate.<sup>118</sup> The first example of this is found in the, at times, subtle distinction between chattels and fixtures. The law treats more favourably those fixtures forming part of a listed building, than those in non-listed

---

<sup>115</sup> Generally Joseph L Sax, *Playing Darts with a Rembrandt* (The University of Michigan Press, 1999). In their second edition Lawson and Rudden give an example in the English legal context of an owner being able to add his Vermeer painting to the bonfire: FH Lawson and Bernard Rudden, *The Law of Property* (2nd edn OUP, 1982) 116.

<sup>116</sup> Darvill (n 27) 47. Discussed at p 85 above.

<sup>117</sup> (P(LBCA)A 1990).

<sup>118</sup> Specific performance in contract law (see *Co-Operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1) and delivery up in response to wrongful interference with goods (Torts (Interference with Goods) Act 1977, s 3(2)(a). Both are discussed at pp 153 below.

buildings<sup>119</sup> or chattels housed in a listed building. In the latter two categories no legal recognition of value is undertaken and no protection given. In effect, because an object has become part of the building through its legal status as a fixture<sup>120</sup> it can benefit, through its physical association, from the designation of value given by the Secretary of State (on the recommendation of English Heritage) by entering the building on the list of buildings of 'special architectural or historic interest'.<sup>121</sup> This affords the CHO greater legal status and protection than the Titian dropped in the river; the fixture cannot be removed or destroyed without permission and any person who does so opens themselves up to criminal liability.<sup>122</sup> The fixture has a privileged legal status purely due to its association with a building of special architectural or historic interest, rather than because of its own cultural heritage value.<sup>123</sup> It is difficult to justify this differing legal treatment when considering on the one hand, the Titian that was washed away and on the other, a statue or wall hanging that, because of the degree and purpose of its annexation, has effectively piggy-backed to the protection afforded to the building to which it is attached. This privileged status translates into a norm of preservation by discouraging destruction or alteration via the associated criminal offence.<sup>124</sup> This may,

---

<sup>119</sup> E.g. *The Artist as Hephaestus*, 1987 by Paolozzi which is at risk of removal from its specially constructed alcove at Bracton House, High Holborn, London: Louisa Buck, 'Holborn Paolozzi fails to sell' *The Art Newspaper* January 2013.

<sup>120</sup> Because of the degree and purpose of its annexation: *Holland v Hodgson* (1872) LR 7 CP 328 (Exch) 334 and *Elitestone v Morris* [1997] 1 WLR 687 (HL) 692.

<sup>121</sup> Planning (Listed Buildings and Conservation Areas) Act 1990 ("P(LBCA)A") s 1(1).

<sup>122</sup> *ibid* s 7.

<sup>123</sup> Charlotte Woodhead, 'Cultural heritage principles and interference with property rights' (2011) 42 *Cambrian Law Review* 52, 63.

<sup>124</sup> P(LBCA)A s 7.

though, be too much of an object-orientated analysis<sup>125</sup> given that the P(LBCA)A focuses on buildings. If a fixture is removed (or destroyed) it is the negative effect that that has on the building which is the statute's concern, rather than the preservation of the object itself, although arguably by destroying the fixture one destroys part of the building. Nevertheless, from the moment of removal it would become a chattel for the purposes of English law. However, English law seems to consciously recognise the cultural heritage value of the object once it is removed because it again privileges such an object where it is subsequently sold or exported, making these offences under the DCO(O)A<sup>126</sup> and consequently giving effect to the norm of preservation through the deterrent effect of criminal sanction. However, in the same way as the P(LBCA)A, the DCO(O)A fails to fully account for the association between object and place. If a free-standing object were displayed in the building but had a significant association with the place (perhaps because both belonged to an historical figure) the law would not recognise the cultural heritage value of association between the object and place. If such an object were stolen, it would be treated like any other property for the purposes of the Theft Act 1968.<sup>127</sup>

Whilst the overlap of the P(LBCA)A with CHOs clearly provides some measure of recognition of the norm of preservation for those privileged objects which are now fixtures and subsumed within the listed building regime, neither the general law

---

<sup>125</sup> Even though it is emphasised that throughout this discussion cultural heritage is treated as intangible and one is concerned with preserving this rather than the physical object.

<sup>126</sup> Discussed below at p 174.

<sup>127</sup> But were the building from which it was taken open to the public the removal could fall under section 11. This means that there would be an offence even if there was no intention to permanently deprive the owner of the object (i.e. so-called 'art napping'). See Humphrey Wine, 'The Missing Goya: Section 11 of the Theft Act 1968' (2001) 6 *Art Antiquity and Law* 301.

applicable to CHOs nor the P(LBCA)A provides any requirement of public access to privately owned attached or unattached CHOs. Consequently, a culturally, aesthetically or historically valuable painting can be hidden away and its cultural heritage principles unfulfilled. It is here that the private property nature of these CHOs is most strongly articulated. To require owners to provide the public with the ability (or even ‘right’) to visit and view CHOs is likely to be regarded as an interference with the human right of peaceful enjoyment of one’s possessions because it would necessarily entail forced visits to residential property.<sup>128</sup> A requirement to lend privately owned CHOs to a public museum (thereby achieving access) might not fall foul of human rights law because this would not involve forcing public access to a private house, yet this is not mandated by law.<sup>129</sup> When it comes to publicly owned objects (or objects for which a taxation benefit has been given to the private owners) there is a much stronger notion of the norm of access.<sup>130</sup>

A second, limited recognition of the cultural heritage principles, is where specific performance or delivery up are awarded as remedies respectively for breach of contract<sup>131</sup> and wrongful interference with goods.<sup>132</sup> The justification for these discretionary remedies is primarily premised on the basis of inadequacy of damages<sup>133</sup> (thereby focusing on the financial value of the CHO, rather than the cultural value). It is possible to see the recognition that cultural value justifies the inadequacy of damages.

---

<sup>128</sup> Art 1 First Protocol (n 104).

<sup>129</sup> In light of the decisions in *Beyeler* (n 105) and *Kozacioğlu v Turkey* (n 105)

<sup>130</sup> Discussed below at pp 203 and 166 respectively.

<sup>131</sup> *Co-Operative v Argyll* (n 118).

<sup>132</sup> Under the Torts (Interference with Goods) Act 1977, s 3(2)(a).

<sup>133</sup> *Co-Op v Argyll* (n 131) 11.

Therefore in *Garcia v De Aldama*,<sup>134</sup> although the claim for conversion was unsuccessful, the delivery up of a manuscript by the Spanish poet, Lorca would have been appropriate because it was ‘intrinsically valuable’.<sup>135</sup> Clearly this value was cultural in nature and this can also be seen in the context of *Duke of Somerset v Cookson*<sup>136</sup> where a silver altarpiece was returned to the Duke of Somerset as an object of antiquity, unique in nature.<sup>137</sup> Furthermore, the rarity of cultural objects can justify specific performance<sup>138</sup> and the associative value of the object to the owner is implicitly recognised where delivery up is awarded in respect of heirlooms.<sup>139</sup> Whilst these decisions recognise the cultural heritage value, and to a limited extent the recognition of preserving the association between a person and an object, they do not fully recognise the norms of physical preservation or access.

It is clear from the foregoing analysis that except for some limited situations English domestic law does not engage with a valuing exercise of cultural heritage or place specific obligations on private owners to fulfil the cultural heritage norms.

#### ***3.4.1.1 Valuing when bringing objects into the public fold***

In a clear reactive rather than proactive manner, English domestic law provides for valuing to take place (and a recognition of that value) when a CHO is at risk of leaving the country and being ‘lost to the nation’, even if it has never before been publicly displayed and where the opportunity arises to acquire a culturally valuable object to

---

<sup>134</sup> [2002] EWHC 2087 (Ch)

<sup>135</sup> *ibid* [12] (Peter Smith J).

<sup>136</sup> (1735) 3 Peere Williams 390 (Ch)

<sup>137</sup> *ibid* 391 (Talbot LC).

<sup>138</sup> *Falcke v Gray* (1859) 62 ER 250 (Ch) 252.

<sup>139</sup> *Pusey v Pusey* (1684) 1 Vern 273 (Ch)

satisfy taxation obligations. In both cases the law seeks to bring objects into the public fold. Bringing into the ‘public fold’ means that objects are transferred from private to public ownership, in which case there is an argument that in most cases they will subsequently receive greater protection and increased access will be provided.<sup>140</sup> The term is also used where the public acquires a ‘stake’ or ‘interest’ in a CHO because its owner has received a taxation incentive; in return for this the public is entitled to be satisfied that the object is preserved and that it shall have access to it.

The legal framework supporting the export licensing regime for cultural heritage aims to provide ‘an opportunity for the retention in this country of cultural goods considered to be of outstanding national importance.’<sup>141</sup> This clearly seeks to uphold the norm of preservation in the national context of seeking to retain CHOs within UK borders. The system facilitates the maintenance of a culturally rich nation, but allows the cultural heritage value to be assessed, albeit from the national viewpoint by the Reviewing Committee. Where an export licence is required before certain CHOs can leave the country,<sup>142</sup> and an object is a candidate for being considered of national importance, it

---

<sup>140</sup> At p 166 below.

<sup>141</sup> *UK Export Licensing for Cultural Goods: Procedures and guidance for exporters of works of art and other cultural goods* (Arts Council 2012) 3. It is justified as an exception to the free movement of goods as the ‘national treasures’ exception to the prohibition on quantitative restrictions between EU member states: Consolidated Version of the Treaty on the functioning of the European Union (ex Article 30 TEC) [2010] OJ C83/47, 61, art 36. It is also the ‘national treasures’ exception to free trade in General Agreement on Tariffs and Trade (WTO 1947) art XX(f).

<sup>142</sup> Because an object meets the financial and age thresholds under either the UK or EU legislation: The Export of Objects of Cultural Objects (Control) Order 2003, SI 2003/2759 (enacted pursuant to The Export Control Act 2002, s 1) and Council Regulation (EU No 116/2009) on the Export of Cultural

is referred to an Expert Adviser in a museum, who may in turn refer it to the Reviewing Committee. If the Committee finds that the object satisfies one of three non-statutory criteria (known as the Waverley Criteria<sup>143</sup>) it can recommend that the Secretary of State defers granting an export licence to allow time to receive offers at or above the fair market price from public institutions or private individuals who give undertakings regarding public access. This allows the object to remain in the UK and seemingly retain its association with the country, although the criteria extend beyond merely national associations; by transferring objects from private to public ownership it increases ‘opportunities for British citizens to engage with value’<sup>144</sup> and thereby facilitates the norm of access. Obviously, this is only achieved where public funding is found,<sup>145</sup> otherwise objects will still be lost to the nation. In 2011-2012 seven items met the Waverley Criteria but only four<sup>146</sup> were bought by public institutions or private individuals providing the requisite public access. If an owner indicates in advance his unwillingness to accept such an offer, were it made, the licence will normally be refused.<sup>147</sup> The Waverley Criteria ask three questions:

---

Goods [2009] OJ L039 respectively, unless there is an open general export licence applicable to the object or an individual open licence.

<sup>143</sup> Established in the Report of the Committee on the Export of Works of Art 1952 (chaired by Viscount Waverley).

<sup>144</sup> Derek Gillman, *The Idea of Cultural Heritage* (Revised edition, CUP 2010) 198.

<sup>145</sup> Where no offer is made during the deferral period, in which case, the Secretary of State will ‘normally grant’ the licence: *Export Controls on Movable Cultural Interest – Statutory Guidance on the Criteria to be taken into consideration when making a decision about whether or not to grant an export licence*, DCMS November 2005 [20]

<sup>146</sup> DCMS and Arts Council, *Export of Objects of Cultural Interest 2011/12* (TSO 2012) 18.

<sup>147</sup> Statutory Guidance (n 145) [23].



‘(1) Is [the object] so closely connected with our history and national life that its departure would be a misfortune?

(2) Is it of outstanding aesthetic importance?

(3) Is it of outstanding significance for the study of some particular branch of art, learning or history?’<sup>148</sup>

The first of these clearly upholds the cultural heritage value of association with the UK’s history and national life. The measure of value is assessed, in a similar way to the definition of cultural heritage used in this thesis,<sup>149</sup> by considering the gap that will be left by the object were it lost. Here, though, the concern is about the loss beyond national borders rather than loss through destruction. Consequently it focuses on the national element of association and importance, rather than universally or globally. As Merryman observes: ‘The peculiar value attached to the authentic object combines with nationalist concerns to support a desire to keep the work from leaving the national territory.’<sup>150</sup> In this way a nation is keen to keep objects within its borders, regardless of notions of free movement of goods and free trade.<sup>151</sup>

However, for an object to fall within Waverley (1) more is needed than simply that the artist came from that country;<sup>152</sup> although export licences were deferred for three

---

<sup>148</sup> *ibid* [11].

<sup>149</sup> Set out at p 26 above.

<sup>150</sup> John Henry Merryman, ‘International Art Law: from Cultural Nationalism to a Common Cultural Heritage’ (1983) 15 *New York Journal of International Law and Politics* 757, 757.

<sup>151</sup> See text to n 141.

<sup>152</sup> An object which did satisfy Waverley (1) was a Celtic bronze mirror discovered in Kent: Reviewing Committee on the Export of Works of Art and Objects of Cultural Interest: *Note of case hearing on 11 February 2009: A Celtic Bronze Mirror* (Case 25, 2008-2009) <<http://www.artscouncil.org.uk/media/>

paintings by Turner: the *Dark Rigi*,<sup>153</sup> the *Blue Rigi*<sup>154</sup> and *Lake Lucerne*,<sup>155</sup> the Reviewing Committee's recommendations were based on criteria other than Waverley (1). The explanatory text accompanying the Criteria in the DCMS Guidance demonstrates a wide interpretation of this Waverley (1) as it extends to objects that have a local importance for history or have gained significance from their presence within a collection, or by associations with 'significant historical events, people or places'.<sup>156</sup> This therefore recognises the community value of cultural heritage, albeit under a scheme which provides a national umbrella for decisions.

The second criterion focuses on the aesthetic value, a component of many of the typologies of value previously discussed.<sup>157</sup> Here again, the strength of the value is articulated by using the adjective 'outstanding'. This element is also an essential component of Waverley (3) which deals with the evidential or informational value of the object, thereby focusing on how it can help with study relating to art, history or other branches of learning. Such objects are therefore set apart as superlative examples of a particular artistic movement or branch of study.

The notion of preserving the associative value of CHOs with this country is arguably implicit across all three criteria in the practice of requiring an object to have been in the

---

uploads/case\_hearings\_2008\_9/Case\_17\_Note\_of\_case\_hearing\_230209\_\_FINAL.pdf> accessed 28 April 2013.

<sup>153</sup> *Export of Objects of Cultural Interest 2006-2007* (DCMS 2007) Case 4 2006-2007.

<sup>154</sup> *ibid* Case 10.

<sup>155</sup> *ibid* Case 6.

<sup>156</sup> DCMS 2005 (n 147) [12]. This is repeated in the *UK Export Licensing for Cultural Goods: Procedures and guidance for exporters of works of art and other cultural goods – An Arts Council England Notice* (Arts Council England 2012) [31].

<sup>157</sup> Chapter 2, Fig 2.

UK for the last 50 years.<sup>158</sup> However, this does not account for recently developing associative value and adopts a short-term approach to cultural heritage. If all examples of the “Brit Art” movement were exported, arguably there would be a loss to our cultural heritage (perhaps not acknowledged now, but probably in the future). The public is therefore not fully recognised since the scheme focuses on the link between past and future, rather than present and future as well. Instead, if one were to recognise in recently made objects their potential (in terms of their cultural heritage value to future generations) then this would more fully reflect the public legacy notion.<sup>159</sup>

These three criteria do, at the classification stage,<sup>160</sup> demonstrate the need to assess the value of the objects to determine whether they will be treated differently from other objects which their owners wish to export. Some legal provisions that designate CHOs as falling into a particular category of protection (e.g. the DCO(O)A and the Iraq (United Nations Sanctions) Order 2003<sup>161</sup>) do not actually assess the strength of the type of value and provide an essentialist, rather than a value-based approach.<sup>162</sup> The Waverley Criteria provide an opportunity to assess the particular types of value in relation to the object as well as the strength of those types of value. This therefore provides a legal ‘values-based approach’ called for by *inter alia* Mason,<sup>163</sup> but shows it at work outside the conservation field, which is the traditional place value assessments

---

<sup>158</sup> DCMS 2005 (n 147) [28] and [29].

<sup>159</sup> As set out at p 93 above.

<sup>160</sup> I.e. when the law determines whether a category of object should be treated differently from the usual course of events.

<sup>161</sup> 2003/1519. Discussed below at p 175.

<sup>162</sup> At p 69 above.

<sup>163</sup> Randall Mason, ‘Theoretical and Practice Arguments for Values-Centered Preservation’ (2006) *Cultural Resource Management Journal* 21, 28. Discussed at p 70 above.

are made.<sup>164</sup> However, the most significant limitation of the approach is its focus on retaining culturally valuable CHOs that have no association with the UK beyond their having been in the UK for more than 50 years. This limitation is particularly strong where the cultural heritage value might be more fully appreciated abroad than here in the UK, for example if the object continued to be culturally valuable to people in its country of origin. This therefore perpetuates a nationalist approach and can be seen in the following situation.

Crewdson, using the metaphor of the eponymous ancient steamship *Waverley* to describe these criteria, suggests that, although it flies the British flag, *Waverley* is a privateer free of Parliamentary control yet carrying the whole of the system of export control for the UK's art.<sup>165</sup> Whilst the Reviewing Committee may have wide scope in the absence of Parliamentary control, one can observe the Committee's ambit as tightly drawn. In the case of papers of the 8<sup>th</sup> Earl of Elgin the Reviewing Committee concluded that they satisfied *Waverley* (3) on the basis that they were of 'outstanding importance for the study of British Imperial history, and of the history of British North America in particular',<sup>166</sup> and that the national interest would not be satisfied by retaining copies in the UK rather than the originals.<sup>167</sup> The applicant provided evidence showing that the papers had more historical significance to Canada than to the UK

---

<sup>164</sup> Chapter 2.

<sup>165</sup> Richard Crewdson, 'Waverley Adrift' (1997) 6 *International Journal of Cultural Property* 353, 353.

<sup>166</sup> Reviewing Committee on the Export of Works of Art and Objects of Cultural Interest: *Note of case hearing on 4 June 2008: Papers of James Bruce, 8<sup>th</sup> Earl of Elgin, as Governor of British North America* (Case 2, 2008-2009) < [http://www.artscouncil.org.uk/media/uploads/pdf/Case\\_2\\_Note\\_of\\_case\\_hearing\\_FINAL.pdf](http://www.artscouncil.org.uk/media/uploads/pdf/Case_2_Note_of_case_hearing_FINAL.pdf)> accessed 7 September 2012 [10].

<sup>167</sup> *ibid*

because they related mainly to his time as a diplomat and governor of Canada. The Committee was told of a proposal that the anticipated purchaser (the Libraries and Archives of Canada (LAC)) would 'ensure the papers were cared for in the best possible way' and that a digitised copy would be presented to the National Archives of Scotland.<sup>168</sup> However, the Reviewing Committee emphasised that any consideration of the ultimate destination of the papers was not within its terms of reference and its task was solely 'to make a recommendation to the Secretary of State as to whether the papers were of national importance to the UK under the Waverley Criteria'.<sup>169</sup> In this way, the Committee was unable to take into account the full range of types of value and assess what was the best means by which to fulfil the cultural heritage value of the object and was constrained by a nationalist retentionist approach. Here, on the balance of the evidence before the Committee, there was clearly a strong associative value to Canada and so the cultural heritage principles might have been best served by not recommending a deferral. Ultimately, the Secretary of State (who was able to take into account more factors than the Reviewing Committee) granted the export licence, being of the view that the national interest would be met by the terms of the agreement with LAC.<sup>170</sup> Although this decision was still made from the viewpoint of the national interest, it shows an appreciation of cultural heritage value and how an assessment of the different types of value can lead to a solution that optimises those different types of value. However, this is a significant step towards showing that the overall cultural heritage value of the objects was recognised as an intangible concept. Nevertheless, the Committee that has the relevant expertise to make these assessments was frustrated in

---

<sup>168</sup> *ibid* [7].

<sup>169</sup> *ibid* [9].

<sup>170</sup> *ibid* [15].

this task by restrictive terms of reference which necessarily focus on the national viewpoint and whether the papers were of national importance under the Waverley Criteria.<sup>171</sup>

The export licensing system is clearly premised on the basis that it seeks to retain nationally important objects within the nation<sup>172</sup> and is justified on the basis of these being national treasures.<sup>173</sup> This approach presupposes a level of association to the nation where its loss would be a misfortune (Waverley (1)). Nevertheless, the Waverley Criteria cover not only nationally important objects, but also those CHOs having solely aesthetic and academic value, rather than specifically the importance of the aesthetic or academic value to the nation;<sup>174</sup> this focuses on maintaining a culturally rich nation rather than a nation rich in its own culture.<sup>175</sup> The fact that the cultural value of the object may be greater to another community or nation is ignored by the criteria. The system assumes value to the nation by the object having resided in the UK for 50 years.<sup>176</sup> The UK undoubtedly benefits from CHOs which came to the country during colonial times and so this system, which gives museums time to acquire these, effectively takes advantage of the colonial era, or at least benefits from it.

Once again, the narrow aim of the legal instrument reflects the norms of cultural heritage that it successfully upholds; in this way the concept of preservation upheld by the export licensing regime is that of preserving the association with a nation (although

---

<sup>171</sup> *ibid* [9].

<sup>172</sup> Arts Council (n 141) discussed above at text to n 141.

<sup>173</sup> n 141 above.

<sup>174</sup> Waverley (2) and (3).

<sup>175</sup> Woodhead, 'Cultural heritage principles' (n 123) 65.

it has been seen that the system extends beyond this stricter remit).<sup>177</sup> However, the physical preservation of the object is clearly not granted any normative action, in particular, because the Reviewing Committee may also take into account ‘the condition as well as the extent of the damage or restoration to which [the object] may have been subjected’.<sup>178</sup> This shows a preoccupation with retaining good quality objects meeting the Waverley Criteria; in an extreme situation an object would be rejected if not of the necessary quality, irrespective of any strong cultural heritage value. In the context of Canova’s *Three Graces*, the export licensing system is said to have ‘addressed the possible loss of the sculpture...but could not protect the integrity of the sculpture and its context.’<sup>179</sup> In that case the Canova sculpture had been removed from a listed building and a separate question arose as to whether it was a fixture.

The second instance in English domestic law where there is an assessment of the cultural heritage value of privately owned objects is the conditional exemption scheme (CES) in taxation law. This regime is held up in this thesis as representing a very strong recognition of the cultural heritage principles that are translated into legally enforceable norms which place duties on private owners of CHOs. These clear responsibilities placed on owners seemingly derive from the public’s ‘stake’ in the object (given in return for the taxation advantages) which means that the object should be preserved and the public given access. The valuing exercise and normative action are reactive insofar as the object is assessed for pre-eminence when it is offered as a means of gaining a taxation advantage, rather than proactive in terms of assessing the norms imposed in

---

<sup>177</sup> At p 159 above.

<sup>178</sup> DCMS 2005 (n 147) [12].

<sup>179</sup> Sarah E Bush, ‘The Protection of British Heritage: Woburn Abbey and The Three Graces’ (1996) 5 *International Journal of Cultural Property* 269, 281.

any event. Nevertheless this legal valuation is a response to neither physical loss nor to potential loss to the nation; assessments are made in an atmosphere without ‘knee jerk reactions’ to value, but instead without the contemporary pressures of imminent loss which are present in export licensing decisions.

The CES is one of several taxation schemes aimed at bringing ‘pre-eminent’ cultural objects into the public fold (either by continued private ownership with relevant access, or through transfer to public ownership<sup>180</sup>). These schemes, in a similar way to the export licensing scheme, require the application of criteria to the subject matter which assess the different types of value and their strength. The CES permits an owner to retain ownership of CHOs, but requires them to give undertakings regarding preservation and access,<sup>181</sup> in return for which the asset is exempt from inheritance tax.<sup>182</sup> CHOs that are conditionally exempt are ‘pre-eminent’ for ‘their national, scientific, historic or artistic interest’<sup>183</sup> and similar assessments to those found in the Waverley Criteria are undertaken. The questions are:

- (a) Does the object have an especially close association with our history and national life?
- (b) Is the object of especial artistic or art-historic interest?

---

<sup>180</sup> The Acceptance in Lieu scheme under ITA, s 230.

<sup>181</sup> Discussed below at p 166.

<sup>182</sup> Inheritance Tax Act 1984, s 30 (ITA).

<sup>183</sup> ITA, s 31(2). s 31(1)(a).



(c) Is the object of especial importance for the study of some particular form of art, learning or history?<sup>184</sup>

Whilst the Waverley Criteria use the term ‘outstanding’, the use of ‘especial’ here is certainly a synonym and suggests that the object must be something beyond the usual.

By permitting the owner to retain the CHO, the CES clearly recognises the associative value of objects as part of a collection<sup>185</sup> or with the places in which they are housed. It further provides for objects that are ‘historically associated’<sup>186</sup> with any building that has been conditionally exempt for its ‘outstanding historic or architectural interest’;<sup>187</sup> this might be in a situation where the objects in their own right would not be considered as pre-eminent. To determine the level and nature of association, the significance of the object to the building in which it is displayed is assessed, in addition to the period of time that the object has been there.<sup>188</sup> Furthermore, it is assessed whether there are any exceptional circumstances which ‘point to the desirability of the object (or group of objects) being accepted although the normal requirements are not met’.<sup>189</sup> This permits an associative value to be recognised for more recent additions to the building, for example any authentic restoration with historically appropriate objects.<sup>190</sup>

---

<sup>184</sup> HM Revenue & Customs, *Capital Taxation and the National Heritage* (HM Revenue & Customs 2011), <<http://www.hmrc.gov.uk/inheritancetax/conditionalexemption.pdf>> accessed 9 September 2012 [11.23].

<sup>185</sup> Indeed, a collection or group of objects to be considered pre-eminent as a whole: ITA, s 31(1)(aa).

<sup>186</sup> *ibid* s 31(1)(e).

<sup>187</sup> *ibid* s 31(1)(c).

<sup>188</sup> HM Revenue & Customs (n 184) [11.22(i-ii)].

<sup>189</sup> *ibid* [11.22(iii)].

<sup>190</sup> *ibid*

This scheme clearly recognises and assesses the cultural heritage value and gives effect to these different types of value through preservation and access without the need for public ownership. Public access is required, but by avoiding transfer into public ownership, there is no connotation of hoarding for the public. Instead, cultural heritage is preserved and accessed for its own sake.

Specific duties of preservation and access are clearly recognised as essential to the object's recognition as 'pre-eminent' and because the public now has a 'stake' in it by providing a taxation concession. This clearly fulfils the government's policy of 'preservation of the national heritage for the public benefit in private ownership'.<sup>191</sup> In this way, the system, through taxation incentives and contractual undertakings, aims to preserve not only objects of importance to the nation, but also those having associative importance and seeks to preserve these associations by incentivising owners to retain them in their context. If any conditionally exempt objects were sold without permission or the associated objects removed from the building then this would be a breach of the undertaking and could make the full tax chargeable on the asset.

A key element of the scheme is reasonable public access as prescribed by statute;<sup>192</sup> specifically, the reasonable public access requirement should not be confined to access with a prior appointment.<sup>193</sup> This was introduced by the Finance Act 1998. Concern had been raised about the public finding it difficult to gain access to some conditionally exempt objects.<sup>194</sup> Access is clearly high on the agenda. However, HM Revenue &

---

<sup>191</sup> HM Revenue & Customs (n 184) 8.

<sup>192</sup> ITA, s 31(2).

<sup>193</sup> *ibid* s 31(4FA).

<sup>194</sup> Mark Thomas, Channel Four Dispatches, Series 2 1998.

Customs takes a wide approach to this by not restricting it to national access. Therefore, it supports temporary exports of conditionally exempt objects since ‘Access would clearly be enjoyed by visitors to the exhibition, and public access, in its statutory context, is not confined to access in the UK’.<sup>195</sup>

The Acceptance in Lieu scheme, another taxation scheme, focuses on bringing into public ownership pre-eminent objects (or groups or collections of objects which taken as a whole are pre-eminent) in satisfaction of inheritance tax.<sup>196</sup> Once again the associative value of objects with places is upheld since when buildings are given in satisfaction of tax there is provision for any objects associated with the building to remain in situ.<sup>197</sup> Pre-eminence and association are assessed in the same way as under the CES.<sup>198</sup>

Whilst the criteria for pre-eminence are primarily the same as the Waverley Criteria, there is no commonality of terminology for the objects themselves, nor is there a common decision-making body. In the case of both conditionally exempt objects and those accepted in lieu of tax the Acceptance in Lieu Panel (administered by the Arts Council) makes recommendations to HM Revenue & Customs.

#### ***3.4.1.2 Failing to recognise cultural heritage value - entitlement to archaeological finds***

Where objects are found either during archaeological excavations or by chance, English domestic law neither engages in an assessment of their cultural heritage value, nor

---

<sup>195</sup> HM Revenue & Customs (n 184) [4.4].

<sup>196</sup> ITA, s 230(4)(a)-(b).

<sup>197</sup> ITA, s 230(3).

<sup>198</sup> HM Revenue & Customs (n 184).

provides a system of preservation and access by bringing them all into the public fold. Instead, English domestic law has committed itself to a statutory system under which objects defined as ‘treasure’ are owned by the Crown.<sup>199</sup> This categorisation focuses primarily on the age of the object and its precious metal content,<sup>200</sup> rather than its cultural heritage value *per se*; a somewhat arbitrary distinction is therefore made between those objects that are classed as treasure and objects that are not and which fall under the common law of finding.<sup>201</sup> Under the latter system, the owner or lawful possessor of the land has a better title to objects found in or attached to the ground than the finder.<sup>202</sup> The owner or lawful possessor of the land is then free to do what he wishes with the discovered objects. If the object remains in private ownership then the norms of preservation and access remain unfulfilled. Potentially much valuable cultural heritage information could be lost since the legal system fails to appreciate the different types of cultural heritage value, most notably ignoring the historical and evidential value. The public legacy aspects of both the TA and its statutory code of practice (TACoP) can be seen through its focus on national or local museums acquiring objects

---

<sup>199</sup> TA, s 4 or ownership is vested in one of the franchises: s 4.

<sup>200</sup> TA, s 1(1). Note certain Iron Age objects have been designated by the Secretary of State under s 2(1): Treasure (Designation) Order 2002, SI 2002/2666.

<sup>201</sup> The ‘Treasure Act’ has been described as a misnomer since it assumes that ‘only objects made from precious metals are worth protecting’: David WJ Gill, ‘The Portable Antiquities Scheme and the Treasure Act: Protecting the Archaeology of England and Wales, (2010) 20 *Papers from the Institute of Archaeology University College London* <<http://pia-journal.co.uk/index.php/pia/article/viewArticle/pia.333/409>> accessed 19 December 2012.

<sup>202</sup> *Waverley Borough Council v Fletcher* [1996] QB 334 (CA) 346 (Auld LJ), building on the decision of Donaldson LJ in *Parker v British Airways Board* [1982] QB 1004 (CA) 1010.

designated as treasure<sup>203</sup> to ensure that the finds are retained in the public domain for future generations; however English domestic law (as separate from the Portable Antiquities Scheme (PAS)) fails to fully reflect the strong public legacy towards the remains of our past by its restriction to objects of precious metal or of pre-historic origin. In the context of discovered portable antiquities one sees the successful dovetailing of a legal regime (under the TA) with a non-legal system (the PAS) which provides for a voluntary system of reporting; finders are encouraged to report their finds of ‘objects...that are irreplaceable and of great importance for the nation’s heritage’<sup>204</sup> so that the historical and archaeological information relating to them can be archived for current and future researchers.<sup>205</sup> In this way, the scheme treats non-treasure as having valuable information which can be recorded for posterity, rather than deriving value from the direct and continued access to the physical object. Even without a firm legal framework, it has proved a successful means of providing a fuller picture of the archaeological heritage of England,<sup>206</sup> and might be described as one of Brown’s ‘civil society strategies’.<sup>207</sup> Although he used this term in the context of dispute resolution, the PAS nevertheless demonstrates, in the same way as Brown’s examples, the concept of achieving a solution with collaboration and negotiation. People are contributing to the public interest by supplying information that we glean from the past so that we can use now and pass on to the future.

---

<sup>203</sup> Treasure Act 1996 Code of Practice (2<sup>nd</sup> Revised edition) [60], [63]. This is also clear from the debates on the passing of the Bill: David Shaw MP, HC Deb 8 March 1996, vol 273, col 563.

<sup>204</sup> Iain Sproat, HC Deb 8 March 1996, vol 273, col 584.

<sup>205</sup> The Portable Antiquities Scheme <[www.finds.org.uk](http://www.finds.org.uk)> accessed 1 September 2012.

<sup>206</sup> Between 1997 and 2010 over 740,00 finds were recorded by the PAS: Michael Lewis (ed), *The Portable Antiquities Scheme Annual Report 2009 & 2010* (The British Museum 2011) 4.

<sup>207</sup> Michael F Brown, *Who Owns Native Culture?* (Harvard University Press 2003) 246.

The aim of the TA is clearly to preserve our national heritage,<sup>208</sup> achieved by a carrot and stick approach. The stick requires a find to be reported where a person knows or has reasonable grounds for believing that it is treasure or where someone ‘acquires property in the object’ and knows or has reasonable grounds for believing that the find has not been reported; failure to do so is a criminal offence.<sup>209</sup> The reporting and ultimate preservation of important objects is further incentivised through the usual practice of finders and landowners sharing a reward equivalent to the market value.<sup>210</sup> This substantial reward therefore provides the carrot which further encourages the reporting of finds of treasure. The notion of preservation here is that of keeping important objects for the nation.

The TACoP provides the impetus to preserve the evidential and historical value of finds by providing guidance for finders to retain as far as possible the archaeological context to enable further research<sup>211</sup> as well as guidance that a coroner need not publicise the exact location of the site of a find.<sup>212</sup> However, the value of the find to a particular local community, on the face of the Code of Practice, appears subordinate to the national value in light of the current practice of giving first refusal to the national museum and only if the offer to purchase is declined, to offer it to other museums.<sup>213</sup> However, where the hoard is of national importance it ‘should be kept intact and will normally be

---

<sup>208</sup> Patrick Nicholls MP, HC Deb 8 March 1996, vol 273, col 561.

<sup>209</sup> TA, s 8(3) (finders) and s 8A(4) (acquirers of property).

<sup>210</sup> Provided that the finder was not trespassing, in which case it is likely to be abated: TACoP (n 205) [31] or where the parties have reached a prior arrangement, in which case that will usually be upheld: TACoP (n 205) [72]. Professional archaeologists do not obtain a reward: TACoP (n 205) [81].

<sup>211</sup> TACoP (n 205) [33] and to make a visual record of the site [34].

<sup>212</sup> *ibid* [46].

<sup>213</sup> *ibid* [63].

acquired by the national museum'.<sup>214</sup> This latter expectation is most likely due to the legislative preventions on deaccessioning from national museums which do not apply to non-national museums.<sup>215</sup> The find would therefore effectively be kept in perpetuity for the nation rather than be at risk of deaccession by a non-national museum.<sup>216</sup> Unusually, the ownership of the Staffordshire hoard (heralded as one of the most important archaeological finds ever) was shared between two local authorities for their museums,<sup>217</sup> despite its national importance. The perception, though, is that it is owned 'on behalf of the nation',<sup>218</sup> thereby recognising the public legacy, as discussed below. This treats the contents of the hoard as culturally and historically valuable rather than the extent of the hoard in terms of its associative value with all objects found within it (since it is displayed in different museums). Nevertheless, the introduction of Conservation and Research Advisory Panels,<sup>219</sup> dealing with the entire hoard, shows the recognition of the evidential value. It is a clear attempt to uphold those different types of value. However it is argued (on the basis of personal visitor experience) that an appreciation of the scale of the hoard, as whole, is lost when visiting only part of it.

---

<sup>214</sup> *ibid* [63(2)].

<sup>215</sup> Discussed below at p 183.

<sup>216</sup> Discussed at 206 below.

<sup>217</sup> Birmingham City Council and Stoke-on-Trent Council.

<sup>218</sup> 'Staffordshire Hoard Partners, <<http://www.staffordshirehoard.org.uk/partners>> accessed 2 September 2012.

<sup>219</sup> 'Conservation Advisory Panel' <<http://www.staffordshirehoard.org.uk/conservationandresearch/the-conservation-advisory-panel>> accessed 2 September 2012 and 'Research Advisory Panel' <<http://www.staffordshirehoard.org.uk/conservationandresearch/research-advisory-panel>> accessed 2 September 2012.

The TA itself upholds the notion of preserving the context or association by recognising associated objects; where an object (which would not be treasure in its own right) is found at the same time or after something that is treasure, all objects are classed as treasure.<sup>220</sup> In this way the non-precious metal vessel in which coins or other precious metal object has been found would remain with the coins, rather than being separated from the hoard. Therefore the whole find can be acquired by a museum rather than just the coins or the gold or silver object and there is no risk that the non-precious metal items would be returned to the finder.<sup>221</sup> Obviously, this does not prevent the museum from subsequently separating the objects if this is not prevented by any restrictions on transfer.<sup>222</sup> Once again though, the Act only goes so far in preserving context because it applies to only a small subset of archaeological objects found in England by bringing just treasure into public ownership. However, the PAS provides a means to prevent losing the contextual information through voluntary reporting, even if it does not retain the context itself. Once more, the notion of preserving for the nation, rather than preserving *per se* is evident in the TA. Further support for the indirect recognition of the norm of preservation is clear in the TACoP which suggests that where a find is of ‘national importance’ it should be kept intact and ‘will normally be acquired by the national museum’<sup>223</sup> and provides a presumption that ‘objects of treasure found during the course of archaeological excavations or investigations will be kept with the rest of the archaeological archive’.<sup>224</sup> However, where a hoard of treasure is acquired by a

---

<sup>220</sup> TA, s 1(1)(d).

<sup>221</sup> This is what happened under the previous common law of treasure trove: Sir Anthony Grant MP, HC Deb 8 March 1996, vol 273, col 553.

<sup>222</sup> E.g. the Staffordshire hoard (at p 171 above).

<sup>223</sup> TACoP (n 205) [63(3)].

<sup>224</sup> *ibid* [63(4)].



museum other than a national museum there is no legal duty on the museum's governing body to keep that collection intact. Potentially a collection could be divided (which happened with the Staffordshire Hoard with the shared ownership of the two local authorities) or part of it sold off<sup>225</sup>.

An attempt at preserving context for a wider category of discovered portable antiquities by deterring the initial illicit excavation is found in the provisions of the Ancient Monuments and Archaeological Areas Act 1979 (AMAAA 1979) which prohibits the use of metal detectors without prior consent on scheduled monuments, monuments under guardianship of the Secretary of State or an area of 'archaeological importance'.<sup>226</sup> This clearly extends the category of objects that are indirectly protected by the provision, albeit that it narrows the location of those objects to the protected places set out in section 42(2). The trade in any objects excavated in circumstances amounting to an offence is made illegal by the DCO(O)A, section 2(2) (whether in the UK or abroad). This treats all archaeological objects equally, regardless of age or precious metal content or the location in which they are found. Unfortunately, no convictions have been made under the Act, not least because of difficulties in proving when an object was illegally excavated since this needs to take place after the Act commenced.<sup>227</sup>

---

<sup>225</sup> Whether other pressures may come to bear on a museum that were to transfer permanently part of such a collection will be analysed in Chapter 4 in the context of museum codes of ethics.

<sup>226</sup> ss 42(1), (2).

<sup>227</sup> Simon Mackenzie, 'Dealing in cultural objects: a new criminal law for the UK' (2007) 71 *Amicus Curiae* 8, 11. See also Janet Ulph and Ian Smith, *The Illicit Trade in Art and Antiquities: International Recovery and Criminal and Civil Liability* (Hart Publishing 2012) 132

### **3.5 Recognition of value through systems of deterrence**

English domestic law has recognised to a limited extent the value of cultural heritage through specific criminal law offences and also by giving enhanced status to crimes involving cultural heritage when sentencing of other general criminal law offences.

#### **3.5.1 Recognising value and encouraging preservation of context, irrespective of ownership**

The desire to stem the flow of the illicit trade in CHOs has transcended the public-private ownership divide in terms of effectively upholding the cultural heritage principles and norms irrespective of who is the owner. The cultural heritage value of objects disassociated from either the building to which they were attached or their archaeological context is clearly recognised by the DCO(O)A.<sup>228</sup> For something to fall within the Act's ambit, it must be a 'cultural object', defined as being of 'historical, architectural or archaeological interest'.<sup>229</sup> No assessment is made of the degree of interest that the object has or to whom; in this way no full valuing exercise is mandated by the law (in terms of weighing up the plural types of cultural heritage value). Instead it suffices that the object satisfies a threshold level of interest. This approach is understandable since the illicit trade in such decontextualised objects is widespread and affects objects irrespective of degree of cultural heritage value; the information that may be lost through unlawful removal may be much more significant than the physical object itself. The aims of the legislation clearly show that it is focused on preventing

---

<sup>228</sup> The Act forms 'part of a range of measures designed to help protect and sustain our own and the international historic environment': Lord McIntosh of Haringey, HL Deb 12 September 2003, vol 652, col 557. It followed the recommendation of the Illicit Trade Advisory Panel: Norman Palmer (Chair), *Ministerial Advisory Panel on Illicit Trade: Report* (DCMS 2000).

<sup>229</sup> DCO(O)A, s 2(1).

loss to the historical record<sup>230</sup> and so recognises the wider cultural heritage value of objects and the need to preserve associative and evidential value (through context). The potential loss that this Act's provisions seek to preserve through deterrence is 'to all humanity',<sup>231</sup> and the Act 'shows that we care for the culture of other countries as well as our own'.<sup>232</sup> Therefore, it is a criminal offence to dishonestly deal<sup>233</sup> in a tainted cultural object (in that a person knew or believed that the object was tainted).<sup>234</sup> An object is tainted where it has been illegally removed or excavated from a building or monument of historical, archaeological interest respectively.<sup>235</sup> This desire to stem the illicit trade in decontextualised objects therefore elevates their status and separates them from other CHOs which might regardless have an associative importance with a person or place, but which are neither attached to a listed or building nor excavated from a scheduled monument.

The impetus to preserve the cultural heritage value of association and the loss to a nation of large tracts of their cultural heritage (through deterring activities) came in the form of the Iraq (United Nations Sanctions) Order 2003 (I(UNS)O) which responded to the UK's obligation to bring into force UN Security Council Resolution 1483 of May 2003.<sup>236</sup> This concerned sanctions imposed in the wake of the Iraq war. Specifically, article 8 makes provision for offences relating to 'Illegally removed Iraqi cultural

---

<sup>230</sup> ITAP (n 228) [66].

<sup>231</sup> *ibid*

<sup>232</sup> Baroness Buscombe HL Deb 12 September 2003, vol 652, col 555.

<sup>233</sup> Acquire, dispose, import or export: DCO(O)A, s 3(1). Dishonesty is determined by the test in *R v Ghosh* [1982] QB 1053 (CA).

<sup>234</sup> DCO(O)A, s 1.

<sup>235</sup> *ibid* ss 2(1) and (4).

<sup>236</sup> The Order was made pursuant to the United Nations Act 1946,

property’.<sup>237</sup> The article specifically refers to the various types of value in its definition as ‘of archaeological, historical, cultural, rare scientific or religious importance’,<sup>238</sup> recognising more varied types of value than the DCO(O)A. Again, whilst clearly articulating the types of cultural heritage value in the objects falling within its purview, the Order neither assesses the strength of value nor weighs up the different types of value where competing.

### **3.5.2 Elevating the status of cultural heritage through sentencing**

By elevating the status of certain objects considered to contribute to our nation’s cultural heritage and treating any offences dealing with such objects more severely this can act as a deterrent against inappropriate behaviour. This is clear from a case where the cultural and historical value of rare books in the British Library and the Bodleian Library were recognised; there a scholar had illegally cut out pages of rare texts and stolen them.<sup>239</sup> There was no specific definition of the subject matter of the case and terms such as ‘cultural and historical resource’<sup>240</sup> and ‘cultural property’<sup>241</sup> were used interchangeably, although it was acknowledged that the books contributed to the nation’s cultural heritage.<sup>242</sup> However, the court, in the absence of specific sentencing guidelines on cultural heritage, made an analogy with thefts in breach of trust.<sup>243</sup> This therefore elevated the status of the stolen property (CHOs) from everyday property to

---

<sup>237</sup> Defined in I(UNS)O, art 8(4).

<sup>238</sup> *ibid*

<sup>239</sup> *R v Farhad Hakimzadeh* [2010] 1 Cr App R (S) 10 (CA) [21].

<sup>240</sup> *ibid* [8].

<sup>241</sup> *ibid* [13].

<sup>242</sup> *ibid* [8]; see 24 above.

<sup>243</sup> *ibid* [14].

something of particular importance to the nation, worthy of a deterrent sentence.<sup>244</sup> In this way the court demonstrated the importance of encouraging the preservation of physical cultural heritage: ‘a significant element of deterrence is always necessary to deter others from such crimes which diminish the intellectual and cultural heritage of the nation’.<sup>245</sup> The focus here was on physical preservation of objects because the appellant had cut out pages from important books. Whilst the importance of discouraging such actions in the future was emphasised by the court, in treating the offence as akin to a breach of trust, this was not translated into a direct legal duty on anyone.<sup>246</sup> Furthermore, as Warner points out, the case’s impact was undermined by the reduction of the sentence due to mitigation.<sup>247</sup> She observes that the ‘message that theft or damage of cultural property is a serious offence that will attract condign punishment would have been stronger if no or little mitigatory weight had been given to the appellant’s reputation as a scholar and philanthropist’.<sup>248</sup> Nevertheless, *Hakimzadeh* does emphasise the justification of deterrent sentences to encourage preservation of cultural heritage.

Where the object’s importance rests in its role within a collection (where its individual financial value is minimal), the cultural value of that role can be recognised, as seen in

---

<sup>244</sup> *ibid* [13] and [21]. Although there was mitigation: text to n 248 below.

<sup>245</sup> n 239 [21].

<sup>246</sup> *Hakimzadeh* (n 239) [14]. The breach of trust analogy was relevant for the purposes of sentencing but the decision of the court did not place the defendant under any specific legal duty regarding the preservation of cultural heritage.

<sup>247</sup> *ibid* [19]. Kate Warner, ‘Theft of Cultural Heritage: *R v Hakimzadeh* (2010) 15 *Art Antiquity and Law* 95, 97.

<sup>248</sup> *ibid* 97.

the context of stolen books from the Royal Horticultural Society's library (RHS).<sup>249</sup> Again, the level of the appellant's sentence reflected the value of the collection (which was seen as 'at the very root of cultural heritage in this country'<sup>250</sup>), thereby distinguishing the texts, as CHOs, from ordinary property. *Jacques* clearly shows the recognition of the associative value of objects and the value of the collection *per se*.<sup>251</sup> In both *Hakimzadeh* and *Jacques* there was no prior legal categorisation of the objects as cultural heritage. Nevertheless, these objects would undoubtedly have fallen within the definition of 'cultural property' used by the UK for the purposes of the 1970 Convention<sup>252</sup> specifically category 9 'Books more than 100 years old, singly or in collections'.<sup>253</sup> Although the objects may have fallen within the definitions provided in the 1970 Convention, the 1993 Council Directive and the 2005 Council Regulation, these classification would only have affected the objects' treatment were they to have been exported and so these legal instruments had no effect in the circumstances. Instead, the classification of them as cultural heritage (albeit in varied terminology) in the two cases happened at the sentencing stage.<sup>254</sup> This exemplifies Avery's suggestion that value tends only to be articulated when the subject matter is at threat.<sup>255</sup> There may

---

<sup>249</sup> *R v William Simon Jacques* [2011] 2 Cr App R (S) 39 [1], [3].

<sup>250</sup> *ibid* [7].

<sup>251</sup> Discussed at 62 above.

<sup>252</sup> This definition is also found in the 1993 Council Directive (n ) and the 2005 Council Regulation (Council Regulation (EC) 116/2009 (n 142)).

<sup>253</sup> n 41 Annex, (9).

<sup>254</sup> The Court of Appeal in both *Hakimzadeh* (n 239) and *Jacques* (n 249) only needed to treat the objects in question as cultural heritage for the purposes of deciding the appropriate sentences to impose on the defendants. It was not necessary in the circumstances to classify the objects as cultural property for the purposes of engaging the provisions of the 1970 Convention.

<sup>255</sup> Avery (n 1). Discussed at p 89 above.

be some argument though, that objects contained within major collections such as the British Library, Bodleian and RHS libraries would, by virtue of their accession into the collection become cultural heritage.

### **3.6 Assuming or constructing value through law in museum collections**

It has been seen that not only do individual CHOs have a value, but so too may collections.<sup>256</sup> This may derive from the assemblage's connection with a particular person, or because of the value derived from the ideas and ideals of the collector which are demonstrated in the collection as a whole.<sup>257</sup> This section analyses the way in which collections are valued in law. First, in the context of national museums where value is assumed and secondly how the other museum structures can be set up so that the law can more effectively value cultural heritage.

#### **3.6.1 Assuming value and automatically privileging the contents of national museum collections**

The approach taken so far in this thesis towards the principles and norms of cultural heritage has been to look at them consecutively; where there are various types of cultural heritage value experienced by different people towards cultural heritage, this strength is recognised by the public legacy notion (linking the past, present and future use of the cultural heritage). In turn, these give rise to the norms of preservation and access. However, it is argued in this thesis that in the case of national museums in England, governed by statutes, the approach is to treat the cultural heritage principles

---

<sup>256</sup> See p 117 above.

<sup>257</sup> Patrick J O'Keefe, 'The Heritage Value of a Private Collection' in Marc-André Rénoild & Quentin Byrne-Sutton, *La libre circulation des collections d'objets d'art* (Schulthess Polygraphischer Verlag 1993) 182. Discussed at p 117 above.

and norms in reverse.<sup>258</sup> When curators received the original objects that were included in the collections that formed the national museum, they may not have made an individual assessment on each object. This is often also the case where a museum receives a large bequest.<sup>259</sup> Nevertheless, once an object is part of the national museum collection, the legal regime looks at the public legacy and deems that because it is there, it should be cared for because of its link with the past and the need for it to be available for future generations.<sup>260</sup> In reality, the cultural heritage value of an individual object is assumed and the law requires no assessment to be made that a particular object within a national collection has any independent cultural heritage value.<sup>261</sup> This focus on the public legacy, in turn, places duties of physical preservation, preservation of the collection intact<sup>262</sup> and reasonable access on the governing bodies of most (but not all)

---

<sup>258</sup> This is because, by virtue of its presence in the collection the object becomes part of the national museum, and therefore becomes virtually inalienable due to the restrictive statutory provisions on transfer: e.g. BMA s 3(4); National Heritage Act 1983, ss 6, 14 and 20 and MGA, s 4.

<sup>259</sup> The sheer size of bequests and the difficulty of researching each individual item has been relevant in the context of the lack of provenance checking in claims before the Spoliation Advisory Panel: Report of the Spoliation Advisory Panel in respect of a painting now in the possession of Glasgow City Council HC 10 (2004) [23] and Report of the Spoliation Advisory Panel in respect of three pieces of porcelain now in the possession of the British Museum London and the Fitzwilliam Museum, Cambridge (11 June 2008) (2008 HC 602) [25] and [30].

<sup>260</sup> *ibid*

<sup>261</sup> E.g. a print that may have been part of a larger bequest may have little value on its own account, perhaps being a poor example of a particular style, yet its value as part of the entire collection of the national museum would be assumed, even if by itself it adds nothing to the collection.

<sup>262</sup> BMA s 3(4); National Heritage Act 1983 (“NHA”), ss 6, 14 and 20 and MGA, s 4. C.f., IWMA, s 2(1)(c)



of the national museums.<sup>263</sup> The importance of retaining the objects within the collections for the public's benefit is a theme permeating the following discussion.

Curators are the public's agents in determining whether the object has sufficient merit in terms of its cultural heritage value and deciding whether to accept the object into the museum's collection through formal accession,<sup>264</sup> since there is no legally prescribed assessment of value. There is no express stipulation regarding the types of object that can become part of the collection of the British Museum,<sup>265</sup> the Victoria and Albert Museum (V&A),<sup>266</sup> the Science Museum<sup>267</sup> or the Imperial War Museum<sup>268</sup> and certainly there is no requirement of the objects meeting any particular level of cultural heritage value before accession takes place. Whilst the governing legislation of the Tate Gallery and the National Portrait Gallery refers to the types of object which shall comprise the collection, it makes no mention of the cultural heritage value of those objects.<sup>269</sup> The legislation governing the National Gallery requires an assessment of the cultural heritage value when looking at the objects that comprise the collection by

---

<sup>263</sup> MGA, s 2(1)(c), s 2(2)(c), ss2(3)(c) and s 2(4)(c).

<sup>264</sup> Although this has no legal definition, the Museums Association defines it as 'the act of formally including the item in the permanent collection and recording it in the register of the permanent collection': Museums Association, 'Ethical guidelines 1 – Acquisition Guidance on the ethics and practicalities of acquisition' (2<sup>nd</sup> edn Museums Association 2004) <<http://www.museumsassociation.org/download?id=11114>> accessed 23 September 2012, 1.

<sup>265</sup> British Museum Act 1963 (BMA), s 3(1) merely refers to 'the objects comprised in the collections of the Museum' in the context of the trustees' obligation to keep the collections and one of the trustees' general powers is merely to 'acquire...property' with no specificity: BMA, s 2.

<sup>266</sup> NHA, 2(1).

<sup>267</sup> *ibid* s 10(1).

<sup>268</sup> IWMA, s 2(1).

<sup>269</sup> Museums and Galleries Act 1992 (MGA), ss 2(2) and 2(3).

specifying that the collection should be ‘principally consisting of pictures, of established merit or significance...’ and associated documentation.<sup>270</sup> In this way, it is clear that whilst the National Gallery’s collections should comprise significant works rather than more minor ones, the law does not usually prescribe the nature or strength of any cultural heritage value that is necessary before an object can become part of the national museum’s collection. The law thereby generally assumes this value and attributes it to the objects within the collections as the strong recognition of public legacy and the norms affect not only the collection as a whole, but also the individual objects and depend on this value being assumed.

The first manner in which the public legacy is upheld is in the traditional notion of physical preservation of the objects within the collection, yet this is an inconsistent doctrine. Beyond their duty to keep the object together in an approved repository,<sup>271</sup> the trustees of the British Museum do not have a statutory duty to preserve the objects, nor does the Imperial War Museum.<sup>272</sup> Contrastingly, the governing bodies of the National Gallery, the Tate Gallery, the National Portrait Gallery and the Wallace Collection ‘so far as practicable...shall - care for [and] preserve’ the particular category of objects within their collections.<sup>273</sup> The governing bodies of the V&A, the Science Museum and the Armouries have identically worded obligations.<sup>274</sup> Whilst these requirements appear under headings relating to the functions of the board of trustees, and are required ‘so far

---

<sup>270</sup> *ibid* s 1(1).

<sup>271</sup> BMA, s 3(1).

<sup>272</sup> It is arguable that this similarity with the BMA is because both statutes were enacted in a similar era whereas the NHA and MGA were enacted in times with enhanced recognition of the duty to preserve.

<sup>273</sup> MGA, ss 2(1)(a), 2(2)(a), 2(3)(a) and 2(4)(a) respectively.

<sup>274</sup> NHA, ss 2(1)(a), 10(1)(a) and 18(2)(a) respectively.

as possible' they seem to constitute duties. These latter provisions correspond with the government recognition that 'Museums have a duty to care for objects entrusted to them for the benefit of the public'.<sup>275</sup> The norm of preservation, as translated into a legal duty, in the vast majority of national museum governing statutes, does presume that the objects themselves have sufficiently strong cultural heritage value to warrant such a normative response.

Perhaps the strongest legal recognition of the public legacy of national collections is found in the practically impenetrable statutes<sup>276</sup> preventing deaccessioning<sup>277</sup> even where it might be morally appropriate to do so.<sup>278</sup> These provisions can be interpreted as upholding the associative value of the collection, by seeking to preserve it intact.

The National Gallery Board has no power to dispose of objects from its collections other than by way of transfer to an institution in Schedule 5 of the MGA.<sup>279</sup> This shows a particularly strong degree of preserving collections.<sup>280</sup> The BMA prohibits disposal, save for the limited provisions of section 5.<sup>281</sup> The trustees may only 'sell, exchange,

---

<sup>275</sup> *Treasures in Trust: A Review of Museum Policy* (Department of National Heritage 1996) [3.2]. This moral obligation will be analysed further in Chapter 4.

<sup>276</sup> BMA, s 3(4); National Heritage Act 1983 ss 6, 14 and 20 and MGA, s 4. C.f. IWMA, s 2(1)(c) which permits disposal of objects that are no longer required.

<sup>277</sup> I.e. the permanent removal of an object from a museum's collection: *Ethical guidelines 2*, Museums Association <<http://www.museumsassociation.org/download?id=11113>> accessed 3 September 2012.

<sup>278</sup> *Attorney-General v The Trustees of the British Museum*: [2005] Ch 397 (Ch).

<sup>279</sup> MGA, s 4(3). The power of transfer is under MGA, s 6. The list of institutions in Schedule 5 is broadly the principal national museums and The Historic Buildings and Monuments Commission for England (English Heritage).

<sup>280</sup> This power of transfer is analysed further at p 161 above.

<sup>281</sup> BMA, s 3(4).

give away or otherwise dispose of' objects vested in them and compromised with the collections if the object is a duplicate<sup>282</sup>, if it is substantially of printed matter, being made not earlier than 1850 (and where a copy can be made by photography or similar means)<sup>283</sup> or if it is unfit to be retained in the collections and 'can be disposed of without detriment to the students.'<sup>284</sup> These limited powers of disposal are subject to any legal constraints imposed by particular gifts or bequests.<sup>285</sup> The trustees can also dispose of an object where it is damaged, deteriorating or is suffering from an infestation.<sup>286</sup>

The power to transfer printed matter covers situations where the disposal of the object does not leave a gap in the collection because either another object or a copy of the printed matter will suffice. In a rather roundabout way, the evidential value of cultural heritage (or more specifically the information contained within documents) is recognised in the limited exceptions where copies can be made.<sup>287</sup> This therefore ensures the preservation of the documentary record (the information), effectively prioritising the value of the information for culture, history or other study (i.e. what the object can tell us) over the authentic original.<sup>288</sup> The risk is that relatively recent material could be digitised with the original document being lost to the museum but its true cultural value not yet being fully appreciated.

---

<sup>282</sup> *ibid* s 5(1)(a).

<sup>283</sup> *ibid* s 5(1)(b).

<sup>284</sup> *ibid* s 5(1)(c).

<sup>285</sup> *ibid* s 5(1). This means by which testators and donors can construct value in law is discussed at p 215 below.

<sup>286</sup> *ibid* s 5(2).

<sup>287</sup> BMA, s 5(1)(b). Note that the BMA also applies to the Natural History Museum: s 8.

<sup>288</sup> At p 98 above.

Alleged past exercise of the power to dispose of duplicates has caused controversy in the context of the Benin Bronzes, not least because these objects are subject to claims from Nigeria for their return,<sup>289</sup> but also because of the conceptual difficulty in treating these bronzes as anything other than unique.<sup>290</sup>

In the context of the power to dispose of an object where it is ‘unfit to be retained’ there is a proviso, requiring the trustees to determine that there is no detriment to students.<sup>291</sup> This is a narrow subset of the potential beneficiaries on whose behalf the collection is held by the British Museum Trustees and focuses on those who use the collection as a study resource, rather than general visitors to the collections. It is therefore not as inclusive as the notion of the ‘citizens of the World’, who the British Museum’s trustees treat as the trust’s beneficiaries.<sup>292</sup> Instead, the narrow category of person in section 5(1)(c) is reminiscent of the original target audience of the museum where it was ‘chiefly designed for the use of learned and studious men, both natives and foreigners, in their researches into the several parts of knowledge...’<sup>293</sup> In contrast, the comparable provision to section 5(1)(c), relating to the Tate Gallery, deals with objects that are ‘unsuitable for retention’ but the proviso for the museum’s governing body is that the disposal should be ‘without detriment to the interests of students or other members of

---

<sup>289</sup> Maev Kennedy, ‘British Museum sold precious bronzes’ *The Guardian* 28 March 2002 <<http://www.guardian.co.uk/uk/2002/mar/28/education.museums>> accessed 5 September 2012.

<sup>290</sup> See Nigel Evans, Letter 1 March 1997 *The Independent* <<http://www.independent.co.uk/voices/letter-british-guilt-over-the-benin-bronzes-1270387.html>> accessed 4 January 2013.

<sup>291</sup> BMA, s 5(1)(c).

<sup>292</sup> British Museum Reports and Accounts for the year ended 31 March 2007, Chairman’s foreword, 12 July 2007 (2007 HC 777).

<sup>293</sup> Joseph Mordaunt Crook, *The British Museum* (Allen Lane The Penguin Press, London 1972) 54.

the public’.<sup>294</sup> This therefore acknowledges the modern wider remit of museums as responsible to different stakeholders.<sup>295</sup>

The focus of these restrictions is clearly on retaining the entire collection together, regardless of how valuable the collection is as a whole. The law assumes that the curator’s assemblage of objects has cultural heritage value, worthy of preserving for future generations; this is a strong recognition of the approach that ‘a museum’s collection is to be held on behalf of the public as inalienable cultural assets’.<sup>296</sup> A practically impenetrable duty to preserve national collections together and not to transfer in circumstances where there may be strong moral arguments for doing so, demonstrates that the cultural heritage value and the norm of preserving the cultural heritage value of each object may be frustrated. The decision of the Vice Chancellor in *AG v Trustees of the British Museum*<sup>297</sup> shows that there are no additional common law powers for national museum governing bodies to deaccession objects based on a moral compunction to do so. It was held that the principle established in *Re Snowden*<sup>298</sup> which allows for the transfer of charity property, on the approval of the Secretary of State cannot be used to fulfill a perceived moral obligation where a statutory bar on transfer exists preventing this.<sup>299</sup>

---

<sup>294</sup> MGA, s 4(4)(b).

<sup>295</sup> Discussed further at p 262 below.

<sup>296</sup> Treasures in Trust (n 275) [3.2] (one of the guiding principles). It will be argued below that this approach shows that there is little justification in treating non-national museums differently from this.

<sup>297</sup> [2005] Ch 397 (Ch).

<sup>298</sup> [1970] Ch 700 (Ch).

<sup>299</sup> *AG v Trustees of the British Museum* (n 297) [45].

### 3.6.1.1 *Pursuing another agenda?*

It therefore appears settled law that the governing bodies of these national museums are unable to deaccession objects either in general terms by responding to repatriation requests (to give effect to moral obligations) or by way of sale. The effect of these prohibitions is that whilst, on the face of it, the aim is to preserve intact the national collections as a valuable cultural unit, the focus is more on retaining the national collections for future generations in the public domain, since transfers can take place between institutions, in which case the direct associative value of the collections would be lost.<sup>300</sup> The power of the trustees to transfer objects to other museums in Schedule 5 of the MGA, demonstrates that the British Museum's collection (and those of the other named national museums) are not inviolable and transfer may frustrate the full associative value of such a global collection.<sup>301</sup> The focus of the legislation is on fulfilling the public legacy principle in general and the notion of "saving objects for the nation",<sup>302</sup> within the major collections, rather than the norm of preserving intact the collection because of the specific value of that collection as an entity.<sup>303</sup> It is difficult, therefore, to justify arguments against return based solely on the ideal of maintaining the associative value of the objects as a collection.

---

<sup>300</sup> Under MGA, s 6(1).

<sup>301</sup> The power of transfer exists under MGA, s 6(1).

<sup>302</sup> The language of 'saving for the nation' or 'save for the nation' has developed in the context of the export deferral process under the Waverley Criteria both in the media and official policy: see Fiachra Gibbons, 'Tate chief attacks "save for the nation" art policy' *The Guardian* 12 November 2003<<http://www.theguardian.com/uk/2003/nov/12/arts.artsnews3>> accessed 30 December 2013 and DCMS and Arts Council, *Export of Objects of Cultural Interest 2011/12* (n 146) 4.

<sup>303</sup> As discussed at p 117 below.

Some national collections originated from large individual bequests or donations, around which the national museum was established<sup>304</sup> and so the association between objects later added to the collection and the original objects may be quite weak.<sup>305</sup> Arguments in favour of creating such an association have been made in terms of the universal nature of global collections such as the British Museum which contain encyclopaedic collections which should remain together.<sup>306</sup> Such a strong public legacy risks stifling the recognition of the different types of cultural heritage value on many occasions. For example were a repatriation request made for the Rosetta Stone there is no mechanism through which the different types of cultural heritage could be assessed and acted upon since the statutory bar in the BMA would be insurmountable without legislative intervention. The restrictive powers of deaccessioning support a notion of

---

<sup>304</sup> E.g. the British Museum, The Tate Gallery and the Wallace Collection: Sheila Watson & Andrew Sawyer, 'National Museums in Britain' in Peter Aronsson & Gabriella Elgenius (eds), *Building National Museums in Europe 1750-2010*. EuNaMus Report No 1 (Linköping University Press 2011).

<sup>305</sup> For example, there are no restrictions on the types of objects that can be acquired by the trustees of the British Museum (BMA), ss 2 and 3(1). Therefore there is potential for an eclectic mix of objects acquired by the museum as a result of bequests or purchases over time. E.g. there may be little connection between the British Museum's collections of Kanga textiles from Africa and the Mildenhall Treasure from Roman Britain (two objects featured on the opening page of the British Museum's online collection: <[http://www.britishmuseum.org/research/collection\\_online/search.aspx](http://www.britishmuseum.org/research/collection_online/search.aspx)> accessed 30 December 2013). However, the varied nature of these objects contributes the notion of the collection as encyclopaedic and a 'universal museum': see Chris Wingfield, 'Placing Britain in the British Museum: Encompassing the Other' in Simon J Knell, Peter Aronsson, Arne Bugge Amundsen, Amy Jane Barnes, Stuart Burch. Jennifer Carter, Viviane Gosseline, Sarah A Hughes and Alan Kirwan, *National Museums: New Studies from Around the World* (Routledge 2011) 123-124.

<sup>306</sup> *Declaration on the importance and value of universal museums* [2004] ICOM News 4. Discussed at p 257 below.



public legacy and preservation that is primarily geared towards privileging the general ‘public view’ about preserving collections intact for the future, rather than focusing on balancing the, at times competing, different types of cultural heritage value.<sup>307</sup> There are clear legislative signals that the collections are not as impregnable as might otherwise be thought with the two statutory exceptions permitting transfer of human remains and Nazi Era cultural objects.<sup>308</sup> These two exceptions to the inalienable nature of national collections show a limited recognition of the other aspect of the public legacy which concerns returning objects where it is more important to other groups or where it is appropriate to do so. Both the H(RCO)A and section 47 of the HTA put national museums on an equal footing with non-national museums which have no statutory bar to giving effect to perceived moral obligations.<sup>309</sup> These systems, which clearly demonstrate the interface between law and ethics, have the potential to assess value and make decisions which fulfil the cultural heritage value.<sup>310</sup>

---

<sup>307</sup> E.g. the cultural heritage value of objects to communities, whether specifically for the community’s identity or cultural practices: see Blake (n 76) 7. This may include letting the cultural heritage object deteriorate: e.g. the Lakota Ghost Dance Shirt Seventh Report of the Select Committee on Culture, Media and Sport, ‘Cultural Property: Return and Illicit Trade’ HC (1999-2000) 371-III Memorandum Submitted by Glasgow City Council, Evidence 18 May 2000 [2.2.2] or the Zuni War Gods: Adele Merenstein, ‘The Zuni Quest for Repatriation of the War Gods: An alternative basis for claim’ (1992) *American Indian Law Review* 589, 590.

<sup>308</sup> Holocaust (Return of Cultural Objects) Act 2009 and the Human Tissue Act 2003, s 47 discussed at p 190 below.

<sup>309</sup> Although where a charity, will need to have permission of the Charity Commission or the Attorney General: at p 247 below.

<sup>310</sup> The effectiveness of this is discussed at p 195 below.

The first of these, the H(RCO)A, aimed to provide justice for those Jewish owners of cultural objects during the Second World War and was seen as the UK fulfilling its commitments under the 1998 Washington Conference principles<sup>311</sup> and as drawing ‘a line in the sand which indicates that Britain, and, indeed, no right-thinking country, will ever again allow that kind of injustice to be perpetrated, either in the name of democracy or of humanity.’<sup>312</sup> Whilst the Act’s title alludes to this Holocaust connection, the legislation’s ambit (which mirrors the terms of reference of the SAP<sup>313</sup>) is cultural objects where possession was lost during the Nazi Era<sup>314</sup> and not necessarily caused by the Nazis themselves. The only cultural object transferred from a national collection to date was the Beneventan Missal, a twelfth century manuscript, lost from a Chapter House in Italy during the confusion of war (unrelated to the Nazis).<sup>315</sup> The wide ambit of this statute demonstrates that it can extend beyond seeking to redress past wrongs and return objects in circumstances where an object has been wrongfully taken but where acquisition was made without the requisite levels of provenance checks. This

---

<sup>311</sup> *Principles with respect to Nazi-Confiscated Art*, Washington Conference on Holocaust-Era Assets, 1998 <[www.state.gov/www/regions/eur/981203\\_heac\\_art\\_princ.html](http://www.state.gov/www/regions/eur/981203_heac_art_princ.html)> accessed 6 January 2013.

<sup>312</sup> Lembit Öpik MP, Public Bill Committee, ‘Holocaust (Stolen Art) Restitution Bill’ HC (2008-09) col 14.

<sup>313</sup> DCMS, ‘Spoliation Advisory Panel Terms of Reference’

<<http://webarchive.nationalarchives.gov.uk/20121204113822/http://www.culture.gov.uk/images/publications/SAPConstitutionandTOR11.pdf>> accessed 14 April 2013 [1]. It recommends just and fair solutions based on the moral strength of the claim and whether any moral obligation rests on the possessor institution, in particular from the circumstances of the acquisition.

<sup>314</sup> H(RCO)A 2009, s 3(3).

<sup>315</sup> Report of the Spoliation Advisory Panel in respect of a renewed claim by the Metropolitan Chapter of Benevento for the return of Beneventan Missal now in the possession of the British Library (15 September 2010) (2010 HC 448).

brings some hope to extending the powers of national museum governing bodies to include transfers that are not simply to redress past wrongs for widespread atrocities such as the Holocaust.<sup>316</sup> If such an extension were made it would bring the English law in line with the non-legally binding obligation in the UN Declaration on the Rights of Indigenous Peoples which requires states ‘to provide redress through effective mechanism, which may include restitution...with respect to their cultural...religious and spiritual property taken with their free, prior and informed consent or in violation of their laws, traditions and customs’.<sup>317</sup> This instrument goes further in the context of ceremonial objects and human remains which requires states ‘to enable the access and/or repatriation’ of such things ‘through fair, transparent and effective mechanism developed in conjunction with indigenous peoples concerned.’<sup>318</sup>

The second exception deals with the transfer of human remains, which are of significance to the communities from whom the deceased originates. Section 47 of the HTA permits the governing bodies of nine named national museums<sup>319</sup> to transfer human remains of people who died less than 1,000 years before the commencement of the section where it ‘appears appropriate to do so for any reason, whether or not relating to their functions’.<sup>320</sup> This provision was introduced on the recommendation of the Working Group on Human Remains which had been established, in part, following a joint statement by the Australian and British prime ministers committing themselves to

---

<sup>316</sup> But NB the British Museum Act 1963 (Amendment) Bill HC Bill (2008-2009) that failed after its second reading.

<sup>317</sup> art 11(2).

<sup>318</sup> art 12(2).

<sup>319</sup> HTA 2004, s 47(1).

<sup>320</sup> *ibid* s 47(2). The power does not, however, override any trust or condition which would prevent this: HTA 2004, s 47(4).

encouraging the repatriation of Australian indigenous human remains.<sup>321</sup> This seemingly wide power in theory allows return for any reason whether or not it relates to assessing the cultural heritage aspect of the remains.<sup>322</sup> However, DCMS has produced non-statutory guidance for the exercise of this power<sup>323</sup> which requires museums to establish similar institutional guidance as a policy to govern their day-to-day curation as well as decision-making.<sup>324</sup> This power and its accompanying guidance therefore provides an opportunity for museums to give effect to the cultural importance of the remains to communities and to take into account a variety of factors when reaching their decisions.<sup>325</sup>

These recent exceptions to deaccessioning were introduced in response to political will and changing social mores to correct past injustices and interfere with the strict public

---

<sup>321</sup> Extracted in Norman Palmer (Chair), *Report of the Working Group on Human Remains* (DCMS 2003) [4]. This commitment followed the increased awareness of the need to repatriate indigenous human remains. In Australia this received government support, leading to repatriation of human remains, and the establishment of a repatriation unit at the National Museum of Australia which acts as a repository for repatriated remains. This support also led to the Joint Statement between the two prime ministers. See generally Marilyn Truscott, 'Repatriation of Indigenous Cultural Property' paper prepared for the 2006 Australian State of the Environment Committee, Department of the Environment and Heritage, Canberra, < <http://www.environment.gov.au/system/files/pages/e535aa20-601d-4e5f-9279-5fe172d2b708/files/repatriation.pdf> > accessed 30 December 2013.

<sup>322</sup> Although as a public body, decisions of the trustees of the British Museum would be subject to judicial review and so could be neither illegal, irrational nor *Wednesbury* unreasonable: *Wednesbury Corp v Ministry of Housing and Local Government* (No 2) [1966] 2 QB 275 (CA).

<sup>323</sup> And which is equally applicable to non-national museums which in any event had a power to deaccession objects, in the absence of any prohibitory trust or condition.

<sup>324</sup> DCMS *Guidance for the Care of Human Remains in Museums* PP 847 (DCMS 2005) 16.

<sup>325</sup> This process will be discussed in more detail in Chapter 4.

legacy if one interprets it solely as passing on to future generations the CHOs that have gone before. However, if one focuses on cultural heritage as an intangible concept then the cultural heritage value and the public legacy can still be upheld even though the objects no longer remain in public ownership if one considers the public and therefore the public legacy as being tainted by the continued retention, in public collections, of such objects.<sup>326</sup> However, this extended public legacy argument can be applied equally to other tainted objects held by national collections (such as the Maqdala Treasure<sup>327</sup>) and yet the statutory bars clearly prevent giving effect to moral desires to repatriate such sacred objects. There appears to be a clear inconsistency in approach and the limited exceptions to deaccessioning were in response to clear political pressure<sup>328</sup> even though equally strong claims can be made for other objects within national collections.<sup>329</sup> O'Donnell suggests that the link between the looting of Jewish property

---

<sup>326</sup> E.g. Baroness Deech, Hansard HLvol 712 cols 907-908 10 July 2009 in the context of Nazi Era cultural objects.

<sup>327</sup> See Nita Bhalla, 'Ethiopia presses for return of treasures' <<http://news.bbc.co.uk/1/hi/world/africa/651322.stm>> accessed 9 September 2012.

<sup>328</sup> Specifically the Joint Statement of the British and Australian Prime ministers and the cross-Parliamentary support for the passage of the Holocaust (Return of Cultural Objects) Act 2009 which was described as a 'friendly consensus on this important issue': Andrew Dismore MP, Public Bill Committee, 'Holocaust (Stolen Art) Restitution Bill' HC (2008-09) col 4.

<sup>329</sup> For example the Maqdala Treasure, which are sacred Ethiopian Tabots located in the British Museum's collection, have been described by the Culture, Media and Sport Select Committee as one of the clearest examples of where a museum should give effect to a moral claim: First Report from the Culture, Media and Sport Select Committee, 'Cultural Objects: Developments since 2000' (2003-04 HC 59) [58]. See also Robert K Paterson, 'Resolving Material Culture Disputes: Human Rights, Property Rights and Crimes Against Humanity' (2006) 14 *Willamette Journal of International Law and Dispute Resolution* 155, 164 in the context of culturally affiliated objects of cultural significance to communities.

and genocide might justify such differing treatment,<sup>330</sup> but highlights the difficulty that ‘future victim-groups must surpass the Holocaust-paradigmatic standards of suffering’.<sup>331</sup>

### 3.6.1.2 *Exercising the power to return objects: extra legal considerations*<sup>332</sup>

Decisions about deaccessioning by either a national museum (under a statutory exception) or a non-national museum (which in general has no restriction on this power) provide scope to balance the different types of cultural heritage value as well as the public legacy to fulfil the corresponding norms. The power under the HTA,<sup>333</sup> is exercised by individual museums and informed by the DCMS Guidance<sup>334</sup> and any institutional human remains policy.<sup>335</sup> Governing bodies of non-national museums that are unconstrained by statute or any trust or condition may decide about transferring Nazi Era cultural objects in-house; although they may refer the claim to the SAP if the

---

<sup>330</sup> Thérèse O'Donnell, ‘The Restitution of Holocaust Looted Art and Transitional Justice: The Perfect Storm or the Raft of Medusa?’ (2011) 22 EJIL 49, 70.

<sup>331</sup> *ibid* 71.

<sup>332</sup> Whilst this analysis necessarily includes extra legal considerations (and could equally be considered in Chapter 4), the decision has been taken to discuss the exercise of powers under HTA 2004, s 47 and the H(RCO)A at this juncture. It should be noted that these decision-making processes also occur when non-national museums decide whether or not to respond to moral claims.

<sup>333</sup> s 47.

<sup>334</sup> DCMS, *Guidance for the Care of Human Remains in Museums* PP 847 (DCMS 2005) (DCMS HR Guidance).

<sup>335</sup> E.g. ‘The British Museum Policy on Human Remains’ <<http://www.britishmuseum.org/pdf/Human%20Remains%206%20Oct%202006.pdf>> accessed 27 October 2012 and ‘Policy on Human Remains held by the University of Oxford’s Museums’ *Oxford University Gazette* Supplement (2) to No. 4787 (15<sup>th</sup> November 2006).

parties would prefer an *ex gratia* sum by the government.<sup>336</sup> A national museum's power to transfer an object only arises on the recommendation of the SAP and the Secretary of State's approval.<sup>337</sup>

An argument made in support of returning objects taken during the Nazi Era to the heirs of their pre-war owners was the symbolic importance of the objects to those families and the desire to recover these is because of the 'great personal meaning as the last link with lives that were utterly destroyed or irrevocably damaged by the Nazis'.<sup>338</sup> Despite these strong sentiments, it appears not to be a factor for the SAP, having been prepared to return gallery stock in the same way as family-owned objects.<sup>339</sup> Therefore, the SAP focuses more on returning objects to their rightful owners, or redressing past wrongs than taking into account the cultural heritage value.<sup>340</sup> From the opposite point of view, the symbolic or cultural value might be strongly felt by the visiting public in circumstances where the object has little or no personal connection with the claimant.<sup>341</sup> In such a situation it is arguable that a more nuanced balancing exercise is needed

---

<sup>336</sup> Such as in the *Courtauld/Feldmann* claim: Report of the Spoliation Advisory Panel in respect of three drawings now in the possession of the Courtauld Institute of Art (24 January 2007) (2007 HC 200)

<sup>337</sup> H(RCO)A, s 2.

<sup>338</sup> Select Committee 371-III (n 42), Minutes of Evidence, Memorandum submitted by the Commission for Looted Art in Europe.

<sup>339</sup> Report of the Spoliation Advisory Panel in respect of a painting now in the possession of Glasgow City Council HC 10 (2004).

<sup>340</sup> Charlotte Woodhead, 'Redressing historic wrongs, returning objects to their rightful owners or laundering tainted objects? 21st century UK remedies for Nazi Era injustices' (2014) (forthcoming).

<sup>341</sup> Perhaps if the claimant is a distant relative by marriage of the original owner.

regarding the relative importance of the object where there is a significant cultural value to the public and therefore a strong reason for the institution retaining the object.<sup>342</sup>

The SAP fails to fully balance these competing types of value and specifically the cultural heritage value of the object and the public legacy. The SAP focuses on whether the moral claim is made out and how best to fulfil that. Hitherto none of the SAP's recommendations has justified retention of an important cultural object and an *ex gratia* payment on the basis of a strong cultural value to the public of retaining it within the public collection, despite in several cases acknowledging the importance of the object to the museum collection and notably its public importance.<sup>343</sup> Public benefit, whilst being argued by some respondents, has not formed a substantive part of the reasoning of the SAP's recommendations.<sup>344</sup> Arguably cultural heritage value to the public would be lost if it were likely that (a) on its return the object would be kept in private without public access or (b) it might be exported abroad. In the former situation it would be difficult to justify retention solely because the potential transferee (who would later be the owner) decided to keep the object in private. There is no general obligation on

---

<sup>342</sup> Here the phrase 'public benefit' is used to refer specifically to the different types of cultural heritage value that the public would derive.

<sup>343</sup> E.g. *The Rothberger claim*: Report of the Spoliation Advisory Panel in respect of three pieces of porcelain now in the possession of the British Museum London and the Fitzwilliam Museum, Cambridge (11 June 2008) (2008 HC 602) [6].

<sup>344</sup> The British Library argued that its good stewardship of the manuscript and provision of free access to scholars and experts compared with the difficulties encountered in the past of accessing the manuscript when in the claimant's possession meant that the public interest fell in their favour (Report of the Spoliation Advisory Panel in respect of a 12<sup>th</sup> century manuscript now in the possession of the British Library (23 March 2005) (2005 HC 406) [70]. The Panel rejected this argument, stating that had it been successful, it would defeat all future claims for objects held in national collections [71].



private owners of culturally important objects to display them in public and so it would be difficult to indirectly impose one here. However, in the latter situation, the value to the public of retaining the object would be strong if it were of national importance such that in the usual course of things the granting of an export licence would be deferred (and might ultimately remain in the country).<sup>345</sup> Were the SAP to take this into account in the future, it would effectively need to pre-empt the Reviewing Committee's decision by assessing whether the object would likely satisfy the Waverley Criteria. The SAP is unlikely to adopt such an approach bearing in mind the view that the public benefit of retention of an object (and the public access that would follow) are subordinate to the interests of the claimants.<sup>346</sup> However, where the object has no strong symbolic or cultural value to a claimant<sup>347</sup> and he intends to sell it outside the public domain, this value to the public would seem a relevant consideration for the SAP when assessing the appropriate remedy to give effect to a moral claim.<sup>348</sup> In a similar way in which a court

---

<sup>345</sup> Arts Council (n 141) 3.

<sup>346</sup> Select Committee (n 42) [193].

<sup>347</sup> I.e. he is claiming it *qua* property rather than *qua* cultural heritage.

<sup>348</sup> This could be a situation where Waldron's concept of superseding circumstances apply in the sense that the circumstances of the original injustice have been transformed such that return of the CHO is no longer appropriate, but that instead it should remain in the public collection for the public benefit: see Jeremy Waldron, 'Superseding Historic Injustice' (1992) 103 *Ethics* 4, 24. In the recent Dutch claim (Advisory Committee on the Assessment of Restitution Applications, *Binding opinion in the dispute on restitution of the painting entitled Christ and the Samaritan Woman at the Well by Bernardo Strozzi from the estate of Richard Semmel, currently owned by Museum de Fundatie: Case Number RC 3.128* <[http://www.restitutiecommissie.nl/en/recommendations/recommendation\\_rc\\_3128.html](http://www.restitutiecommissie.nl/en/recommendations/recommendation_rc_3128.html)> accessed 2 January 2014) the public benefit of keeping a particular painting in a public museum was a relevant consideration, particularly in circumstances where the claimants had never known the dispossessed

only enquires into what a claimant will do with his damages when determining whether it is reasonable to award diminution in value or cost of cure, it might be appropriate for the Panel to make such an enquiry when dealing with important CHOs.<sup>349</sup>

The only situation where the public benefit (and therefore necessarily the cultural value) to be derived from continued retention of the object was considered was where the favoured solution of both parties was retention of the objects in the public collection and they sought the payment of an *ex gratia* payment by the government to the claimants.<sup>350</sup> In the circumstances, the SAP viewed the poor quality of the drawings as providing minimal public benefit.<sup>351</sup> Consequently it was considered unfair to burden the taxpayer with paying even such a ‘modest’ sum (approximately £10,000).<sup>352</sup> This absence of a clear public benefit removed the justification for public expenditure (despite it being the preferred solution of the parties). This approach seems to favour concern for public benefit when public funds are at stake, but not where there is a risk of losing a culturally valuable object from which the public would derive benefit. However, it is clear that certainly the trustees of the British Museum will carefully take into account their public responsibilities regarding the public benefit. In its 2010 Deaccession Policy the museum trustees state that even if the SAP recommends return, the trustees must be satisfied that

---

owner. The Dutch Committee decided in that case not to return the painting, but to recommend the display of an account of the dispossessed owner’s link with the painting [7.7] and [7.8].

<sup>349</sup> Under the principle in *Ruxley Electronics & Construction Ltd v Forsyth* [1996] 1 AC 344 HL, 372.

<sup>350</sup> *Courtauld/Feldmann claim* (n 336) [28].

<sup>351</sup> *ibid*

<sup>352</sup> *ibid* [24].

‘the transfer of the object represented the best solution to the claim after giving due weight to the importance of the object to the Museum’s collection and circumstances in which the object was acquired by the Museum’.<sup>353</sup>

This therefore takes into account the cultural heritage value at stage 3 of the process under section 2 of the H(RCO)A. The British Museum’s policy also narrows the scope of the power under the H(RCO)A by stating that when exercising the power the trustees must be satisfied that the original owner lost possession of the object ‘as the consequence of wrongful action of the National Socialist Government of Germany or its collaborators in Nazi occupied Europe’.<sup>354</sup> Therefore were the Beneventan Missal to have remained in the British Museum rather than transferred to the British Library in 1972<sup>355</sup> it is unlikely that it would have been returned to Benevento, in which case there would have been no return of the Missal to change the perception by the city of Benevento towards the UK ‘from one of deep hurt, mistrust, even of hate, to one of joyful pleasure and generosity of spirit’.<sup>356</sup>

Whereas the SAP fails to focus on the issue of the cultural heritage value enjoyed by the general public, various museum governing bodies exercising the similar power found in section 47 of the HTA have focused more closely on this exercise, influenced by the DCMS Guidance. This document encourages museums to balance the different types of value including the cultural and religious significance of the human remains to the

---

<sup>353</sup> *British Museum Policy on De-Accession of Registered Objects from the Collection*, 4 March 2010 <[http://www.britishmuseum.org/pdf/Deaccession\\_2010-03-04.pdf](http://www.britishmuseum.org/pdf/Deaccession_2010-03-04.pdf)> accessed 4 November 2012, 3.7.4

<sup>354</sup> *ibid* 3.7.2.

<sup>355</sup> Under the British Library Act 1972, s 3(1).

<sup>356</sup> Jeremy Scott, ‘War and Cultural Heritage: Return of a Beneventan Missal’ (2005) 10 *Art Antiquity and Law* 299, 306.

claimant community<sup>357</sup> and the scientific, educational and historical value of the remains to the museum and to the public.<sup>358</sup>

Public legacy forms a major part of the decision making process according to the DCMS Guidance.<sup>359</sup> First the considerations of the past and future educational and scientific value to the museum and to the public strongly uphold the public legacy.<sup>360</sup> Secondly, the consideration of the circumstances of the removal and acquisition of the remains is also relevant to the decision and clearly shows a concern for the public legacy (by not benefiting from something that has been tainted by wrongful taking).<sup>361</sup> Thirdly, there is a clear link to public legacy in the sense that there is concern for what would happen to the remains were they to be returned to a community.<sup>362</sup> However, some museums<sup>363</sup> have created a metaphorical bar entitled ‘public benefit’ which any

---

<sup>357</sup> DCMS Guidance (n 334) 27 where it states ‘Demonstration through some or all of the ways above, of strong continuous cultural, spiritual or religious significance of particular human remains, will add weight to a claim.’

<sup>358</sup> *ibid* 28: ‘In considering a request for return of human remains, a museum should carefully assess their value and reasonably foreseeable potential for research, teaching and display and should ensure that specialists with appropriate knowledge and experience have assessed this.’ This balancing exercise is clearly articulated where the Guidance sets out the document’s ethical framework and states: ‘It is important for museums to be willing to consider the views of all those with interests, but no one view will have automatic preeminence’: DCMS Guidance (n 334) 13.

<sup>359</sup> Specifically where it states ‘In considering the future of remains, consideration may be given to what use they had been put in the past’: DCMS Guidance (n 334) 28.

<sup>360</sup> DCMS Guidance (n 334) 28.

<sup>361</sup> *ibid* 27.

<sup>362</sup> *ibid* 28.

<sup>363</sup> E.g. the British Museum (BM HR Policy (n 335)) and the Pitt Rivers Museums (Oxford University HR Policy (n 335)).

claimant must surmount by adopting a presumption in favour of retaining collections of human remains intact in the context of deciding whether to exercise the power to transfer human remains from their collections.<sup>364</sup> Despite the DCMS Guidance stating that ‘It is important for museums to be willing to consider the views of all those with interests, but no one view will have automatic pre-eminence’<sup>365</sup>, the British Museum’s Policy on Human Remains<sup>366</sup> and the University of Oxford’s policy<sup>367</sup> that applies *inter alia* to the Pitt Rivers Museum start with the presumption of retaining the collection intact.<sup>368</sup> In this way, the museums, whilst having been provided with an opportunity to undertake a balancing exercise of the various different types of value and guidance to that effect, nevertheless restrict the public legacy by presuming retention and by replacing the previous impenetrable legislative barrier with another conceptual barrier which places claimants in the weaker position.<sup>369</sup>

The British Museum equates holding in trust for society with a static, preservationist notion which will only be displaced in circumstances where there is a strong public benefit.<sup>370</sup> Therefore, the public benefit is expressed as being strongly in favour of retention.<sup>371</sup> The public benefit test established in the policy requires that the

---

<sup>364</sup> Under HTA, s 47. Contrastingly, no such presumption was found in the context of the Nazi Era CHOs.

<sup>365</sup> DCMS Guidance (n 334) 13.

<sup>366</sup> BM HR Policy (n 335)

<sup>367</sup> University of Oxford HR Policy (n 335)

<sup>368</sup> BM HR Policy (n 335) [5.1] and *ibid* [1.6].

<sup>369</sup> Arguably this perpetuates the notion of Smith’s Authorized Heritage Discourse (Discussed in Chapters 1 and 2).

<sup>370</sup> The presumption in favour of retaining the collection intact even when exercising this power is discussed at 168 above: BM HR Policy (n 335) [5.1].

<sup>371</sup> *ibid* [5.11].

significance of ‘the direct and close genealogical link’ between the claimants and the human remains<sup>372</sup> or the ‘significance of the Cultural Continuity<sup>373</sup> and the Cultural Importance<sup>374</sup> of the human remains...outweighs the public benefit to the world community of retaining the human remains in the Collection’.<sup>375</sup> The necessary elements of cultural continuity and the cultural importance do focus on the particular value or significance of the human remains to the modern-day community claiming them and so takes account of cultural heritage value of the remains.<sup>376</sup> However, these must be shown to exceed the public benefit in a way that is not seen in the context of Nazi Era spoliation even though in the former situation the subject matter of the request for transfer are former people and so may well be a strong feeling of connection to the remains which would otherwise justify return.

The decisions made under these two legislative exceptions provided hope for a balanced assessment of cultural heritage value, but were found wanting. When dealing with Nazi Era objects the SAP, rather than approaching the assessment in a balanced way, focuses strongly on the notion of redressing past wrongs and the returning cultural objects to their ‘rightful owners’, rather than looking at the fulfilment of the cultural value.<sup>377</sup> In the case of human remains, whilst informed by DCMS Guidance requiring a balanced view of the different types of cultural heritage value (and the specific types of value

---

<sup>372</sup> Of people who died less than 100 years old.

<sup>373</sup> Defined in BM HR (n 335) [5.14.3].

<sup>374</sup> *ibid* Defined at [5.14.4].

<sup>375</sup> *ibid* 5.16.1 and 5.16.2 respectively.

<sup>376</sup> DCMS Guidance (n 334) 27: ‘Where claims are made it would be expected, but not essential, for the claimant group to show that human remains and their treatment have a cultural, religious or spiritual significance to their community.’

<sup>377</sup> At p 196 above.

relevant to human remains), the balance is clearly in favour of the holding institution, which makes the decision and in some instances sets an extra bar for claimants to surmount as well as showing a predilection for presuming continued retention.

### **3.6.2 The public interest in gaining access to national museums**

In the case of national museums, like privately owned conditionally exempt cultural heritage (in which the public now has an interest or ‘stake’), there is a clear duty of access.<sup>378</sup> In this way, the BMA requires its trustees (expressed as a duty), so far as it is appears practicable to them, to make the objects within the collection available to members of the public when required for inspection.<sup>379</sup> This access can be made subject to relevant conditions to ensure the safety of the objects and the proper administration of the museum<sup>380</sup> and therefore mirrors Merryman’s approach that preservation is pre-eminent to access.<sup>381</sup> Presumably the museum’s decision to restrict access to sacred Tabots<sup>382</sup> could be justified on the basis that it is not practicable to provide such access; the effect is that the cultural heritage value (specifically the religious value) of the objects is better upheld by restricting, rather than permitting widespread access. The British Museum’s approach to access in terms of making available for inspection incorporates both public viewing as a visitor to the museum and for researchers

---

<sup>378</sup> For the facilitation of access to national museums: see BMA, s 3(3); MGA, s 2 and for the requirement of an undertaking to provide reasonable public access under the conditional exemption scheme: see ITA, s 31(2).

<sup>379</sup> *ibid* s 3(3).

<sup>380</sup> BMA, s 3(3).

<sup>381</sup> John Henry Merryman, ‘The Public Interest in Cultural Property’ (1989) 77 Cal LR 339, 361.

<sup>382</sup> Tiffany Jenkins, ‘The censoring of our museums’ *New Statesman* 11 July 2005.

(although this presumes non-destructive research).<sup>383</sup> The national museums governed by the MGA are required 'so far as practicable' to 'secure' the public exhibition of the objects within their collections<sup>384</sup> and to secure that the objects and documents are available to those who wish to access them for study or research.<sup>385</sup>

Wider public access is facilitated in the provisions relating to national museums lending objects to other museums.<sup>386</sup> In this way, art can act as a 'good ambassador'.<sup>387</sup> A strong example can be seen with the British Museum's loan of the Cyrus Cylinder to Iran whilst diplomatic relations were tense and its subsequent loan to the USA which featured on the national news bulletin.<sup>388</sup> The British Museum has powers to lend for public exhibition<sup>389</sup> and is subject to considerations as to the effect that the loan would have on the interests of students and other visitors to the museum<sup>390</sup> and also to

---

<sup>383</sup> Such destructive action would fall foul of the provisions preventing the disposal of objects under BMA, s 3(4).

<sup>384</sup> MGA, s 2(1)(b), s 2(2)(b), s 2(3)(b) and s 2(4)(b).

<sup>385</sup> MGA, s 2(1)(c), s 2(2)(c), ss2(3)(c) and s 2(4)(c).

<sup>386</sup> BMA, s 4 and MGA, s 5.

<sup>387</sup> Paul M Bator, *International Trade in Art* (University of Chicago Press, London 1983) 30. Further facilitation of lending works of art is provided in provisions relating to the Tate Gallery, the National Gallery and the National Portrait Gallery, which permits their governing bodies to lend objects in contravention of the provision of trust or condition provided that 50 years have elapsed and that the donor or his personal representatives consent: MGA, s 5(3)(a) and (b). In the case of the Victoria and Albert Museum this period is 25 years: NHA, s 7(3)(a). This contrasts with the position of the Wallace Collection discussed at pp 215-218 below.

<sup>388</sup> BBC, *British Museum lends ancient 'bill of rights' cylinder to US* <<http://www.bbc.co.uk/news/entertainment-arts-20508195>> accessed 4 January 2013.

<sup>389</sup> BMA, s 4.

<sup>390</sup> *ibid*



considerations relating to the physical state of the object and its rarity,<sup>391</sup> once again prioritising preservation over access. However, the British Museum, in its loans policy, further restricts this power by not normally lending ‘key objects’ that the visiting public would expect to be on display in London.<sup>392</sup> In this way controversial, but major objects, such as the Rosetta Stone are unlikely to be lent. Whilst there are many visitors to the museum in London,<sup>393</sup> access to such important objects, which could be considered as being of universal value, could be enhanced by loans abroad. This approach therefore facilitates continued access in the UK at the expense of wider access abroad.<sup>394</sup>

The governing bodies of the National Gallery, Tate Gallery and National Portrait Gallery have similar powers to lend for public exhibition or otherwise and are expressly permitted to lend objects abroad.<sup>395</sup> In exercising this power the governing bodies should take into account similar considerations to those of the British Museum, but also to the ‘suitability of the prospective borrower’ and any risks to which the object might be exposed.<sup>396</sup> Once again, this focuses on the need to balance the physical preservation of the object with the access which a loan will facilitate.

---

<sup>391</sup> *ibid*

<sup>392</sup> British Museum, *Loans Policy* (British Museum 2006) <<http://www.britishmuseum.org/PDF/Loans.pdf>> accessed 9 September 2012 [2.2].

<sup>393</sup> In 2010/11 25% of overseas visitors to London visited the British Museum: NMDC, *World Collections* <[http://www.nationalmuseums.org.uk/media/documents/images/world\\_collections\\_final\\_report.pdf](http://www.nationalmuseums.org.uk/media/documents/images/world_collections_final_report.pdf)> accessed 1 November 2012, 2).

<sup>394</sup> Chapter 4 discusses the approach taken in the museum codes of ethics.

<sup>395</sup> MGA, s 5(1).

<sup>396</sup> *ibid* s 5(2)(b).

### 3.6.3 Articulating value through the use of law

#### 3.6.3.1 *Articulating value and upholding norms through constructing legal mechanisms: non-national museums*

Non-national museums range from local authority museums, museums set up by private trusts, university museum collections to museums established by special interest societies. Whilst national museums are governed by various statutes, there is no specific legislation governing all non-national museums, in part because of their varied legal forms.<sup>397</sup> Consequently there is no general express recognition of the cultural heritage principles or norms. Most notably the associative value of non-national collections is ignored by the law, with no restrictions on deaccessioning. In this way there is no recognition of culturally valuable collections as ‘inalienable cultural assets’ in the same way as was seen with national museums.<sup>398</sup> This is a particular concern given that over 60 non-national museums have been designated as pre-eminent collections of national or international importance.<sup>399</sup> The cultural heritage value of the collections and their component objects to communities is frustrated by the general legal position. In order to provide for more enhanced legal recognition of the museum collections of CHOs, the founders of these institutions (or at a later date reforming governing bodies) need to use the law to construct value to impose on themselves enhanced obligations in respect of

---

<sup>397</sup> For a now rather dated overview of the varied legal nature of museums in the UK see: Jeremy Warren ed), *The Legal Status of Museum Collections in the United Kingdom* (Museums and Galleries Commission 1996). For details of the common types of museum see: Museums Association, ‘What different types of museum are there? <<http://www.museumsassociation.org/about/frequently-asked-questions>> accessed 30 December 2013.

<sup>398</sup> At p 186 above.

<sup>399</sup> Under the Designation Scheme (see p 239 below): Sixth Report from the Culture, Media and Sport Select Committee, ‘Caring for our Collections’ (2006-07 HC 176-I) 7.

the objects within their collections through the use of charity law. Alternatively, donors or legators may use individual contractual arrangements or terms of bequests to retain the link between the CHOs, or between them and the individual collectors or philanthropists. However, this enhanced appreciation of the cultural heritage value through charity and trusts law, which results in recognition of the norms, once again occurs because of the forward planning of those guiding the institution, rather than the intervention of the law.

Whilst the Public Libraries and Museums Act 1964 gives local authorities the power to make provision for the establishment and maintenance of museums,<sup>400</sup> it provides no duties for their preservation or for the public access to these collections.<sup>401</sup> In many instances the CHOs are not separated from the rest of the local authority's property and consequently occasions may arise, particularly in the financially austere times that the UK has encountered in recent years, when a local authority may wish to sell an important CHO so as to reallocate resources to other obligations. There is nothing in the museum's legal structure to prevent such a sale, although it will be analysed later how far the ethical framework relating to museum governance may intervene to prevent (or at least discourage) such financially motivated sales;<sup>402</sup> this ethical imperative has also been emphasised by the Select Committee describing 'a moral duty on councils to hold cultural collections in trust for the wider community' and that local authorities should

---

<sup>400</sup> s 12(1).

<sup>401</sup> This was criticised by the Sixth Report (n 399) 22. See Nicholas Goodison, *Goodison Review: Securing the Best for our Museums: Private Giving and Government Support* (HM Treasury 2004) 17.

<sup>402</sup> At p 238 below. However, outside the museum context one can see that there might be no such restrictions: e.g. the London Borough of Tower Hamlets has indicated that it wishes to sell Henry Moore's *Draped Seated Woman 1957-58*, although there is a dispute over its ownership of the sculpture: Martin Bailey, 'Disputed Moore pulled from sale' *The Art Newspaper*, January 2013.

be dissuaded from selling objects based solely on financial reasons.<sup>403</sup> The Goodison Review recommended that local authorities be encouraged to explore the possibility of establishing charitable trust vehicles for their museum collections, although the reasons for recommending this were on the basis of transforming leadership, releasing energy and enthusiasm and encouraging donors,<sup>404</sup> not on the basis of giving greater effect to the cultural heritage principles and norms.

University museum collections will usually be subject to the statutes governing the individual university and are exempt charities,<sup>405</sup> in which case the cultural objects within the museum's collection will be treated as part of the general property of the university for the purpose of furthering its educational purpose.<sup>406</sup> Some museums may have been established by trusts and later receive charitable status for the individual collection.<sup>407</sup>

If a museum is established as a charity then because of the taxation benefits derived from this status, the 'works of art and collections...are held to be for the public advantage, and we therefore regard them as being for our purposes semi-public

---

<sup>403</sup> Sixth Report (n 399) 53.

<sup>404</sup> Goodison Review (n 401) 18.

<sup>405</sup> Charities Act 2011 ("CA"), Sch 3, [2]-[6].

<sup>406</sup> Charity Commission, RR10- *Museums and Galleries* (Version 08/02) [B18].

<sup>407</sup> Even though the charity may be established for the benefit of the university's students and academic staff, this will be a sufficient proportion of the public: *ibid* B18. See *Re Mariette* [1915] 2 Ch 284 where a gift was charitable for the erection of squash courts at a school.

bodies’.<sup>408</sup> With this semi-public nature comes the responsibilities of both preservation (in an indirect manner)<sup>409</sup> but also more importantly access (which is a vital element of the public benefit requirement before a body can achieve charitable status).<sup>410</sup> To be established as a charity, a museum must advance ‘the arts, culture, heritage or science’<sup>411</sup> for the public benefit;<sup>412</sup> it will be subject to the jurisdiction of the Charity Commission<sup>413</sup> unless it is an exempt charity.<sup>414</sup> Simply because a museum advances one of those purposes does not mean that it is established for the public benefit.<sup>415</sup> To satisfy the public benefit test a museum must show that it provides sufficient public access, that any individual private benefit is incidental (and appropriately regulated) and that it is not used for non-charitable purposes such as trading.<sup>416</sup> As well as satisfying

---

<sup>408</sup> Lord Cottesloe (Chair), Report of the Committee of Enquiry into the Sale of Works of Art by Public Bodies: HM Treasury 1964 19.

<sup>409</sup> In that the outright destruction of the charity property would be a breach of duty as a charitable trustee: see where the destruction of a chapel was ‘the grossest and most indecorous breach of trust’: *ex parte Greenhouse* (1815) 56 ER 36 (Ch) 41.

<sup>410</sup> CA, s 4 and RR10 (n 406) [7(i)].

<sup>411</sup> CA, s 3(1)(f) under s 2(1)(a).

<sup>412</sup> *ibid* s 2(1)(b).

<sup>413</sup> *ibid* s 13. Specifically, the trustees will be subject to s 15(1)4 which relates to identifying and investigating apparent misconduct relating to the administration of a charity and the ability to take remedial action.

<sup>414</sup> Which is the case for national museums and universities: Charities Act 2011 (CA), s 22(1) and Schedule 3 [12]-[25] and [2]-[6] respectively.

<sup>415</sup> CA, s 4(2).

<sup>416</sup> RR10 (n 406) [7(i)].

the public benefit test, Charity Commission guidance indicates that the museum needs to satisfy the criterion of merit, which is that

‘there is sufficient evidence that the collections and exhibits and the use of them either will educate the minds of the public whom the museum or art gallery intended to serve, or at least will be capable of doing so’.<sup>417</sup>

In this way, whilst the educative aspect of the collection is a key component of its merit, so too is its cultural heritage value. The collection’s merit will be assumed where it is registered under the Arts Council’s Accreditation Scheme or where the collection comprises works by ‘established and acknowledged artists’ such that expert evidence is not required by the Charity Commission,<sup>418</sup> otherwise expert evidence regarding merit will be obtained.

The requirement that objects within the collection have some merit, before a museum can benefit from the protection afforded by the law of charity, clearly brings with it a consideration of the cultural heritage value of the collection. Therefore well-meaning artists or collectors who wish to retain (or obtain) posthumous notoriety will be prevented from foisting on others charitable gifts which have little cultural heritage value.<sup>419</sup> The assessment is made in terms of the quality of the objects, rather than specifically the cultural heritage value of the objects themselves. However it has the effect of upholding the cultural value of the collection. This is clearly demonstrated by the case of *Re Pinion*.<sup>420</sup> Even though expert evidence indicated that just a few items

---

<sup>417</sup> *ibid* [7(ii)].

<sup>418</sup> RR10 (n 406) [10] and [9] respectively.

<sup>419</sup> See *Re Pinion* [1965] 1 Ch 85.

<sup>420</sup> *ibid*

from a collection forming the subject matter of the bequest had merit, this was insufficient to amount to ‘a museum’ to justify the objects being kept together as a charitable trust.<sup>421</sup>

The access requirement is a fundamental prerequisite of public benefit.<sup>422</sup> The Charity Commission indicates that even small museums should be open to the public for at least half of the year;<sup>423</sup> however, there is a clear recognition that this access requirement is subordinate to the need for physical preservation of the collections such that the latter can justify restricted access.<sup>424</sup> Overall, the Charity Commission’s approach to requiring access, including the need for transparency by publication of visitor numbers,<sup>425</sup> demonstrates the notion of the public having a ‘stake’ in the charitable property which is necessary before a charity can benefit from taxation advantages.

Where collections are charities, the trustees would be acting in contravention of their obligations as trustees of charitable property if they were to act deliberately to destroy charity property, since presumably it would be a disposal of charity property without the consent of the Charity Commission or the Attorney-General.<sup>426</sup> In the context of preserving the integrity of a collection for its cultural heritage value, the law of charity achieves this on the basis that charity property effectively ‘belong[s] to the charitable

---

<sup>421</sup> *ibid* 107 (Harman LJ).

<sup>422</sup> RR10 (n 406) [A19].

<sup>423</sup> *ibid* A21.

<sup>424</sup> *ibid* A22. This mirrors Merryman’s hierarchy of preservation-truth-access (at 96 above). However, museums will need to find other means of providing non-physical access such as internet, lectures and media coverage: RR10, A28.

<sup>425</sup> *ibid* A30.

<sup>426</sup> A charity’s trustees will need the permission of the Charity Commission before dealing with charity property: CA, s 105 or the Attorney General in the case of exempt charities.

purpose for which they were given'.<sup>427</sup> Where property is not part of the charitable property the charity trustees will be at liberty to dispose of the property.<sup>428</sup> For example, in 1962 the Royal Academy (RA) was able to sell cartoons by Leonardo da Vinci since the RA's Instrument of Foundation 'does not mention the exhibition of Old Master pictures to the public as one of the objects of the charity' and so no special authority was required from the (then) Charity Commissioners.<sup>429</sup> If a university is an exempt charity and the property which it seeks to dispose of is not part of the charity property then it would not necessarily need to seek permission from the Attorney General. However, where property is that of the charity (in terms of used for furthering the charity's purposes) then in the case of a charitable trust the charity will need to seek the permission of the Charity Commission<sup>430</sup> (or where the property is held by a university, the Attorney-General). If a charity wishes to give effect to its perceived moral obligation then the Charity Commission or the Attorney-General (in the case of an exempt charity) may authorise the charity to apply the property to achieve this purpose, or waive its entitlement to receive property.<sup>431</sup>

Charitable status therefore imposes on the governing bodies certain responsibilities that recognise and uphold (by accident rather than by thoughtful consideration) the different types of cultural heritage value. However, whilst many governing bodies will be encouraged to establish their institution in such a manner because of the financial incentives through taxation concessions, others will not be legally bound to uphold and

---

<sup>427</sup> Cottesloe Report (n 408) [12].

<sup>428</sup> *ibid* 5.

<sup>429</sup> *ibid* 5.

<sup>430</sup> CA, s 105.

<sup>431</sup> CA, s 106(1) and *Re Snowden* (n 298) respectively.



preserve cultural heritage in this way; it will then be left to the non-legal system to fill in the gaps.<sup>432</sup>

It is possible to see how the establishment of a collection without sufficient thought, regardless of its cultural heritage value, can lead to the frustration of the norms of preservation. Despite international statements regarding the importance of cultural heritage and articulation of the norms of preservation and access, if a collection is not properly held as a charitable trust, separate from other property which might be needed to pay for liabilities, a court may be unable to recognise the need to preserve the collection intact. The subject matter of *Re Wedgwood Trust Ltd (In Administration)*<sup>433</sup> was the Wedgwood collection, inscribed on the UK Memory of the World Register. UNESCO's Memory of the World (through non-treaty means) aims (a) To facilitate preservation, by the most appropriate techniques of the world's documentary heritage... (b) To assist universal access to documentary heritage... (c) To increase awareness worldwide of the existence and significance of documentary heritage'. The collection was described as:

one of the most complete ceramic manufacturing archives in existence...Unparalleled in its diversity and breadth the 80,000 plus documents embrace every imaginable subject from pot to people, transport to trade, society and social conditions.<sup>434</sup>

---

<sup>432</sup> See Chapter 4.

<sup>433</sup> [2012] Pens LR 175.

<sup>434</sup> *2011 UK Memory of the World Register* <[http://www.unesco.org.uk/2011\\_uk\\_memory\\_of\\_the\\_world\\_register](http://www.unesco.org.uk/2011_uk_memory_of_the_world_register)> accessed 27 April 2012.

The issue was whether the Wedgwood collection was the beneficial property of the Wedgwood Museum Trust Ltd (the Museum Company) such that it was available to meet the liabilities, specifically, the pensions' liabilities of the whole Wedgwood group (£134.7 million).<sup>435</sup> HHJ Purle QC (sitting as a High Court Judge) recognised the cultural heritage principle of value and the 'immense importance' of the Wedgwood collection as cultural heritage.<sup>436</sup> However, these principles were not translated into norms or duties since they were subordinate to the laws relating to pension protection and insolvency.<sup>437</sup> No express mention was made in the judgment of the collection's recognition as contributing to the *Memory of the World*.<sup>438</sup> The collection was found not to be held on trust, but instead formed part of the beneficial property of the company; consequently it was available to fulfil the pension liabilities.<sup>439</sup> Whilst the judge viewed this as a 'sad conclusion' he continued:

It is at least a legitimate view that the tragedy that befalls working people when their pensions are affected by insolvency is at least as great as the tragedy that has befallen, or may now befall, the collection in this case.<sup>440</sup>

Despite one of the *Memory of the World* programme's principal aims being to facilitate the preservation of such collections, when competing interests were involved in a

---

<sup>435</sup> *Re Wedgwood* (n 433) [1] and [12].

<sup>436</sup> *ibid* [56].

<sup>437</sup> As demonstrated at *ibid* [56] where Purle J recognised the importance of the collection as 'part of our cultural heritage' but stated that the 'combined result of the pension protection and insolvency legislation' prevented the cultural heritage value of the collection taking priority over the interests of the 'working people...[whose] pensions are affected by insolvency'.

<sup>438</sup> The Wedgwood collection was inscribed on 23 May 2011 on the UK Memory of the World Register.

<sup>439</sup> *Re Wedgwood* (n 433) [55].

<sup>440</sup> *ibid* [56].

national court, the preservation of the collection was subordinate to these interests and indeed the national recognition of the need to preserve such collections was not even considered by the court.

### **3.6.3.2 *The dead hand of the benefactor***

The discussion relating to national museums has analysed the way in which statute law upholds strong levels of protection for the physical preservation, preservation of the collection as a whole and access to cultural heritage in national museums based on assumed value of the objects and the collection. However, it can be seen that even in the case of national museums, a much higher level of preservation can be afforded through the use of law, at the behest of a benefactor. In this way, a national collection can receive enhanced cultural heritage value (as a collection) and even greater protection of its physical and metaphysical integrity (i.e. in terms of the preservation of collection in an intangible sense). This is most clearly shown in the context of the Wallace Collection where it can be argued that an enhanced associative value was created by the bequest for the following reasons. The collection of paintings and other works of art housed in Hertford House, Manchester Square, London was bequeathed by Lady Wallace on condition that it should be kept together intact, without being mixed with other objects.<sup>441</sup> This led to the establishment of the Wallace Collection, now governed by the MGA, section 4(6) of which states:

---

<sup>441</sup> Wallace Collection, *The Bequest* <<http://www.wallacecollection.org/thecollection/historyofthecollection/thewallacecollectionasmuseum/thebequest>> accessed 7 October 2012.

‘The Wallace Collection Board shall neither add any object to their collection nor dispose of any object the property in which is vested in them and which is comprised in their collection’.<sup>442</sup>

The legal prohibitions on acquisition, disposal and lending artificially create an associative value between the objects themselves and their association with Wallace, which might otherwise not have been there, or perhaps not to the same degree. The objects comprising the Wallace Collection were those collected by Sir Richard Wallace and the first four Marquesses of Hertford and arguably they have a particular association with Hertford House where Sir Richard and Lady Wallace lived, which ultimately became the collection’s home.<sup>443</sup> Whilst O’Keefe suggests that there comes a point at which the public has ‘an interest’ in a private collection, in terms of recognising its value to the public,<sup>444</sup> here the status of these objects as a collection has been cemented by the law. The association between the owners and the objects has been further enhanced and heightened from what it would have been naturally, to an artificially constructed associative value created by the law and ultimately becomes ‘a monument to [Sir Richard Wallace’s] taste’.<sup>445</sup> The law has not given the individual objects comprising the collection their cultural heritage attributes in terms of the value/significance. However, the legal mechanism for keeping the collection intact has enhanced the associative value which might not otherwise have been so strong. Whilst I

---

<sup>442</sup> This collection is now classed as one of the UK’s national museums since it is governed by statute and receives direct public funding.

<sup>443</sup> Andrea Geddes Poole, *Stewards of the Nation’s Art: Contested Cultural Authority, 1890-1939* (University of Toronto Press 2010) 27.

<sup>444</sup> P O’Keefe (n 257) 182. Discussed at 93 above.

<sup>445</sup> Poole (n 443) 27.

doubt that the law in general gives value to cultural objects (something that Carman argues), nevertheless one can see Carman's analysis at work here since, the law itself is acting as 'a machine for changing the way in which bodies of material are thought about and understood'.<sup>446</sup> Here the 'bodies of material' would be the Wallace Collection itself. This also demonstrates what Avrami et al call the valorizing of cultural heritage<sup>447</sup> in the sense that by accepting the collection (as an immovable feast) as a gift to the nation from benefactors, this elevates the entire collection as an entity to cultural heritage (rather than simply the objects within the collection). It is the imposed conditions that the benefactor has created through the medium of law that has added value to the objects to create the collection; this is not an instance where the law has simply recognised the value and given effect to appropriate norms.<sup>448</sup> The overall effect of this artificially created association with the removal of any powers of disposal, acquisition or lending is to preserve the collection in aspic from the past – in the present – to the future. The legal provisions governing this collection are the most restrictive of all the national museums;<sup>449</sup> they exemplify the preservation of the collection itself to fulfil the conditions of the bequest, rather than for the purpose of preserving the cultural heritage principles relevant to the CHOs within the collection.

---

<sup>446</sup> John Carman, *Valuing ancient things: archaeology and the law* (Leicester University Press, 1996) 164.

<sup>447</sup> Erica Avrami, Randall Mason & Marta de la Torre (eds), *Values and Heritage Conservation: Research Report* (The Getty Conservation Institute 2000) 8.

<sup>448</sup> Set out at p 111 above.

<sup>449</sup> Whilst the National Gallery Board cannot transfer objects at all other than to the Schedule 5 institutions, it can lend objects (MGA, s 5(1)). The Wallace Collection has no such power at all.

The wishes of Lady Wallace, through the wording of her bequest, provided enhanced levels of preservation for the physical integrity of a collection.<sup>450</sup> The cultural heritage principles of certain objects might be better preserved by transferring an object to another location due to its associative value with a different place.<sup>451</sup> However, there is no capability to fulfil these, not least because unlike the governing bodies of the other national museums governed by the MGA 1992<sup>452</sup>, the Wallace Collection Board has no power to lend any object.<sup>453</sup> None of the objects comprised in the collection can therefore act as what Bator would call ‘good ambassadors’.<sup>454</sup> Whilst access to the collection is clearly facilitated through the MGA,<sup>455</sup> enhanced access might otherwise have been achieved through loans to specialist exhibitions such as Canaletto (of which the Wallace Collection has several).

### **3.7 A state’s moral obligation recognised in law**

As a precursor to the next chapter, it is worth noting that the 1970 Convention makes it clear in its Preamble that nations should not only uphold legal obligations, but also

---

<sup>450</sup> MGA, s 4(6).

<sup>451</sup> This is recognised by the National Museum Directors Conference in *Too much stuff? Disposal from museums*, National Museum Directors Conference (London 2003) 3. This will be further analysed in Chapter 4.

<sup>452</sup> MGA, s 5(1).

<sup>453</sup> Museums governed by the MGA are given a power to lend objects in section 5(1). However, the Wallace Collection Board is not mentioned in that section and this accords with the initial bequest: Wallace Collection Bequest (n 441).

<sup>454</sup> Bator (n 387) 30. Article 15(4) of the 1966 International Covenant (n 100) supports this view in stating that the state parties ‘recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the...cultural fields.’

<sup>455</sup> s 2(4)(b).

moral ones regarding cultural heritage. It says that ‘to avert these dangers<sup>[456]</sup>, it is essential for every State to become increasingly alive to the moral obligations to respect its own cultural heritage and that of all nations’.<sup>457</sup> The general international desire to protect countries’ national heritage, derived from *inter alia* the 1970 Convention has filtered down into domestic courts and was articulated recently by the Court of Appeal in *Government of the Islamic Republic of Iran v The Barakat Galleries Ltd.*<sup>458</sup> This seems a prime example of a nation being ‘alive to [its] moral obligations’.<sup>459</sup> In that case the court held that a claim<sup>460</sup> by one state to recover its national heritage should not be prevented on the basis that it was simply a claim to enforce foreign public law (which the court held in any event that it was not) and that if it was a test of whether the foreign law was contrary to public policy, there were clearly ‘positive reasons of policy why a claim by a State to recover antiquities which form part of its national heritage’ should be upheld.<sup>461</sup>

### 3.8 Conclusion

International legal measures clearly recognise and seek to uphold the varied types of value and public legacy of cultural heritage when dealing with objects. These measures deal in the main with the categorisation of heritage and its link to the norm of preservation. However, the different types of value and the public legacy will not necessarily be a relevant consideration in domestic dispute resolution, as is evident

---

<sup>456</sup> I.e. ‘theft, clandestine excavation, and illicit export’: 1970 Convention (n 17) Preamble.

<sup>457</sup> *ibid*

<sup>458</sup> [2009] QB 22 (CA) 65.

<sup>459</sup> n 457.

<sup>460</sup> Otherwise valid under private international law: *Barakat* (n 458) [63].

<sup>461</sup> *ibid*

from the treatment of the Wedgwood collection.<sup>462</sup> This therefore poses significant impediments for claimants who seek the return of culturally significant objects, particularly where there are legal bars to de-accessioning either relating in general to national collections, or imposed by the terms of a bequest or gift.

English domestic law does not recognise culturally important objects *as* CHOs in any generalised or holistic manner by providing a wide-ranging regime such as the listing and scheduling systems governing places.<sup>463</sup> Whilst occasionally the cultural heritage value is relevant when an object is being designated as one of these different categories, on other occasions no valuing of cultural heritage in legal terms takes place. Sometimes the law merely treats a CHO as ‘an object’ in law. However, this results in no special treatment where it is privately owned (save for a limited exception discussed in the next section) yet is given privileged status when it forms part of certain museum collections.<sup>464</sup>

The nature of the owner of CHOs strongly influences the degree to which the norms of preservation and access are upheld in domestic law. Whilst some privately owned CHOs are protected because of their link with a place (as a fixture on a listed building) many CHOs are at risk of physical destruction since the law does nothing to protect them. In this way one must rely on their having a financial value which incentivises continued preservation, although this did not stop Jake and Dino Chapman from apparently buying original prints of Goya’s ‘Disasters of War’ and adding images of

---

<sup>462</sup>*Re Wedgwood* (n 433).

<sup>463</sup> P(LBCA) A and AMAA.

<sup>464</sup> Discussed at p 179 above.



puppies and clowns to create ‘Insult to Injury’<sup>465</sup> and Fechner suggests that a triptych’s market value would increase if sold separately.<sup>466</sup>

Where the public has a ‘stake’ or ‘interest’ in CHOs English domestic law does more to uphold the norms of preservation and access. Consequently, where an owner has received a taxation advantage he is placed under a contractual duty to both preserve and provide public access to the objects. The law undertakes a clearer assessment of the cultural heritage value of the object and its association with a particular place before designating such an object as ‘pre-eminent’ and worthy of this taxation advantage. This is the clearest legal expression of cultural heritage value and the legal recognition of the norms. Other instances where assessments of value are made (such as export licensing) are tinged by nationalist views of maintaining a culturally rich nation. In situations where objects are preserved as part of a national collection, once more the collection is preserved intact because of the national viewpoint, rather than because of the cultural heritage value of this assemblage. Culturally valuable collections of objects in non-national museums will only be valued as such by the law if the founding fathers or progressive reformers establish them as charities. The law provides a safety mechanism to ensure that culturally worthless collections are not preserved at the public’s expense (in terms of taxation advantages given to a charity) by requiring a public benefit assessment which looks at the quality of the collection. However, important collections are still at risk of dispersal where improperly constituted, as demonstrated by the Wedgwood saga.

---

<sup>465</sup> Amy M Adler, ‘Against Moral Rights’ (2009) 79 *California Law Review* 263, 282.

<sup>466</sup> Frank G Fechner, ‘The Fundamental Aims of Cultural Property Law’ (1998) 7 *International Journal of Cultural Property* 376, 383.

Even where preservation is mandated in law, this primarily focuses on physical preservation, preservation of archaeological context, association with a place or person and a collection; there is no express recognition of the role of CHOs within cultural practices. This might be explained by the fact that England does not have many communities with traditional indigenous practices making use of culturally important objects, but instead many objects will be aesthetic or form part of the archaeological heritage with little connection to modern-day practices. Nevertheless, this is a relevant omission in the context of national museum collections which house many objects acquired during colonial times that might still have an importance for modern-day indigenous communities. It will therefore be necessary in the next chapter to assess how far the non-legal regime takes account of such types of value.

# Chapter Four

## *Quasi*-legal recognition of the cultural heritage principles and norms

---

‘Laws restrict activities and define methods or means of compliance. They serve as the minimum standards of social behavior. Ethics defines and describes correct actions for persons working in a specialized profession.’<sup>1</sup>

### 4.1 Introduction

This chapter analyses the effectiveness of the non-legal regime governing museums in upholding the cultural heritage principles and norms. Particular attention will be placed on determining whether this regime, based on enhanced ethical notions in professional codes of ethics and guidelines as well as government guidance, more fully recognises the principles and norms than the English legal regime.<sup>2</sup> Museums have placed themselves under stricter obligations than their legal ones and have adopted terminology and developed concepts to reflect these higher standards, such as valid title, moral title and guardianship.<sup>3</sup> It will be analysed how far these have developed into *quasi*-legal principles and whether these emerging ethical concepts might more fully reflect the cultural heritage principles and norms.

Morals and ethics are central to the treatment of cultural heritage, not only in the professional practices involving museums and archaeology, but more fundamentally

---

<sup>1</sup> Gary Edson, *Museum Ethics* (Routledge 1997) 9.

<sup>2</sup> As concluded by Chapter 3.

<sup>3</sup> Discussed at pp 283-285 below.

when assessing cultural heritage value.<sup>4</sup> States are encouraged to be wise to their moral obligations<sup>5</sup> and this is reflected in the notion of ethical or moral treatment of cultural heritage being part of the ‘common themes’ of heritage which have been described as being duty, honour, including stewardship, fairness and responsibility as well as social obligations.<sup>6</sup> Whilst archaeologists and the art market also govern themselves by professional codes,<sup>7</sup> the decision has been taken in this chapter to focus on museums because first, the need for museums to act morally is mandated by UNESCO in that ‘museums...should ensure that their collections are built up in accordance with universally recognized moral principles’.<sup>8</sup> Secondly, the museum profession has been at the forefront of developing codes of ethics at both the professional body and institutional level.<sup>9</sup> These codes include general ethical principles<sup>10</sup> by which those who

---

<sup>4</sup> See G Smith and others, citing various authors in support, who suggest that ‘Any discussion of values, including heritage values, begins in the realm of ethics and morals’: George S Smith, Phyllis Mauch Messenger and Hilary A Soderland, ‘Introduction’ in George S Smith, Phyllis Mauch Messenger and Hilary A Soderland (eds), *Heritage Values in Contemporary Society* (Left Coast Press, Inc 2010) 16.

<sup>5</sup> Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property UNESCO, Paris (adopted, 14 November 1970, entered into force 24 April 1972 823) UNTS 231, Preamble.

<sup>6</sup> G Smith and others (n 4) 16.

<sup>7</sup> E.g. British Association of Biological Anthropology and Osteoarchaeology, *Code of Ethics* (BABAO 2010) < <http://www.babao.org.uk/index/ethics-and-standards>> accessed 6 January 2013 and the Antique Dealers Association, *Code of Conduct* <<http://theadaco.uk/code.htm>> accessed 6 January 2013.

<sup>8</sup> 1970 Convention (n 5) This has been described as a ‘strong pressure instrument’ – regarding the establishment of ethical codes: Manlio Frigo, ‘Ethical Rules and Codes of Honor Related to Museum Activities: A Complementary Support to the Private International Law Approach Concerning the Circulation of Cultural Property’ (2009) 16 *International Journal of Cultural Property* 49, 51.

<sup>9</sup> E.g. *Code of Ethics for Museums* (UK Museums Association, London 2008) (“MACoE”) and *ICOM Code of Ethics for Museums* (International Council of Museums, Paris 2006) (“ICOMCoE”).

work and govern museums should conduct themselves as well as specialist guidance on certain issues.<sup>11</sup> Further ethical provision is made by specific government guidance relating to museums which is not covered to the same extent as other professionals dealing with CHOs. All this makes a clear non-legal regulatory regime worthy of particular analysis as a major part of the day-to-day work of museums. The self-imposed and externally imposed ethical obligations provide a more flexible level of regulation than legal provisions and make inroads into addressing the lacunae in the law previously identified.<sup>12</sup> Laws can provide minimum standards,<sup>13</sup> but a system expressing the ethical expectations of a profession can go further by providing enhanced levels of obligations, responding in a more nuanced way to current issues of concern.<sup>14</sup>

As key players in the cultural heritage field museums ‘uniquely mediate the past, present and future’<sup>15</sup> and are ‘the golden thread of our heritage that links yesterday to tomorrow’.<sup>16</sup> The varied nature of the cultural heritage for which they have

---

<sup>10</sup> ‘Hold collections in trust on behalf of society’ (MACoE ibid [1]), ‘Focus on public service’ (MACoE ibid [2]) and ‘Encourage people to explore collections’ MACoE ibid [3].

<sup>11</sup> For example acquisition (MACoE (n 9) [5]), due diligence (MACoE (n 9) [5.7]) and consultation with communities (MACoE (n 9) [4.1]).

<sup>12</sup> At pp 219-222

<sup>13</sup> Edson, text to n 1

<sup>14</sup> As analysed from p 240 below.

<sup>15</sup> David Lowenthal, ‘Patrons, Populists, Apologists: Crises in Museum Stewardship’ in Lisanne Gibson and John Pendlebury (eds), *Valuing Historic Environments* (Ashgate 2009) 28.

<sup>16</sup> Michael A Mares, ‘The Moral Obligations Incumbent upon Institutions, Administrators, and Directors in Maintaining and Caring for Museum Collections’ in Hugh H Genoways (ed), *Museum Philosophy for the Twenty First Century* (Alta Mira Press 2006).

responsibility ranges from small items (which whilst not important in themselves, nevertheless contribute to a collection) to world renowned objects such as the Rosetta Stone; the nature of the museums is equally varied (from local, specialist interest museums such as the Washford Radio Museum in Watchet, Somerset, to self-styled ‘universal museums’<sup>17</sup> like the British Museum). These characteristics make museums ideal candidates for detailed study. The variety is not only in the collections themselves, but also in the nature of their governance. Objects held within collections have origins on a sliding scale of propriety, from legitimate excavations, purchases and donations to the more questionable acquisitions from conflicts and times of unequal power. Therefore, the competing interests and claims from interested stakeholders<sup>18</sup> with which museum professionals may be faced provide a cornucopia of decisions involving ethical rather than simply legal issues.

## **4.2 The role, nature and hierarchy of codes of ethics and other guidance**

Before analysing these documents’ effectiveness in upholding the cultural heritage principles and norms it is necessary to identify first the corpus and then consider the nature and scope of the obligations set out in them. If a non-legal instrument has little or no force, this obviously impedes its effectiveness in upholding the principles and norms.

In the context of this chapter the first types of document to be considered are international and national codes of ethics which set out the ethical precepts involved in museums acquiring, caring for and disposing of cultural heritage objects. These have

---

<sup>17</sup> Discussed at p 256 below.

<sup>18</sup> Defined in MACoE (n 9) [6.12] set out at p 70 above.

been developed by the principal professional bodies and reflect the core values<sup>19</sup> of museums which are ‘the foundation for public trust, and [describe] the forms that the connecting activities take.’<sup>20</sup>

The first code of ethics to be considered is that of the International Council of Museums (ICOM)<sup>21</sup> which contributes to this effort by representing a ‘global minimum standard’<sup>22</sup> from which national codes, such as the UK Museums Association (MA)’s code of ethics (which is the second code of ethics analysed here),<sup>23</sup> and individual institutional codes can develop.<sup>24</sup> Adoption of, and compliance with, these codes of ethics are requirements of membership of the professional bodies, by the governing bodies of the institutions, their employees and also individual members.<sup>25</sup>

The MA provides additional guidance on particular matters faced by museums such as acquisition, access to, and disposal of, collections.<sup>26</sup> Further specialist guidance is

---

<sup>19</sup> Edson (n 1) 109. Here the term ‘values’ is used to refer to the ethos or approach of the institution, rather than the cultural heritage value.

<sup>20</sup> *ibid* 90.

<sup>21</sup> ICOMCoE (n ).

<sup>22</sup> *ibid* Introduction vii.

<sup>23</sup> MACoE (n 9).

<sup>24</sup> In this way, these codes will ‘withstand the test of the museum community, standards (ethics)’ because they have been ‘placed in an international or universal context’: Edson (n 1) 127.

<sup>25</sup> E.g. MACoE (n 9).4.

<sup>26</sup> Museums Association, *Ethical guidelines 1 – Acquisition Guidance on the ethics and practicalities of acquisition* (2<sup>nd</sup> edn Museums Association 2004) <<http://www.museumsassociation.org/download?id=11114>> accessed 23 September 2012 and Museums Association *Ethical guidelines 4 – Access* <<http://www.museumsassociation.org/download?id=8352>> accessed 23 September 2012.

published by the DCMS and other organisations on human remains,<sup>27</sup> due diligence combating the illicit trade<sup>28</sup> and other principles on Nazi Era spoliation of cultural heritage objects.<sup>29</sup> This guidance provides subsidiary support for the analysis undertaken in this chapter since the primary focus will be on the two principal codes of ethics.

#### **4.2.1 The soft law nature of codes and guidance**

The codes of ethics and associated guidance act as local soft law for the museum profession by regulating behaviour as well as providing aspirational norms.<sup>30</sup> The term ‘soft law’ has been described as ‘a paradoxical term for defining an ambiguous

---

<sup>27</sup> DCMS, *Guidance for the Care of Human Remains in Museums* PP 847 (DCMS 2005) 7; The *Museum Ethnographers Group Guidelines on the Management of Human Remains* (MEG 1991) <[http://www.museumethnographersgroup.org.uk/index.php?option=com\\_content&view=article&id=7&Itemid=6](http://www.museumethnographersgroup.org.uk/index.php?option=com_content&view=article&id=7&Itemid=6)> accessed 28 October 2012.

<sup>28</sup> DCMS, *Combating Illicit Trade: Due diligence guidelines for museums, libraries and archives on collecting and borrowing cultural material* PP 846 (DCMS 2005).

<sup>29</sup> *Principles with respect to Nazi-Confiscated Art*, Washington Conference on Holocaust-Era Assets, 1998, Holocaust and World War II period (1998) National Museum Directors’ Conference, 1998, Statement of Principles on Spoliation of Works of Art during the Nazi, Holocaust and World War II period, Museums and Galleries Commission, April 1999 (reprinted in N Palmer, *Museums and the Holocaust* (IAL publishing, Leicester 2000) Appendix XI.

<sup>30</sup> In the context of the legal protection of the expressions of folklore, the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, referencing Australia’s *Report of the Contemporary Visual Arts and Craft Inquiry* (Commonwealth of Australia 2002), points out that codes set standards which may inform legal standards in the future: *Preliminary systematic analysis of national experiences with the legal protection of expressions of folklore* WIPO/GRTKF/IC/4/3 (20 October 2002) [121].



phenomenon'; paradoxical because one sees law as being enforceable (ie hard rather than soft) and ambiguous because it is often difficult to discern in practice.<sup>31</sup> A principal difference between the codes of ethics and other soft law norms is their operational level. Many soft law principles are found in international declarations<sup>32</sup> and provide a strong moral justification for state parties to follow them, but lack the same legal force as conventions. Museum codes have some similarity with the UK Corporate Governance Code (UKCGC),<sup>33</sup> compliance with which is required of listed companies under the Listing Rules,<sup>34</sup> in that they apply to a small section of society, here museums rather than listed companies. However, there is a stronger soft law status to the UKCGC since compliance is mandated by virtue of rules prescribed in statute; consequently the soft law strength appears less (but not non-existent) in the context of museum codes. Perhaps the closest analogy with the museum codes is the Editors' Code used by the Press Complaints Commission (PCC) which is a self-regulatory code imposed by the professional bodies themselves.<sup>35</sup> Whilst the PCC's effectiveness has been criticised,<sup>36</sup>

---

<sup>31</sup> Pierre-Marie Dupuy, 'Soft law and the International Law of the Environment' (1991) 12 *Michigan Journal of International Law* 420, 420. However soft law principles even where established by private actors rather than state parties can, nevertheless, 'assume an important role in fixing international standards': Chris Brummer, *Soft Law and the Global Financial System: Rule making in the 21<sup>st</sup> Century* (CUP 2012) 100.

<sup>32</sup> Discussed above at pp 129-140.

<sup>33</sup> Financial Reporting Council, *UK Corporate Governance Code*.

<sup>34</sup> Required by the Financial Services and Markets Act 2000, s 101 and published by the Financial Services Authority in its capacity as the UK Listing Authority under authority from FSMA 2000, s 72.

<sup>35</sup> Press Complaints Commission, *Editors' Code of Practice* (PCC 2011) <<http://www.pcc.org.uk/cop/practice.html>> accessed 13 November 2012.

<sup>36</sup> Rt Hon Lord Justice Leveson, *An Inquiry into the culture, practices and ethics of the press – Executive Summary* (2012 HC 779) [42].

the museum codes have certain advantages relating to enforceability that set them apart in terms of their effectiveness as soft law.<sup>37</sup> The museum codes serve to map and shape practice and behaviour expected of museum governing bodies and professionals.<sup>38</sup> This is heightened by the strong degree of public trust in them as institutions.<sup>39</sup> Nevertheless, they are, in their nature as professional codes of museums, restrictive in scope since they have no jurisdiction over other decision-makers who deal with cultural heritage<sup>40</sup> and it will be seen below that their effectiveness in upholding the cultural heritage principles and norms is hampered by the law.<sup>41</sup> Furthermore, whilst the MA's scope is wide, having over 5,000 individual members and 600 institutional members which bring approximately 1,500 museums across the UK within its purview,<sup>42</sup> it does not, though, have wholesale application to the over 2,000 museums in the UK.<sup>43</sup>

Even though there is no direct legal recognition and sanction<sup>44</sup> both the ICOMCoE and the MACoE form an essential element of museum practice and contribute to a general

---

<sup>37</sup> See pp 239-240 below.

<sup>38</sup> Below at p 235.

<sup>39</sup> Britain Thinks, *Public perceptions of – and attitudes to – the purposes of museums in society* (Museums Association 2013) 26.

<sup>40</sup> E.g. the Reviewing Committee on the export of works of art and objects of cultural interest (“Reviewing Committee”) or the Acceptance in Lieu Panel (“AILP”).

<sup>41</sup> Such as the British Museum Act 1963 (“BMA”), s 3(4) and the Museums and Galleries Act 1992 (“MGA”), s 4. These impediments are discussed below at pp 255-257.

<sup>42</sup> Sixth Report from the Culture, Media and Sport Select Committee, ‘Caring for our Collections’ (2006-07 HC 176-I) 8.

<sup>43</sup> *ibid* 7.

<sup>44</sup> Discussed below at p 235

ethos of moral treatment of cultural heritage, playing an important educative role.<sup>45</sup> Both the ICOMCoE and the MACoE are structured around 8 and 10 broad principles respectively and are underpinned by a general principle of acting for the long-term public interest;<sup>46</sup> the MACoE approaches this in terms of society having ‘a legitimate interest in museums and their activities’<sup>47</sup> and at the core of the ICOMCoE is the ethos of service to society.<sup>48</sup> The language used in the codes demonstrates their hortatory rather than mandatory nature, by preferential use of ‘should’ rather than ‘shall’ or ‘must’.<sup>49</sup> However, because the codes are based on broad principles, they necessarily do not have the same precision as Parliamentary drafting, but this brings a flexibility that can be both a curse and a blessing. Certainly the MACoE makes it clear that when interpreting the code, the spirit of the MACoE ‘is as important as the letter’.<sup>50</sup> In this way, the Code emphasises that ‘ethical behaviour is as much about developing good practice as avoiding malpractice’ and so the Code’s provisions are expressed in positive rather than negative language.<sup>51</sup> The code is therefore not to be read as a dry, decontextualised document, but should be interpreted in the general context of the

---

<sup>45</sup> Patrick J O’Keefe, ‘Codes of Ethics: form and function in cultural heritage management’ (1998) 7 *International Journal of Cultural Heritage Law* 32, 49.

<sup>46</sup> See generally Janet Ulph, ‘The sale of items in museum collections’ (forthcoming) *Modern Studies in Property Law: Vol 7*.

<sup>47</sup> MACoE (n 9).8.

<sup>48</sup> ICOMCoE (n 9). Introduction vii.

<sup>49</sup> P O’Keefe (n 45) 35.

<sup>50</sup> See MACoE (n 9).6 and museums undertake to ‘Uphold, promote and abide’ by the code ‘both in the letter and the spirit’: [2.4].

<sup>51</sup> *ibid*

ethical treatment of cultural heritage<sup>52</sup> and the notion of serving the public.<sup>53</sup> Stark<sup>54</sup> suggests, ‘Codes of professional ethics are helpful guidelines for ethical best practices, but it also takes the skill of the professional who possesses *phronesis*<sup>55</sup> to ... interpret and apply these guidelines.’<sup>56</sup> However, codes of ethics are publicly accessible documents demonstrating to the society whom they serve the obligations under which the museums place themselves and what those various stakeholders can expect of them. They are drafted in language capable of comprehension by the public, rather than in technical terms.<sup>57</sup> The codes therefore provide a level of public transparency, which is a key element of the MACoE<sup>58</sup> and demonstrate service to society.<sup>59</sup> Whilst these statements of intent are understandable by the public, the application of the codes’ principles to individual practical situations (particularly in the context of resolving disputes) within museum practice will require the necessary expert *phronesis*.

On the one hand, the flexibility of ethical, rather than legal rules can be an excellent means by which to make judgements about the care and curatorship of cultural heritage;

---

<sup>52</sup> See also Janet Marstine, ‘The contingent nature of the new museum ethics’ in Janet Marstine (ed), *The Routledge Companion to Museum Ethics* (Routledge 2011) 7 and P O’Keefe (n 45) 34.

<sup>53</sup> As evident in the ICOM and MACoEs discussed at p 241 below.

<sup>54</sup> Judith Chelius Stark, ‘The art of ethics: Theories and applications to museum practice’ in Marstine (n 52) 39.

<sup>55</sup> Described as a concept used by Aristotle which equates to ‘practical wisdom’ or ‘moral know-how’: Stark (ibid) 38.

<sup>56</sup> ibid 39.

<sup>57</sup> For example the use of the word ‘disposal’ rather than ‘deaccession’

<sup>58</sup> MACoE (n 9). [2.12] and [6.11]. The Code also upholds the seven principles of public life, deriving from the Nolan Committee: MACoE (n 9). 23. P O’Keefe sees that it is ‘essential to reassure the public that those to whom the heritage is entrusted for safekeeping are indeed doing their duty’: (n 45) 49.

<sup>59</sup> ICOMCoE (n 9).Introduction vii. See p 231 above.

this avoids ‘overly zealous legal protections’ which are ‘not well-suited to a good whose value is intimately connected with something as fluid as culture’.<sup>60</sup> A prime example of the inflexibility of law when resolving cultural heritage claims is seen in the lack of unusual or inventive solutions beyond traditional legal remedies of return or compensation.<sup>61</sup> However, the flexible wording of ethical codes brings with it the risk of imprecision,<sup>62</sup> but if there is a clear dovetailing between the legal and non-legal then the two systems can work in a complementary fashion.<sup>63</sup> Examples of such dovetailing will be shown in the analysis below, yet the law can impede the consistent treatment of cultural heritage across all museums.<sup>64</sup> A clear advantage of the flexibility of moral norms is that they can aid more equitable treatment in individual situations. In this way ‘Ethics...maps a principled pathway to help the museum to navigate through contested moral territory’<sup>65</sup> rather than providing absolute guidance on what actions to take.<sup>66</sup> In

---

<sup>60</sup> Sarah Harding, ‘Value, Obligation and Cultural Heritage’ (1991) 31 *Arizona State Law Journal* 292, 353.

<sup>61</sup> The criticism levelled in this thesis is to the inflexibility of the law as it currently stands, rather than a criticism of law as a mechanism by which to regulate cultural heritage or to resolve disputes involving cultural heritage.

<sup>62</sup> John Henry Merryman, ‘Thinking about the Elgin Marbles’ (1984-1985) 83 *Mich L Rev* 1881, 1903.

<sup>63</sup> See Ulph (n 46) who talks of the MA’s proposed due diligence guidelines meshing with the law and Frigo (n 8) 50 who suggests that the law and ethical codes can combine ‘to create a complete, if not homogenous, regulation’.

<sup>64</sup> At pp 255-257 below.

<sup>65</sup> Tristram Besterman, ‘Museum Ethics’ in S Macdonald (ed), *A Companion to Museum Studies* (Blackwell Publishing 2006) 431.

<sup>66</sup> Clavir suggests that ‘ethics not only provide a framework to guide actions, but they are also intertwined with the social structure, its powerful institutions, and its understanding of “good” and “bad”’: Clavir M, *Preserving What is Valued* (UBC Press 2002) 27.

addition to the flexibility of language is the flexibility of the instrument itself since ethical codes can be redrafted more easily than legislation (or the development of the common law); they can respond much more quickly, easily and effectively to changing social mores<sup>67</sup> and the MACoE is seen as ‘a constantly evolving document’.<sup>68</sup> The codes can also set agenda and practices ‘to meet predetermined ends and objectives’.<sup>69</sup> Consequently codes of ethics can be adapted to the changing role played by museums over the years such as the recent move to reflect an increased role for stakeholders with the changing nature of museums from temples to forums within which to debate issues.<sup>70</sup> This evolutionary nature can be seen in the changing attitude of the MA towards sales from collections, from the restrictive wording in the 1977 Code of Ethics with the strong presumption against disposal, to the more permissive language of later revisions.<sup>71</sup>

The provisions of the ICOM and MACoEs are complementary rather than contradictory, forming a general ethos of ethical behaviour, rather than a hierarchical

---

<sup>67</sup> Seen in the context of the Editors’ Code of Practice administered by the Press Complaints Commission: Ian Beales, *The Editors’ Codebook* (Editors’ Code of Practice Committee 2012) 7.

<sup>68</sup> MACoE (n 9).Foreword 3.

<sup>69</sup> Anthony Griffiths, ‘Codes of Conduct’ (1997) 2 *Art Antiquity and Law* 173, 176.

<sup>70</sup> Flynn uses this analogy and discusses the need for a change from the temple to the forum to take account of the museum’s ‘changing social function’: Tom Flynn, ‘The Universal Museum – a valid model for the 21<sup>st</sup> Century?’ <<http://www.tomflynn.co.uk/UniversalMuseum.pdf>> accessed 24 September 2012.

<sup>71</sup> See Nick Merriman, ‘Museum Collections and Sustainability’ <<http://www.museumsassociation.org/download?id=16720>> accessed 30 December 2012, 8-9.

structure.<sup>72</sup> The separate documents on access, acquisition and disposal give greater particularisation to how they conduct themselves, as does the specific guidance on human remains and Nazi Era objects.<sup>73</sup> In any event, the flexible nature of the codes as general statements rather than narrowly construed obligations, means that they are unlikely to directly contradict one another. Whilst using a degree of *phronesis* would in any case avoid seemingly incompatible obligations, ethical dilemmas arising from any (unlikely) conflict between the two instruments, could be referred to either the MA or ICOM's Ethical Committees for determination.<sup>74</sup>

Non-statutory government guidance on human remains and the illicit trade in cultural heritage objects governs the actions of museum governing bodies and professionals when caring for human remains and when fulfilling their obligations under the 1970 Convention in terms of carrying out due diligence.<sup>75</sup> These documents set out the minimum standards expected of museums and how they can foster good practice. Arguably, were an unsuccessful claimant to mount a judicial review application against

---

<sup>72</sup> In this way neither the MACoE nor the ICOMCoE are subordinate to the other. The MACoE is clearly expressed to be consistent with the ICOMCoE and the MA clearly supports the work of ICOM: MACoE (n 9) 5.

<sup>73</sup> Access and Acquisition Guidance: This includes how museums should deal with CHOs that are important to indigenous communities: MAAcquGuide (n 26) [3.9] and MAAccGuid (n 26) [G4]. Human Remains - the balancing of issues relating to the cultural and scientific value of remains: DCMS HR Guidance (n 27) 27 & 28. Spoliation claims - the need to undertake provenance research and to seek to achieve equitable resolution of disputes: NMDC guidelines (n 29) [2.5] and [5.4].

<sup>74</sup> MA Ethics Committee <<http://www.museumsassociation.org/ethics/ethics-committee>> accessed 6 January 2013 and ETHCOM <<http://icom.museum/the-committees/technical-committees/standing-committee/ethics-committee/>> accessed 6 January 2013.

<sup>75</sup> DCMS, *Combating Illicit Trade* (n 28).

the museum's governing body, the degree of a museum's compliance with these guidelines could be a consideration in determining *Wednesbury* unreasonableness.<sup>76</sup>

#### **4.2.1.1 Enforceability – not in a traditional legal sense**

Neither the ICOMCoE, nor the MACoE has, in itself, any legal force, unless compliance is made a contractual requirement.<sup>77</sup> A principal concern in gauging the effectiveness of codes of ethics is the issue of enforceability.<sup>78</sup> Whilst codes certainly have a significant role to play in educating museum professionals and governing bodies in appropriate ethical behaviour and guiding them in difficult decisions, there are several consequences of non-compliance that, whilst not having the full force of law in terms of any “legal bite”, can contribute to a general ethos of compliance.<sup>79</sup> Patrick O’Keefe suggests that the educative impact should be the primary objective, with sanctions being secondary: ‘above all...codes need to be observed by those to whom they apply in a spirit of goodwill, not one of minute interpretation or in seeking loopholes’<sup>80</sup> However, for any system of norms to achieve any degree of success there needs to be a general ethos of compliance perhaps derived from the professional or

---

<sup>76</sup> *Wednesbury Corp v Ministry of Housing and Local Government (No 2)* [1966] 2 QB 275 (CA). For a general background see Paul Craig, *Craig: Administrative Law* (7<sup>th</sup> edn, Sweet & Maxwell 2012) 647-652.

<sup>77</sup> Discussed at p 239 below.

<sup>78</sup> With authors such as Frigo asking whether the role of codes is purely a pedagogic one: Frigo (n 8) 57

<sup>79</sup> These include the removal of membership, the public embarrassment from non-conformity and the reduction in availability of funding when losing accredited museum status: see p 239 below.

<sup>80</sup> (n 45) 49.



public embarrassment that follows infractions; without this, sanctions are essential to a code's success.<sup>81</sup>

First, both ICOM and the MA, as professional bodies, provide for the ultimate sanction of expulsion if members fail to comply with the codes.<sup>82</sup> In the case of ICOM, its statutes permit membership to be terminated for a breach of professional ethics.<sup>83</sup> Where the MA Disciplinary Committee finds a member guilty of misconduct<sup>84</sup> (or there is an admission of guilt) such as a breach of the code and it considers the member to be unfit or unsuitable to continue as a member it can expel them<sup>85</sup> or suspend their membership for up to one year.<sup>86</sup> Where there is no termination or suspension of membership the MA Disciplinary Committee can either 'reprimand' or 'severely

---

<sup>81</sup> In the context of financial services the potentially negative effect of non-compliance can also 'incentivize compliance': Brummer (n 31) 121. C.f P O'Keefe (n 45) 49 who suggests that the educative role takes priority over the sanctions. In the US museum context Fitz Gibbon emphasises the effect that bad publicity following from a breach of the ethical codes can have on museums which are heavily reliant on private funding: Kate Fitz Gibbon, 'Dangerous Objects: Museums and Antiquities in 2008' (March 1, 2009) SSRN <<http://dx.doi.org/10.2139/ssrn.1479424>> accessed 30 December 2013, 9.

<sup>82</sup> *ICOM Statutes*, Approved in Vienna (August 2007) art 4(4)(ii) and MA, *The disciplinary regulations of the Museums Association* <<http://www.museumsassociation.org/about/12194>> accessed 28 December 2012.

<sup>83</sup> *ICOM Statutes*, Approved in Vienna (August 2007) art 4(4)(ii).

<sup>84</sup> Under the MA, *The disciplinary regulations of the Museums Association* a failure to comply with the code of ethics can constitute misconduct: [7.1]-[7.2]

<sup>85</sup> Which can justify termination of membership under [14.1.1.1]. Termination is also mandated by the Articles of Association of the Museums Association, art 8.2 where in accordance with disciplinary regulations drafted by the Association (see *ibid*).

<sup>86</sup> MA Disciplinary Regulations (n 84) [14.1.1.2].

reprimand' a member who is guilty of misconduct;<sup>87</sup> this can provide a significant deterrent for others who might otherwise have engaged in similar conduct in the future.

The MA has rarely used the sanction of expulsion, having only expelled one institutional member for breach of the code since its establishment in 1889.<sup>88</sup> Two further local authority museums withdrew their membership before having it removed,<sup>89</sup> when the MA's Disciplinary Committee found that Bury Council's decision to sell a painting by Lowry to reduce its financial deficit contravened the code.<sup>90</sup> As Bury Council had already resigned, the Disciplinary Committee severely reprimanded it, stating that any future application made by Bury to rejoin the association would be referred to the MA Council to ensure compliance with the code of ethics.<sup>91</sup> In September 2013 the MA Ethics Committee recommended that Croydon Council should face disciplinary action over the proposed sale of items from the Riesco collection of

---

<sup>87</sup> *ibid* [14.1.2.1].

<sup>88</sup> Derbyshire County Council (Buxton museum): see Merriman (n 71) 9 and Sharon Heal, 'MA takes first steps to discipline Bury council' (2006) 106(11) *Museums Journal* 8. Frigo opines that it is 'vain and useless effort to evaluate effectiveness of codes based on sanctions for non-compliance' because procedures of sanction are rarely used and so suggests that codes may have a primarily pedagogic role: (n 8) 57.

<sup>89</sup> BBC, 'Lowry sale council loses status' BBC News 15 December 2006 <<http://news.bbc.co.uk/1/hi/england/manchester/6183547.stm>> accessed 24 September 2012.

<sup>90</sup> Principally principle 6.13. See Museums Association, 'Statement from the Museums Association Council' (regarding Bury Council) <<http://www.museumsassociation.org/publications/13286>> accessed 1 October 2012.

<sup>91</sup> *ibid*

Chinese objects.<sup>92</sup> Croydon Council resigned from the Museums Association before any disciplinary hearing took place.<sup>93</sup>

This low number of imposed sanctions might suggest that these codes are ineffective in practice as a system of norms.<sup>94</sup> However, the potential negative effects of sanctions can encourage compliance; a significant effect of loss of MA membership in the context of breaches of the code is that museums may lose accredited status from the Arts Council.<sup>95</sup> This can also mean loss of access to funding since compliance with the MACoE and/or accreditation will often be a prerequisite of funding.<sup>96</sup> The effect of non-compliance is heightened where museums lose their Designated status under the Arts Council scheme (as ‘pre-eminent collections’) since they will no longer have access to further funding pools.<sup>97</sup> This added incentive provides some measure of protection for pre-eminent collections by dissuading museums from making financially-motivated sales in contravention of the code. The sale of an object from a pre-eminent collection would have a much greater negative impact on the cultural value of the

---

<sup>92</sup> Geraldine Kendall, ‘Croydon Council to face disciplinary action over Riesco sale; <<http://www.museumsassociation.org/news/18092013-croydon-disciplinary-action>> accessed 30 December 2013.

<sup>93</sup> Patrick Steel, Croydon Council resigns from MA <<http://www.museumsassociation.org/news/01102013-croydon-council-resigns-from-museums-association>> accessed 30 December 2013

<sup>94</sup> Brummer suggests that the ‘mere prospect or threat of expulsion can itself constitute a considerable sanction’ (n 31) 156.

<sup>95</sup> BBC (n 89). See MA Council (n 90)

<sup>96</sup> The MA’s Disciplinary Committee called on heritage funding bodies ‘to consider carefully any decision to award funding to Bury Council’ following its breach of principle 6.13 MA Council (ibid).

<sup>97</sup> Edward Manisty & Julian Smith, ‘The Deaccessioning of objects from public institutions: Legal and related considerations’ (2010) 15 *Art Antiquity and Law* 1, 39-40.

collection than one from a more minor non-national collection. Particularly in an age of austerity the potential to lose financial support can act as a significant deterrent and may encourage compliance with the code, or at least prevent serious infractions of it. Therefore the general threat of such sanction (even if acted upon in only a handful of cases) can incentivise compliance, as demonstrated by Bolton Council's decision not to sell a painting following the indication by the MA's Ethics Committee that it fell within the museum's core collection<sup>98</sup> and its sale would breach the code. This is one manifestation of 'community judgment' flowing from non-compliance with codes.<sup>99</sup> According to this, the public may respond to infractions with lower visitor numbers, but it also extends to the removal of political or financial support as just discussed.<sup>100</sup> This can be significant in ensuring compliance and thus provides enforceability even without direct legal sanction. In a profession where members know each other well (particularly due to cross-border inter-museum loans) professional embarrassment resulting from publication of a serious breach of the ethical code is likely to act as a strong deterrent. For example, in the wake of the sale by Buxton museum 'the general condemnation that the council faced seemed to quell any copycat behaviour'.<sup>101</sup> This feature sets museum codes apart from other professional codes because museums would see tangible effects

---

<sup>98</sup> Museums Association Ethics Committee, 'Advice to Bolton Council regarding proposed sale of selected works from the collection of the Bolton Museum and Art Gallery' <<http://www.museumsassociation.org/news/05042011-bolton-may-withdraw-painting-from-sale>> accessed 24 September 2012, 3.

<sup>99</sup> Edson (n 1) 119.

<sup>100</sup> *ibid.* Extreme situations could, of course, lead to legal action: Edson (n 1) 119.

<sup>101</sup> Sharon Heal, 'The great giveaway' (2006) 106(10) *Museums Journal* 32, 35.

on their finances and reputations in the event of a gross breach of the code, whereas there were ‘few internal consequences for breach’ on the press under the PCC Code.<sup>102</sup>

Compliance with codes can have ‘legal bite’ if it is a contractual obligation.<sup>103</sup> The MA encourages its members to require such compliance not only in its contractual undertakings with employees but also in contracts with consultants and clients.<sup>104</sup> Legal enforcement here does, though, depend on the museum instigating a claim for breach of contract. However, this would be more of a symbolic rather than substantive action since the museum’s loss is likely to be minimal and damages probably only nominal. Nevertheless, the MA’s wide encouragement of such contractual undertakings clearly strengthens not only the sanctions in the event of non-compliance, but also contributes to the development of a general ethos of ethical behaviour in the profession and how it interacts with third parties.

#### **4.3 Codes of ethics: seeking to democratise museums?**

These two principal codes of ethics make some inroads into removing the arbitrary legal distinctions of how cultural heritage is treated depending on the nature of the museum in which the object is located.<sup>105</sup> Whilst precise legal duties are found in the context of most national museum collections and in the contractual undertakings of private owners of pre-eminent objects,<sup>106</sup> the activities of the governing bodies of non-

---

<sup>102</sup> Leveson (n 36) [37].

<sup>103</sup> C.f. *Kingdom of Spain v Christie, Manson & Woods Ltd* [1986] 1 WLR 1120 (Ch), 1125 where the claimant was unable to rely on the code to which the defendant was a party, although the judge considered the code during the course of his judgment.

<sup>104</sup> MACoE (n 9). 5. See also Frigo (n 8) 51.

<sup>105</sup> As discussed in Chapter 3.

<sup>106</sup> Who have benefited through the taxation scheme.

national collections are only regulated if the institution is a charity or the terms of a gift or bequest impose such duties.<sup>107</sup> The non-legal regime attempts to fill the gaps left by the law by seeking to place all museums on an equal footing and by recognising the need for governing bodies to place themselves under moral obligations regardless of the nature or extent of their collections. There is a strong recognition of the cultural heritage value and public legacy of museum collections and the objects therein.<sup>108</sup> Therefore, whether governed by statute or a trust, whether or not funded directly from the government, museums are treated equally by the ICOMCoE as institutions that ‘preserve, interpret and promote...the cultural heritage of humanity’<sup>109</sup> and ‘maintain collections and hold them in trust for the benefit of society’;<sup>110</sup> similarly the MACoE treats them as ‘institutions that collect, safeguard and make accessible artefacts and specimens, which they hold in trust for society’.<sup>111</sup> This is a much more democratic approach, recognising the cultural heritage value in all collections regardless of whether they happen to have been established as national museums (which may have been due to historical happenstance). All governing bodies are placed under duties to preserve and provide access, according to their professional bodies (and where they are accredited, by accreditation schemes<sup>112</sup>). The norms of preservation and access are therefore more uniformly upheld as moral duties. However, whilst the sentiment is

---

<sup>107</sup> At pp 206-218 above.

<sup>108</sup> This can be seen *inter alia* in the following provisions of the codes: MACoE (n 9). [3.18] and [5.2] and ICOMCoE (n 9).

<sup>109</sup> ICOMCoE (n 9). [1].

<sup>110</sup> *ibid* [2].

<sup>111</sup> MACoE (n 9). 9.

<sup>112</sup> Discussed below at p 253.

clearly present to recognise and uphold the principles and norms, several impediments exist which frustrate this democratisation.<sup>113</sup>

#### **4.3.1 Strong and more nuanced recognition of the cultural heritage principles and norms focusing on the intangible dimension of cultural heritage**

Both the ICOM and MA codes show a clear appreciation of the varied nature of cultural heritage value, particularly the sacred significance of some cultural heritage to originating communities.<sup>114</sup> The MACoE shows a clear prioritisation of the cultural heritage value in general by museums undertaking to ‘Encourage the public appreciation of the cultural rather than financial value of items’.<sup>115</sup> In this way it shifts the public’s attention towards the cultural heritage value, treating the financial value as subordinate; this corresponds with the approach taken in Australia’s influential Burra Charter<sup>116</sup> which has no reference to either the economic or financial value of cultural heritage.<sup>117</sup>

The codes encourage the assessment of cultural heritage value at different stages of the life of a cultural heritage object within a collection; the ICOMCoE states that in the context of deaccessioning one should fully understand the significance of the cultural heritage object,<sup>118</sup> to avoid diminishing cultural value by deaccessioning. When

---

<sup>113</sup> Discussed below at pp 255-257.

<sup>114</sup> When acquiring an object a museum should be sure that an object can be kept in a respectful manner: ICOMCoE (n 9). [2.5] and the MACoE recognises that it may be appropriate to restrict access to objects that have a ceremonial or religious importance: (n 9). [7.6].

<sup>115</sup> MACoE (n 9). [3.18].

<sup>116</sup> As discussed in Chapter 2

<sup>117</sup> At p 82 above.

<sup>118</sup> ICOMCoE (n 9). [2.13].

acquiring objects the MACoE requires, on accession, that a museum consider the long-term value of the object and how it will be used.<sup>119</sup> Significantly, this also includes whether or not the object might be more appropriately housed elsewhere. Consequently acquisition would be unethical for ‘items better owned by another museum or public institution for reasons of care, access or context’.<sup>120</sup> Here, one can see a sharpening of the focus of cultural heritage value on to the intangible element of cultural heritage and a clear balancing exercise taking place. This conclusion is strengthened by another category of ‘unacceptable acquisitions’ which includes ‘items better held for moral reasons by individuals, groups, societies or peoples’.<sup>121</sup> The MA’s approach to ethical acquisition effectively balances the different types of value and prioritises the maintaining of cultural heritage value, even if the institution sacrifices public access to the object. Whilst some assessments of cultural heritage value were undertaken in the legal regime (for example, in the context of export licensing) this was underpinned by a concern for retaining objects for the nation.<sup>122</sup> The general approach in these two codes shows that rather than a museum taking a narrow view of whether it is relevant to keep an object within its own collection, it is encouraged to address, head on, a full

---

<sup>119</sup> MACoE (n 9). [5.2]

<sup>120</sup> See MAAcquGuide (n 26) Appendix [A.1].

<sup>121</sup> *ibid*

<sup>122</sup> For example the decision by the Reviewing Committee concerning the Earl of Elgin’s papers: Reviewing Committee on the Export of Works of Art and Objects of Cultural Interest: *Note of case hearing on 4 June 2008: Papers of James Bruce, 8<sup>th</sup> Earl of Elgin, as Governor of British North America* (Case 2, 2008-2009) < [http://www.artscouncil.org.uk/media/uploads/pdf/Case\\_2\\_Note\\_of\\_case\\_hearing\\_FINAL.pdf](http://www.artscouncil.org.uk/media/uploads/pdf/Case_2_Note_of_case_hearing_FINAL.pdf)> accessed 7 September 2012. See p 160 above.



assessment of whether the cultural heritage value might be more effectively met by abstaining from acquiring an object or by transferring it elsewhere.

Unlike the legal recognition of the public legacy, which tended to be implicit,<sup>123</sup> the codes of ethics expressly recognise this notion, seeing museums as acting as agents of the public legacy of collections that are ‘a significant public inheritance’<sup>124</sup> and with which museums are entrusted.<sup>125</sup> The approach taken to public legacy is a holistic one such that, rather than focusing on a narrow category of the visiting public, the MACoE looks at the wide range of stakeholders and the obligation towards the ‘public trust’ which includes ‘the notion of stewardship that includes rightful ownership, permanence, documentation, accessibility and responsible disposal’.<sup>126</sup> The MA sees public trust as demonstrating ‘the idea of society having a legitimate interest in museums’.<sup>127</sup> Rather than focusing solely on future generations, the MACoE demonstrates its commitment to both present and future generations,<sup>128</sup> placing on museums a moral obligation to facilitate current use, but also to pass collections ‘on to future generations’;<sup>129</sup> consequently, when deaccessioning, museums should have a full understanding of ‘any loss of public trust that might result from such action’.<sup>130</sup> The need to assess and account for loss to stakeholders shows considerations of the effect that the cultural

---

<sup>123</sup> See generally Chapter 3.

<sup>124</sup> ICOMCoE (n 9). [2].

<sup>125</sup> The MACoE (n 9). 8 also reflects this notion by suggesting that society has a legitimate interest in museum collections.

<sup>126</sup> ICOMCoE (n 9).

<sup>127</sup> MACoE (n 9).8.

<sup>128</sup> *ibid*

<sup>129</sup> ICOMCoE (n 9). [2.18].

<sup>130</sup> *ibid* [2.13].

heritage value has on the public legacy clearly in excess of the legal recognition of these concepts. In this way, the codes provide a more sustained and consistent recognition of the importance of cultural heritage to a variety of stakeholders. A fuller understanding of the nature of public legacy can be seen in the MACoE than was evident in English law since the code recognises the role of cultural heritage as ‘a tangible link between the past, present and future’.<sup>131</sup> The MACoE therefore encourages museums to respect what has gone before and in particular ‘take account of the contributions of past generations, particularly benefactors, communities of origin and creators of the objects which museums now safeguard’.<sup>132</sup> Perhaps the strongest articulation of this notion is in the phrase ‘intergenerational equity’ used by the MA, suggesting that there is a responsibility to pass on collections yet not necessarily limiting today’s access;<sup>133</sup> it will only be necessary to limit this to safeguard the collections for the future where the current use risks the continued future use.<sup>134</sup>

Unlike the legal regime, the two principal codes demonstrate clear appreciation of all aspects of the public legacy notion, rather than simply keeping objects for future generations; the codes recognise that it may be inappropriate to retain objects for the general public, but instead objects should be enjoyed by those fewer people for whom the significance is greater (e.g. an originating community). Museums, therefore, ‘should be prepared to initiate dialogues’ about returning cultural heritage objects<sup>135</sup> and restitution should happen where it is clear that an object was exported or transferred in

---

<sup>131</sup> MACoE (n 9). [6].

<sup>132</sup> MAAccGuide (n 26) [E2] and see also [F3].

<sup>133</sup> *ibid* [F1].

<sup>134</sup> *ibid* [F2].

<sup>135</sup> ICOMCoE (n 9) [6.2].

violation of laws and museums should take ‘prompt and responsible steps to co-operate in its return’.<sup>136</sup> These approaches clearly recognise and give effect to the rights of indigenous peoples under the UN Declaration, in particular in terms of seeking to enable access to and/or repatriation of sacred items and human remains.<sup>137</sup> In a similar manner to the MA’s notion of ‘unacceptable acquisitions’,<sup>138</sup> the ICOMCoE requires museums to engage with the question of the appropriate treatment of objects and the need, at times, to transfer objects from their collections for the wider fulfilment of the public legacy, thereby avoiding complicity by associating with tainted objects.<sup>139</sup>

Principle 6.8 of the MACoE states that museums should:

‘Recognise that formal title to and guardianship of the collections is vested in the governing body, which must satisfy itself that decisions to dispose are informed by the highest standards of expertise and take into account all legal and other attendant circumstances’.<sup>140</sup>

The reference to ‘attendant circumstances’ provides scope for balancing the relevant types of cultural heritage value to reach a decision that best reflects these (as discussed above in the context of the cultural heritage principles). It is clear that whilst there is a firm commitment to preserving cultural heritage for future generations, there is also a realisation that it may be appropriate to dispose of objects, not least when acceding to repatriation requests. However, in line with the general ethical approach to acquiring

---

<sup>136</sup> *ibid* [6.3].

<sup>137</sup> Specifically to the United Nations Declaration on the Rights of Indigenous Peoples 61/295 2008, art 12(1).

<sup>138</sup> Discussed at text to n 121.

<sup>139</sup> ICOMCoE (n 9). [6.2]-[6.3].

<sup>140</sup> *ibid* [6.8].

and disposing of collections, the MACoE does not support any general ethos of hoarding objects (by constantly aiming to fill display cases and storage shelves) and states that museums should refuse tactfully any bequests or offers of gifts that are not in line with their collections policies.<sup>141</sup>

Where museum governing bodies have determined that cultural heritage value and public legacy would be better served by the loss to a museum of the physical object, this demonstrates ‘resolutions of self-restraint in [museums’] collections policies’, including voluntary return of objects.<sup>142</sup> Examples include the repatriation of a Tasmanian Aboriginal bracelet and necklace<sup>143</sup> from the Royal Albert Museum in Exeter<sup>144</sup> and four skulls that were repatriated from Manchester Museum to the Torres Strait Islanders in 1992.<sup>145</sup> Whilst it is acknowledged that museums are the legal owners of their collections, they have also been categorised as ‘ethical guardians’<sup>146</sup> and as such, in this role, museums can justify acceding to repatriation requests in the absence of a legal imperative to do so since it is deemed unethical to retain such objects.<sup>147</sup>

---

<sup>141</sup> *ibid* [5.18].

<sup>142</sup> John Henry Merryman, ‘International Art Law: from Cultural Nationalism to a Common Cultural Heritage’ (1983) 15 *New York Journal of International Law and Politics* 757, 760-761.

<sup>143</sup> Apparently owned by Truganini: Moira G Simpson, *Making Representations: Museums in the Post-Colonial Era* (Revised edition, Routledge 2001) 276.

<sup>144</sup> *ibid*

<sup>145</sup> Tristram Besterman, ‘Returning the ancestors’ <<http://www.museum.manchester.ac.uk/collection/humanremains/>> accessed 16 November 2012.

<sup>146</sup> MACoE (n 18) [1.0]. This notion, as a developing *quasi*-legal principle, is analysed at p 262 below.

<sup>147</sup> Although note the major legal impediment to this discussed at pp 148-150 above.

#### **4.3.2 Tempering an otherwise unrestricted power**

The governing bodies of non-national museums are not placed under any legal duties corresponding to the cultural heritage norms unless they have been established as charities;<sup>148</sup> additionally there is no recognition of the underlying ethos of respecting the cultural heritage principles. However, by treating museums equally, regardless of legal structure, both the ICOM and MACoEs temper this otherwise unfettered power; non-national museums (which are not charities) are placed under the strong duties of preservation and access as provided for in the codes, as discussed in the preceding section. Therefore, the ethical codes have a clear role to play in more fully recognising the cultural heritage value of the collections (and preserving this) in a way in which the law failed to do. By focusing on the need to balance the various types of cultural heritage value and public legacy (as analysed above) this shows that unlike the legal regime, the codes focus on the preservation of the intangible dimension of cultural heritage, rather than merely the physical manifestations. Whilst the general ethos of preserving the intangible dimension of cultural heritage can be seen in an implicit manner in the discussion above of provisions that relate to value and public legacy, the express recognition of preservation is mandated in terms of physical preservation in both codes.<sup>149</sup> Therefore, the MACoE requires museums to ‘Protect all items from loss, damage and physical deterioration’.<sup>150</sup> At times preservation needs to be weighed against access; accordingly the MACoE states that museums should balance their duty of maintaining and enhancing collections with duties to the present generation as well

---

<sup>148</sup> At pp 206-215 above.

<sup>149</sup> ICOMCoE (n 9) [1]-[2].

<sup>150</sup> MACoE (n 9). [6.3].

as the need for security and conservation as compared with access.<sup>151</sup> However, there is no automatic pre-eminence of preservation over access. The balancing exercise is firmly placed in the context of museums' responsibilities to future generations (i.e. the public legacy<sup>152</sup>) and this links closely with the museums' responsibilities to stakeholders past, present and future. Both codes clearly recognise the importance of preservation of objects even in situations where the acquisition of them might otherwise be improper, if there is a significant risk to the object. This is particularly important where objects have been stolen from national collections during times of conflict and were they not saved there is a risk that they would be lost to the black market.<sup>153</sup> Provision for this is made by both ICOM and the MA.<sup>154</sup> Therefore, the ICOMCoE prioritises preservation even when this contravenes the obligations regarding illicit trade by providing that nothing prevents 'a museum from acting as an authorised repository for unprovenanced, illicitly collected or recovered specimens or objects from the territory over which it has lawful responsibility'.<sup>155</sup> The MA provides an exception permitting acquisition of unprovenanced material for 'objects illicitly removed from a country during recent or continuing war, conflict or other instability'.<sup>156</sup> These two principles deal with museums acting as repositories of last resort, but it is clear that there is a strong need to save cultural heritage in circumstances which might otherwise

---

<sup>151</sup> *ibid* [6.4].

<sup>152</sup> Discussed at p 93 above.

<sup>153</sup> For example following the Iraq war in 2003: see Janet Ulph and Ian Smith, *The Illicit Trade in Art and Antiquities: International Recovery and Criminal and Civil Liability* (Hart Publishing 2012) 11.

<sup>154</sup> ICOMCoE (n 9). [2.11] and MAAcquGuide (n 26) Appendix H.

<sup>155</sup> ICOMCoE (n 9). [2.11]. See also International Law Association, Resolution No 2/2008 *Guidelines for the Establishment and conduct of safe havens* (Rio de Janeiro 2008).

<sup>156</sup> MAAcquGuide (n 26) Appendix H.

be considered as supporting the illicit trade in cultural heritage objects since provision is made: ‘In exceptional cases an item without provenance may have such an inherently outstanding contribution to knowledge that it would be in the public interest to preserve it’.<sup>157</sup> This is reflected in the MA Acquisitions Guidance which permits acquisition of an object that ‘needs to be urgently “saved” because it would otherwise be destroyed’.<sup>158</sup> A further exception is provided for ‘Items, particularly archaeological items, that appear to originate within the local collecting area of the museum but do not have a clear ownership history’.<sup>159</sup> This once again prioritises the physical preservation and risk of loss by providing for the legitimisation of action (here acquisition of otherwise tainted objects) for the greater good of preventing complete loss.

Perhaps one of the strongest instances of tempering the otherwise unfettered power of non-national museums is the focus on the need to preserve the associative value of collections. Whilst a purely financially motivated sale is perfectly permissible in law where there is no charity structure, this would contravene the MACoE except in exceptional circumstances;<sup>160</sup> these include where an object is not part of the museum’s ‘established core collection’, the disposal would ‘significantly improve the long-term benefit’ from the remaining collection, it is ‘not to generate short-term revenue’, it is a

---

<sup>157</sup> ICOMCoE (n 9). [3.4]

<sup>158</sup> n 120, Appendix B.

<sup>159</sup> *ibid*, Appendix H.

<sup>160</sup> MACoE (n 9). [6.13]. More recently the MA has published draft *Due Diligence Guidelines Relating to Sale of Items from Museum Collections*. In that document financially motivated sales continued to be limited to only exceptional circumstances: Museums Association, *Draft due diligence guidelines* (MA 2012) <<http://www.museumsassociation.org/collections/21052012-sale-of-collections-draft-due-diligence-guideline>> accessed 13 November 2012.

last resort and ‘extensive prior consultation with the sector has been undertaken’.<sup>161</sup> By limiting the ability to dispose to objects outside the core collection this preserves the cultural heritage value of the collection, yet recognises the notion of responsible disposal when the cultural heritage value might be better served by the object being elsewhere.<sup>162</sup>

These various provisions relating to preservation show that the codes prioritise the physical preservation of the objects whenever they are at risk,<sup>163</sup> but also acknowledge that it is important to preserve the cultural heritage value of the objects by returning them to communities to whom the cultural heritage is more valuable (implicitly even if that risks the physical integrity of the thing itself).<sup>164</sup> The overall approach is clearly to value cultural heritage for its own sake (in terms of its role within society rather than its aesthetic value). The professional bodies, through the codes, then entreat their members to preserve this cultural heritage value.<sup>165</sup> There is no trace of nationalism or retentive tendencies that so permeated the legal regime.<sup>166</sup> Indeed, the NMDC, which represents the UK’s national museums, suggests that its museums should be willing to dispose of an object where that would better preserve it.<sup>167</sup> This shows a commitment, despite legislative constraints, to an overarching notion of preservation, even at the expense of an individual collection’s continued possession of an object.

---

<sup>161</sup> MACoE (n 9). [6.14].

<sup>162</sup> See p 245 above.

<sup>163</sup> ICOMCoE (n 9) [2.11] and MAAcquGuide (n 26) Appendix H.

<sup>164</sup> ICOMCoE (n 9) [6.3] and MACoE (n 9) [7.7]. The deterioration to the physical integrity of an object might be to ensure that preservation of the cultural heritage value of the object: see Harding (n 60) 312.

<sup>165</sup> ICOMCoE (n 9) [6.3] and MACoE (n 9) [7.7].

<sup>166</sup> As analysed in Chapter 3

<sup>167</sup> NMDC, *Too much stuff? - Disposal from museums* (National Museum Directors’ Conference 2003) 3.



Whereas the legal regime provided for the preservation of the physical objects and the preservation of contexts in a piecemeal fashion in different legal instruments, the museum codes deal with preservation in a comprehensive manner and deal not only with the current status of the object, as part of a museum or as a potential museum acquisition. Instead, the full extent of preservation is recognised, including the preservation of archaeological context which is acknowledged from the perspective of the acquisition of archaeological finds. The MA treats context as being of prime importance such that even where an object has been acquired by the museum it may be appropriate to preserve it in situ.<sup>168</sup> ICOM requires its members to refuse to acquire objects that were acquired by ‘unscientific fieldwork, or intentional destruction...of archaeological... sites’<sup>169</sup> and the MA states that museums should refrain from acquiring where ‘any suspicion that it has recently been removed insensitively from its original context...unless....there is an exceptionally strong reason for acquiring it’.<sup>170</sup> By using the terms ‘unscientific fieldwork’ and ‘insensitivity’ these principles move beyond a refusal to acquire objects that have been illegally removed (which would be the strict legal duty) and adopts a standard requiring a high level of professionalism.<sup>171</sup>

---

<sup>168</sup> MAAcquGuide (n 26) [3.10]. The Guidance also requires museums in the context of fieldwork not to acquire objects where there is damage to the ‘original natural, historic, cultural or social context’ unless there is an ‘exceptionally strong reason’ for it: (n 120) [6.3.1].

<sup>169</sup> ICOMCoE (n 9). [2.4].

<sup>170</sup> MAAcquGuide (n 26) [4.7].

<sup>171</sup> Having said that, presumably a more objective standard could be obtained by referring to the relevant standards required of professional archaeologists.

Both codes of ethics strongly endorse the notion of accessibility.<sup>172</sup> The MACoE has a particularly wide definition of this, extending beyond making physical collections accessible to include information and educational opportunities which can be accessed off-site.<sup>173</sup> In this way the internet is another means by which to make collections more accessible.<sup>174</sup> There is a clear sentiment that access to museums should be available at reasonable times of day for regular periods<sup>175</sup> and as freely as possible in light of confidentiality and security.<sup>176</sup> Furthermore, access should be facilitated for all, with the consequence that concerns regarding widening participation should be addressed where charges may be made for entry.<sup>177</sup> Public access requirements are fortified by the Arts Council's Accreditation Scheme<sup>178</sup> and the DCMS Sponsorship schemes which impose duties of access and require returns to be made setting out visitor numbers.<sup>179</sup> Furthermore, objects should only be acquired where as well as being satisfied that they can provide long-term care, museums can ensure that they can provide 'public access to it, without compromising standards of care and access relating to the existing collections'.<sup>180</sup> The museum's documentation,<sup>181</sup> the results of its research as well as

---

<sup>172</sup> ICOMCoE (n 9) [1.4] and MAAccGuide (n 26).

<sup>173</sup> MACoE (n 9). 8

<sup>174</sup> See *ibid* [2.11]. This was not something envisaged in the statutory provisions analysed in Chapter 3.

<sup>175</sup> ICOMCoE (n 9) [1.4].

<sup>176</sup> *ibid* [3.2].

<sup>177</sup> MACoE (n 9) [3.8].

<sup>178</sup> Arts Council, *Accreditation Scheme for Museums and Galleries in the United Kingdom: Accreditation Standard* (2011) 12.

<sup>179</sup> Access is a key performance indicator: DCMS, *Performance Indicator Guidance* (2008) <[http://www.culture.gov.uk/images/research/PI\\_Guidance\\_note\\_with\\_PA\\_amendment.pdf](http://www.culture.gov.uk/images/research/PI_Guidance_note_with_PA_amendment.pdf)> accessed 13 November 2012, 4. It also contributes to the overall concept of transparency.

<sup>180</sup> *ibid* [5.3].

other information should also be accessible,<sup>182</sup> thereby adding to the notion of transparency.

Once more the ethical nature of the codes shows that rather than hoarding objects within the original collections, there is a focus on the fulfilment of the norm of access, even if that means a temporary loss to the individual museum. In this way there is a presumption in favour of lending where a loan will increase access,<sup>183</sup> thus enabling art to act as a good ambassador.<sup>184</sup>

The MACoE states that museums should ‘Retain items in the public domain at whichever location provides the best balance of care, context and access’.<sup>185</sup> Taken in this order of priority, this mirrors Merryman’s preservation, truth and access.<sup>186</sup> However, the Code restates the need to reconcile the safeguarding and access obligations elsewhere; it does not mention prioritising them, although implicitly suggests that access may be the norm to give way to preservation because it states that where access has to be restricted, this must be made explicit<sup>187</sup> (but makes no reference

---

<sup>181</sup> MACoE (n 9). [3.14].

<sup>182</sup> *ibid* [9.3] and ICOMCoE (n 21) [8.4].

<sup>183</sup> MAAccGuide (n 26) C2 – VI].

<sup>184</sup> Paul M Bator, *International Trade in Art* (University of Chicago Press, London 1983) 30. Bator suggests that the movement of art between nations can encourage an interest in the culture of that nation (*ibid*). It has been shown that even when diplomatic channels between nations have closed between countries, the lending of CHOs can still take place and arguably contribute to the flow of understanding between cultures: e.g. the loan of the Cyrus Cylinder to Iran discussed at p 204 above.

<sup>185</sup> MACoE (n 9). [1.2].

<sup>186</sup> John Henry Merryman, ‘The Public Interest in Cultural Property’ (1989) 77 Cal LR 339, 355. Discussed at p 122 above.

<sup>187</sup> MACoE (n 9) [3.12].

to the reverse situation where an object would be deteriorating by continuing to be accessible). The NMDC recognises that disposal from a collection may be appropriate where this would ensure wider use and enjoyment<sup>188</sup> and sees the context in which access is enjoyed as being a key factor, citing examples of transfers of archaeological objects to their place of origin.<sup>189</sup>

It has been shown<sup>190</sup> that the norm of access should also include the ability to restrict access, but this aspect of the norm was not recognised by the domestic legal regime.<sup>191</sup> In contrast to the legislative obligations placed on national museums to make materials accessible to the public so far as reasonably practical, museum codes encourage restricted access in certain circumstances.<sup>192</sup>

Museums interpret their role in society as being responsible to a variety of different stakeholders<sup>193</sup> and consequently provide for expeditiously addressing requests for removal from display human remains or sacred material.<sup>194</sup> The MACoE appears to go further than ICOM in requiring museums to consider restricting access ‘where unrestricted access may cause offence or distress to actual or cultural descendants’.<sup>195</sup> Therefore this is a pre-emptive requirement which does not depend on any request for removal being made by the originating community; instead it is incumbent on the

---

<sup>188</sup> NMDC (n 167) 4.

<sup>189</sup> *ibid* 7.

<sup>190</sup> Chapter 2.

<sup>191</sup> Chapter 3.

<sup>192</sup> Although note the restricted access provided to the Ethiopian Tabots by the British Museum: p 203 above.

<sup>193</sup> MACoE (n 9) [7.0].

<sup>194</sup> ICOMCoE (n 9) [4.4].

<sup>195</sup> MACoE (n 9) [3.15], see also [7.6].

museum to take action, although presumably museums will consult relevant communities before acting.<sup>196</sup> This sort of approach has been criticised as extending the role of museums beyond an educative one, to one that seeks to ‘instil faith’ by ‘increasingly exhort[ing] shaping and restricting access to displays in accordance with the beliefs and feelings to cultural descendants, privileging the idea that truth and authority are vested in blood and belief’.<sup>197</sup> Yet, the clear sentiment in these codes is to respect the views of these varied stakeholders for whom objects are important, culturally or spiritually. In some cases this will be a direct means by which to uphold the rights of indigenous peoples mandated by the UN.<sup>198</sup>

#### **4.3.3 Impediments to this increased democratisation**

The two principal codes show that outside legal confines museums are strongly encouraged to take account of the various cultural heritage principles and to uphold the norms. These codes of ethics are well-meaning and demonstrate strong commitment towards recognising and upholding ethical principles in museum practice. However, effective recognition in practical terms is only achieved to varying degrees because the codes face a major barrier to their effectiveness: the existing legislative barriers to deaccessioning. The existing nationalist approach to keeping collections within the confines of the few national museums is perpetuated and is not tempered by the codes themselves. A further conceptual, rather than *per se*, legal impediment, is the notion of the universal museum which has been adopted, certainly in the context of the British Museum in England.<sup>199</sup> Whilst Cuno sees ‘preservation of antiquities through

---

<sup>196</sup> Since there is a requirement to consult and involve communities before acting: MACoE (n 9) [4.1].

<sup>197</sup> Lowenthal (n 15) 28,

<sup>198</sup> See p 145 above.

<sup>199</sup> This obviously has legislative backing from BMA, s 3(4).

acquisition and the building of encyclopaedic museums’ as ‘a matter of public trust’,<sup>200</sup>

Besterman suggests that:

‘Placing the need to keep the museum’s collections intact above all other considerations is not a defence of integrity but its betrayal. Behaviour that might seek justification within the retentive dogma of universalism is exposed as an unedifying derogation of ethical leadership’.<sup>201</sup>

Cuno’s viewpoint (as a former director of such an encyclopaedic museum) supports the restrictive governing statutes of the national museums, whilst Besterman, himself a former chair of the MA’s Ethics Committee, shows a clear regard for the need to balance up the competing types of value to determine, otherwise this poses a risk to the very nature of museums. The former view perpetuates the concept of the universal museum, the most fervent articulation of which is found in the *Declaration on the importance and value of universal museums*<sup>202</sup> which suggests that by narrowing ‘the focus of museums whose collections are diverse and multifaceted’ (presumably through repatriation<sup>203</sup>) this ‘would...be a disservice to all visitors’.<sup>204</sup> The term ‘universal museum’ is not defined in the Declaration but seems to be a self-declared designation of the directors of the 19 signatory institutions (although at least one of the institutions houses artworks by 20<sup>th</sup> and 21<sup>st</sup> Century US artists, hardly universal by any scope of

---

<sup>200</sup> James Cuno, ‘Introduction’, James Cuno (ed) *Whose Culture? The Promise of Museums and the Debate over Antiquities* (Princeton University Press 2009) 17.

<sup>201</sup> Tristram Besterman, ‘Cultural equity in the sustainable museum’ in Marstine (n 52).

<sup>202</sup> Declaration on the Importance and Value of Universal Museums [2004] *ICOM News* 4.

<sup>203</sup> The Declaration acknowledges that cases should be considered individually, but reminds museums that they ‘serve not just the citizens of one nation but the people of all nations’.

<sup>204</sup> *ibid*

the imagination<sup>205</sup>). It has been suggested that the aim of the signatories is to create a 'different pedigree of museum, largely due to fears that materials held in their collections of which the ownership is contested, will face claims for repatriation.'<sup>206</sup> Abungu goes on to suggest that the Declaration and the self-defining act of creating a category of universal museums is a means by which to refuse to engage in a dialogue about repatriation.<sup>207</sup> Even in the absence of restrictive legislative provisions, if a museum's governing body adopts the general ethos of a universal museum then this can impede full analysis of cultural heritage value. This has been seen in the context of the trustees of the British Museum's approach to its power under section 47 of the Human Tissue Act 2004<sup>208</sup> and the self-restraint of its power to lend objects where they are 'key objects' which a visitor to the museum would expect to see.<sup>209</sup>

#### **4.4 Enlarging the scope of museum obligations: the development of *quasi*-legal principles**

Some ethical obligations prescribed by museum Codes of Ethics exceed the museum's strict legal obligations,<sup>210</sup> although obviously these cannot override the legal ones.<sup>211</sup> They therefore enlarge the scope of their obligations beyond the strict legal ones; to this

---

<sup>205</sup> See 'About the Collection', The Whitney Collection <<http://www.whitney.org/Collection>> accessed 29 April 2010. Although it is perhaps as universal as the US's 'World Series' baseball competition.

<sup>206</sup> George Abungu, 'The Declaration: A Contested Issue' [2004] *ICOM News* 5, 5

<sup>207</sup> *ibid*

<sup>208</sup> At pp 200-202 above.

<sup>209</sup> British Museum, *Loans Policy* (British Museum 2006) <<http://www.britishmuseum.org/PDF/Loans.pdf>> accessed 9 September 2012 [2.2]. See 172 above.

<sup>210</sup> MACoE (n 9) 5. Frigo observes this to be a general feature of many codes (n 8) 62, although suggests that this stricter level of compliance is not always observed.

<sup>211</sup> *ibid*

end the MACoE encourages its members to support unratified international conventions in situations where obligations under them neither conflict with the UK applicable law nor with the MACoE.<sup>212</sup> Similarly, ICOM lists seven international conventions which it requires museums to acknowledge as a standard in interpreting the code.<sup>213</sup>

A further enlarged modification is found in self-imposed limitation periods. The UK only acceded to the 1970 Convention in October 2002 (with certain reservations) and its provisions do not have retrospective effect.<sup>214</sup> Nevertheless, many museums and professional bodies as well as the DCMS<sup>215</sup> have adopted the year 1970 as a marker in time after which the standard of professional care rises.<sup>216</sup> Consequently, where the provenance of an object is in some regard doubtful, such as where there is a suspicion that it was stolen, illegally excavated or removed from a monument or where it was

---

<sup>212</sup> *ibid*

<sup>213</sup> ICOMCoE (n 9) [7.2].

<sup>214</sup> *The 1970 UNESCO Convention – Guidance for Dealers and Auctioneers in Cultural Property*, Department for Culture, Media and Sport, PP638, 2004. The late accession to the convention was due, in part, to concerns about the broad scope of its provisions, the at times overly prescriptive nature and its lack of clarity (see Seventh Report (n 309) [73] and [109]). Ratification followed the recommendations of the Illicit Trade Advisory Panel (Norman Palmer (Chair), *Ministerial Advisory Panel on Illicit Trade: Report* (DCMS 2000) [61]).

<sup>215</sup> DCMS, *Combating Illicit Trade* (n 28) [4].

<sup>216</sup> This has been described as a political date rather than a legal one: James Cuno, Director of the Art Institute of Chicago, interviewed on BBC Radio Four's *Today Programme*, Wednesday 5 November 2008, available at:

<[http://news.bbc.co.uk/today/hi/today/newsid\\_7710000/7710061.stm](http://news.bbc.co.uk/today/hi/today/newsid_7710000/7710061.stm)> accessed 6 April 2009 since it is a self-imposed rather than legally imposed requirement.



illegally exported since 1970 the MACoE requires the museum to reject such an object.<sup>217</sup>

These enlarging modifications give effect to the status of museums within society as guardians of our culture for present and future generations.<sup>218</sup> Museums effectively set themselves apart from private owners of objects of cultural heritage by taking on greater responsibilities than their strict legal ones. This distinction has been made in the context of Nazi Era cultural heritage objects where the DCMS doubted that the arguments against displaying looted art in private collections would be as strong as those against public collections;<sup>219</sup> this seems, in part, to be due to the absence of public funding. In effect, these perceived additional moral obligations may occasionally require museums to forego their strict legal entitlement to cultural heritage objects in order to fulfil their public role as museums.<sup>220</sup> However, as identified in the legal analysis, not all museum governing bodies may act to transfer objects in comparable circumstances,<sup>221</sup> thereby resulting in a lack of uniformity across the sector.

At times the ethical obligations have the effect of displacing traditional legal concepts in favour of more stringent moral ones. Effectively museum codes have taken a step further than merely developing a set of moral obligations and have created concepts

---

<sup>217</sup> MACoE (n 9) [5.10] and [5.11].

<sup>218</sup> See p 262 below

<sup>219</sup> Restitution of Objects Spoliated in the Nazi-Era: A Consultation Document, Department for Culture, Media and Sport, July 2006, 38

<sup>220</sup> E.g. the instances of return recommended by the Spoliation Advisory Panel.

<sup>221</sup> In Chapter 3. E.g. whilst Truganini's bracelet could be returned from the Royal Albert Museum, Exeter (n 143) had it been owned by the British Museum the BMA 1963 would have prevented transfer.

displacing traditional legal ones such as ethical guardianship or stewardship rather than ownership and ‘valid title’ or moral title rather than legal title.<sup>222</sup> This section seeks to establish whether these *quasi*-legal principles might aid the better fulfilment of the cultural heritage principles and norms.

Whilst the primary focus of this chapter remains on the codes of ethics, the concept of moral title can also be seen in the context of the Spoliation Advisory Panel (SAP). It is therefore appropriate in the following discussion to supplement the discussion on valid title and moral rights in museum codes of ethics with the interpretation of the SAP recommendations to provide further support for this developing *quasi*-legal principle. These recommendations also provide a tangible, practical application of this concept.

#### **4.5 Displacement of traditional notion of ownership – towards stewardship or guardianship?**

Obviously legal title, vested in the museum’s governing body, is necessary for an object to be formally acceded to the collection. Whilst ownership brings with it the notion of control over the property itself, the trustee relationship (under which many collections are held) will import the notion of duties to beneficiaries and where a charity, to the public. The trustee’s role, though, is that of manager or administrator of someone else’s beneficial property and the trustee therefore will not traditionally be seen as having dominion over the trust property in any absolute sense. Nevertheless, because the governing body has legal ownership, this can have negative connotations, particularly where objects were taken during times of unequal power relationships like war and

---

<sup>222</sup> Ethical guardianship: MACoE (n 9) [1.0], Stewardship ICOMCoE (n 9) [2]. Valid title ICOMCoE (n 9) [2.2]. This is an emerging concept in academic practice which is discussed below at p 274.

colonialism.<sup>223</sup> Ownership can be construed as the power to decide what to do with the object and this can cause tensions where the decisions of the Western owner differ from how the originating community would treat the object.<sup>224</sup> However, property rights in objects can take a variety of forms and should not be thought simply as the polarised notions of possession and ownership,<sup>225</sup> but rather as comprising a bundle of rights<sup>226</sup> and even as the relationship between people in respect of things.<sup>227</sup> The interrelational nature of property in the context of cultural heritage has been explored in recent years and suggestions have been made regarding the notion of peoplehood<sup>228</sup> and the introduction of a legal notion of stewardship (or guardianship) in the context of cultural heritage objects.<sup>229</sup> For the purposes of this discussion guardianship and stewardship will be treated as comparable notions and the terms used interchangeably.<sup>230</sup> However,

---

<sup>223</sup> See generally Lyndel V Prott & Patrick J O'Keefe, 'Cultural Heritage' or 'Cultural Property'?' (1992) 1 *International Journal of Cultural Property* 307.

<sup>224</sup> This is in part because 'For indigenous groups, the question of the right to control of cultural heritage is linked to questions of identity, survival and the political project of self-determination': Macmillan F, 'The protection of cultural heritage: common heritage of mankind, national cultural "patrimony" or private property?' (2013) 64 *Northern Ireland Legal Quarterly* 351, 361

<sup>225</sup> See Kristen A Carpenter, Sonia K Katyal & Angela R Riley, 'In Defense of Property' (2009) 118 *Yale Law Journal* 1022, 1029 and Derek Fincham, 'The Distinctiveness of Property and Heritage' (2011) *Penn State Law Review* 641, 649.

<sup>226</sup> *R (the Lord Chancellor) v Chief Land Registrar* [2005] EWHC 176 (Admin) Stanley Burnton J [25].

<sup>227</sup> William N R Lucy and Catherine Mitchell, 'Replacing private property: The case for stewardship' (1996) CLJ 566, 568.

<sup>228</sup> Introduction and Chapter 2.

<sup>229</sup> See generally Carpenter and others (n 225)

<sup>230</sup> This accords with Marstine (n 52)<sup>18</sup> who supports this interchangeable nature whereas Geismar suggests that one uses the term guardianship in the museum context and stewardship in the archaeology context: Haidy Geismar, 'Cultural Property, Museums, and the Pacific: Reframing Debates' (2008)

it is clear in the context of the museum profession and the non-legal regulatory regime that museums should regard themselves as, and disseminate the general view that they are, guardians of collections rather than strict legal owners; the MACoE states that museums should ‘Avoid behaviour that could be construed as asserting personal ownership or control of collections or any part of them.’<sup>231</sup> In this way, museums should not simply think of themselves as owners with rights, but more generally as having a variety of different obligations<sup>232</sup> towards stakeholders and in particular as the ‘ethical guardians’ of their collections.<sup>233</sup> This represents one of the ‘hallmarks’ of stewardship, identified by Lucy and Mitchell in the context of land as being ‘holding subject to responsibilities of careful use’ such that the steward is essentially ‘a duty-bearer, rather than a right-holder’.<sup>234</sup> Consultation with stakeholders is also seen as necessary for promoting ‘a sense of shared ownership in the work of the museum’.<sup>235</sup> In this way a steward (here the museum) ‘is motivated out of concern for the collective, as opposed to the individual’.<sup>236</sup> Stakeholders, for the purposes of the MA, are defined as including ‘visitors, non-users, members of governing bodies, partners, funders and staff members’ and ‘Museums should take full account of their views through research and consultation’.<sup>237</sup> In this way, much effort is made to encourage the participation of

---

*International Journal of Cultural Property* 109, 116. However, when dealing with monuments the UK legal system uses the term ‘guardianship’. It is suggested here that interchanging terminology is justified.

<sup>231</sup> MACoE (n 9).[1.3].

<sup>232</sup> See Geismar (n 230) 115.

<sup>233</sup> MACoE (n 9) [1.0].

<sup>234</sup> n 227, 584.

<sup>235</sup> *ibid* [4.1]

<sup>236</sup> Carpenter and others (n 225) 1071.

<sup>237</sup> MAAccGuide (n 26) [E2] and see also [F3]. E2.

stakeholders within the decision-making processes of museums. Specifically, dialogue or consultation is encouraged between museums and originating communities,<sup>238</sup> particularly when dealing with repatriation requests.<sup>239</sup> However, the MAAccGuide goes further than suggesting a role or voice of stakeholders being taken into account and suggests an element of power-sharing in such a way to encourage ‘them to have a direct influence on museum services.’<sup>240</sup> This contributes to an even greater displacement of the legal notion of ownership. Clear evidence of the importance of stakeholder involvement and consultation is found in the MA Ethics committee’s recommendation to Northampton Borough Council to consult widely<sup>241</sup> to determine the centrality of a statue to its collection.

Where museums engage in dialogue with stakeholders, this means that the museum professionals can hear about the types and extent of cultural heritage value which stakeholders experience towards the cultural heritage;<sup>242</sup> this will facilitate taking

---

<sup>238</sup> MACoE (n 9).[7.5]. Wylie, like others before her, suggests that for stewardship to play a useful role, it should be interpreted as a collaborative venture rather than ‘wise management on behalf of an abstract higher interest [i.e. the public interest]’ Alison Wylie, ‘The Promise and Perils of an Ethic of Stewardship’ in Peter Pels & Lyn Meskell (eds), *Embedding Ethics: Shifting Boundaries of the Anthropological Profession* (Berg Publishers 2005) 65.

<sup>239</sup> MACoE (n 9).[7.7].

<sup>240</sup> MAAccGuide (n 26132) E2.

<sup>241</sup> Museums Association Ethics Committee, ‘Advice to Northampton Borough Council regarding proposed sale of Egyptian funerary monument of Sekhemka from the collection of Northampton Museum and Art Gallery, September 2012 < <http://www.museumsassociation.org/news/25092012-museums-association-ethics-committee-advises-northampton-borough-council-hold-off-sale-2-million-pound-monument>> accessed 25 September 2012.

<sup>242</sup> For example the importance of cultural heritage to the identity of the community and how repatriation is giving a sense of control and authority to the community: Michael Pickering, ‘Despatches From the

account of these types of value in any decision regarding the curation or transfer of a cultural heritage object from its collection. This can lead to civil society solutions, as advocated by Brown<sup>243</sup> which involve community-based initiatives that provide consensus-based solutions to seemingly irresolvable situations.<sup>244</sup>

On the one hand the MACoE uses the notion of guardianship to overcome the negative associations of rights of ownership, but then the concept of ownership is restated in the

---

Front Line? Museum Experiences in Applied Repatriation' in Paul Turnbull & Michael Pickering (eds), *The Long Way Home: The Meaning and Values of Repatriation* (Museums and Collections, Berghahn Books 2010) 171 and Piotr Bienkowski, 'Whose Past? Archaeological Knowledge, Community Knowledge, and the Embracing of Conflict' in Geoffrey Scarre & Robin Coningham (eds) *Appropriating the Past: Philosophical Perspectives on the Practice of Archaeology* (CUP 2013) 54 and J Janewa Osei Tutu, 'A Sui Generis Regime for Traditional Knowledge: the Cultural Divide in Intellectual Property Law' (2011) 15 *Marquette Intellectual Property Review* 147, 182. This control and authority is an essential part of self-determination: Macmillan (n 224) 361.

<sup>243</sup> Michael F Brown, *Who Owns Native Culture?* (Harvard University Press 2003) 242.

<sup>244</sup> E.g. the compromise reached regarding Peter Jackson's use of images of a Maori sacred site in the *Lord of the Rings* films: Susan Scafidi, *Who Owns Culture?: Appropriation and Authenticity in American Law* (Rutgers University Press 2005) 124; Bunker discusses the compromise between a Chinese institute and Swiss museum regarding certain textiles that had been acquired by the museum which involved a joint initiative including joint publications: Emma C Bunker, 'The Acquisition and Ownership of Antiquities in Today's Age of Transition' in Kate Fitz Gibbon (ed), *Who Owns the Past? Culutral Policy, Cultural Property and the Law* (Rutgers University Press 2005) 314. Bunker also suggests allowing deaccessioning of duplicate objects or leasing of objects as a means of achieving a mutually beneficial solution for the parties: *ibid* 316, Brown points out that in many cases joint stewardship agreements are reached between the parties, even though frequently the focus is on 'high visibility examples of repatriation': Michael F Brown, 'Exhibiting Indigenous Heritage in the Age of Cultural Property' in James Cuno (ed), *Whose Culture? The Promise of Museums and the debate of antiquities* (Princeton University Press 2009) 151.

sense of sharing in the work of the museum (rather than specifically its collections).<sup>245</sup> However, these seem to be two means to reach similar ends in the sense of seeking to achieve a collaboration between the museums and the stakeholders who may have felt disenfranchised, particularly where cultural heritage objects originating from their communities are held within museums with little or no input from them.<sup>246</sup> A second example of treating the collections as the property of everyone (in a non-legal sense) is found in a document published by the NMDC; the collections are ‘technically the property of their boards of trustees...they are not owned in the ordinary unfettered sense’ due to the public interest involved as national assets.<sup>247</sup> Donors’ contributions and the use of public or charitable funds<sup>248</sup> mean that these national collections:

‘are therefore as much the property of the nation as a whole as of a particular institution. And because they have been built and handed down by past generations, they belong as much to posterity as to the present’.<sup>249</sup>

According to the NMDC this notion of shared ownership extends beyond the cultural heritage objects of national origin and:

‘There is also a real sense in which the wider world has a stake in the treasures which [collections] contain. Many of them derive from cultures outwith Britain, and even those that do not may be of international importance.’<sup>250</sup>

---

<sup>245</sup> Text to n 235.

<sup>246</sup> See p 105 above regarding the importance of control of cultural heritage to indigenous groups.

<sup>247</sup> NMDC (n 167) 3.

<sup>248</sup> E.g. the National Heritage Memorial Fund, the National Lottery and the National Art Collections Fund.

<sup>249</sup> NMDC Report (n 167) 12.

In contrast to the NMDC's approach which alludes to shared ownership, the ICOMCoE reflects the notion of stewardship (in a similar way to the ethical guardianship in the MACoE), seeing this as inherent in the concept of the public trust.<sup>251</sup> The Department of National Heritage (the predecessor of the DCMS) also recognised the need for stewardship of museum collections within the confines of the trusteeship,<sup>252</sup> meaning that any non-legal notion of stewardship was necessarily limited by the legal obligations of a trustee towards beneficiaries and in the case of charities towards the public. These various approaches demonstrate what Marstine suggests is a move from possession to guardianship;<sup>253</sup> this is 'a means... towards sharing in new ways rights and responsibilities to this heritage.'<sup>254</sup> These changing relationships associated with guardianship can therefore develop 'relationships of consultation and collaboration'.<sup>255</sup> Consequently, guardianship can facilitate repatriation since the reciprocal nature of the enterprise can highlight the benefits of return which can strengthen future relationships between the parties.<sup>256</sup> However, the author of this thesis doubts that as a concept it necessarily 'prioritizes repatriation as a human right and emphasizes the strengthening relationships that the return of cultural 'property' inspires'<sup>257</sup> since in addition to the collaborative nature of guardianship there is a clear caring role to be played by the guardian in maintaining the collection for the future where it is appropriate to do so.

---

<sup>250</sup> *ibid*

<sup>251</sup> ICOMCoE (n 9).[2].

<sup>252</sup> *Treasures in Trust: A Review of Museum Policy* (Department of National Heritage 1996) [5.4].

<sup>253</sup> Marstine (n 52) 17.

<sup>254</sup> *ibid*

<sup>255</sup> Geismar (n 230) 115.

<sup>256</sup> E.g. see Marstine (n 52) 18.

<sup>257</sup> *ibid* 19.



This would therefore be in keeping with fulfilling the public legacy principle of cultural heritage. Geismar suggests that whilst a move towards guardianship makes repatriation easier, it has become a type of property relation (or perhaps cultural property relation) which ‘actually facilitates the keeping of objects inside museums, where they still continue to serve a dual function’.<sup>258</sup> The focus in stewardship or guardianship shifts from title to ‘notions of “custody” and “trusteeship”’<sup>259</sup> which bring with them heightened senses of responsibilities to stakeholders. In this way it is possible for museums to engage more fully with the communities from which their collections originated and with the communities that they serve in terms of providing visitor opportunities.

Lucy and Mitchell criticise the approach of some commentators who see stewardship as based on the public interest.<sup>260</sup> Since all approaches premised on the public interest have as their basis some ‘substantive moral principle’ these authors suggest instead that stewardship is founded on that basis rather than the public interest.<sup>261</sup> Adopting their approach, one can see in the context of cultural heritage the following: rather than treating the desire to preserve and provide access to cultural heritage as being generically ‘in the public interest’ (here the terms lacks precision, not least because of multifarious interests of people which may conflict) the substantive moral principle on which to base stewardship would be the public legacy as derived from the cultural heritage value to different people. The value includes that of cultural, historical,

---

<sup>258</sup> Geismar (n 230) 116. This dual function is where the object might actually belong to a source nation, but the object can be available for the public to enjoy: Geismar (n 230) 116.

<sup>259</sup> Carpenter and others (n 225) 1074.

<sup>260</sup> n 227 595.

<sup>261</sup> *ibid*

religious significance or importance for their identity and the strong relationship between cultural heritage and the people justifying the inter-generational equity that is the public legacy. These can form the moral principles on which to base stewardship and these, in turn, give rise to the desire to preserve and provide access to it. To this end, stewardship, as an instrumental principle,<sup>262</sup> can place obligations on the steward to carry out these duties of preservation and access to the varying degrees deemed appropriate following a thorough assessment of the cultural heritage principles. These duties to ensure ‘a reasonable and fair regime of controlled access’ and ‘careful management and maintenance of the resource’ are seen as distinctive features of stewardship.<sup>263</sup> Consequently, a doctrine of stewardship with its moral foundational principle based on the cultural heritage principles would play an instrumental role by facilitating the achievement of the cultural heritage norms (with which as a concept, it is inherently aligned). Lucy and Mitchell propose that stewardship ‘can more easily accommodate the possibilities of duties to future generations than private property’,<sup>264</sup> and so the public legacy aspect of cultural heritage might also be satisfied by such a notion.

However, in reality the existing legal relationship by which many museum governing bodies hold the property is one of trusteeship (albeit usually charitable in nature with duties owed to the public).<sup>265</sup> Many of the features of stewardship in terms of the need

---

<sup>262</sup> *ibid* 596 (rather than a moral principle: n 227 596). I.e. stewardship is a means by which to facilitate the use of or the access to the resource, rather than the justification for the particular treatment itself.

<sup>263</sup> *ibid* 599.

<sup>264</sup> *ibid*

<sup>265</sup> As to trustees’ duties of care see Jill E Martin, *Hanbury & Martin: Modern Equity* (19<sup>th</sup> edn, Sweet & Maxwell 2012) 530-533. For background on the public benefit in charity law see Robert Meakin, *The Law of Charitable Status: Maintenance and Removal* (CUP 2008) 34-42.

to care for and take account of the views of others is clear in the codes of ethics discussed above and there is some limited recognition of this in the legal regime where museums are established as trusts.<sup>266</sup> It is the consultation element of the stewardship concept that is lacking any legal force, although it is strongly mandated by the ethical codes.<sup>267</sup> This could be given legal force and combine with the existing trustee relationships to provide the same effect of stewardship, without having to create a new type of property relationship to displace the trust in the museum context.<sup>268</sup> However, this would only work in situations where the museum existed in the guise of a charity, otherwise there would be no legal recognition of either the caring for (fiduciary) element of stewardship or the consultative element.

#### **4.6 Valid and moral title**

‘there may be other instances [than those connected with genocide] where the acquisition of items of cultural property, however legal on its face, does not comply with fundamental moral requirements’.<sup>269</sup>

In recent years there has been an increasing concern<sup>270</sup> about the legitimacy of museum collections, specifically the circumstances in which original owners lost objects and in

---

<sup>266</sup> At p 206 above. Carpenter and others identify that trusteeship is often overlooked in the context of cultural property (n 225) 1074, although they were looking at it in the context of indigenous groups rather than museums.

<sup>267</sup> Geismar (n 230) 115 asks, in the context of the British Museum, where ‘the consultation and collaboration’ is.’

<sup>268</sup> Explored further in Chapter 5.

<sup>269</sup> Tullio Scovazzi, ‘The Return of the Benev. VI29 Missal to the Chapter Library of Benevento from the British Library’ (2011) 16 *Art Antiquity and Law* 285, 294.

<sup>270</sup> See Tatiana Flessas, ‘The Ends of the Museum’ LSE Law, Society and Economy Working Papers 14/2013 < [http://www.lse.ac.uk/collections/law/wps/WPS2013-14\\_Flessas.pdf](http://www.lse.ac.uk/collections/law/wps/WPS2013-14_Flessas.pdf)> accessed 24 December

which museums obtained them.<sup>271</sup> In this regard, the focus shifts to the continued relationship between the museum and the object where an object is ‘tainted’ by its provenance (ownership history).<sup>272</sup> In the context of Nazi era cultural objects in public museums the relationship between the object and the public has been described in the following terms:

‘The spectator cannot look at it without seeing the pain and betrayal that led it to be situated there... It taints the spectators who knowingly take advantage of the presence of the picture there and it speaks to them of loss and war...’<sup>273</sup>

This tainting seemingly occurs even where legal title is acquired through statutes of limitation.<sup>274</sup> Correspondingly, the ICOMCoE distinguishes between legal title and

---

2013, 2 and Liz Bell, ‘Museums, Ethics and Human Remains in England: Recent Developments and Implications for the Future’ in Turnbull & Pickering (n 242) 30. This has led to increased consultation with indigenous groups since the 1980s: Brown, ‘Exhibiting Indigenous Heritage’ (n 244) 150.

<sup>271</sup> C.f. the view of de Montebello regarding the acquisition of unprovenanced CHOs and the risk of the object becoming inaccessible to the public: Philippe de Montebello, ‘And What Do You Propose Should Be Done With Those Objects?’ in Cuno, *Whose Culture?* (n 244) 70.

<sup>272</sup> Specifically, to determine whether it is ethically appropriate for the museum to retain the CHO: MACoE (n 9) [7.7] or to acquire it for inclusion in a museum’s collection: MAAcquGuide (n 26) [2.5]

<sup>273</sup> Baroness Deech, HL Deb 10 July 2009 vol 712 cols 907-908.

<sup>274</sup> Under the Limitation Act 1939, s 3(2). In the claims heard by the Spoliation Advisory Panel the legal title of the museums has been described as ‘unimpeachable’: Report of the Spoliation Advisory Panel in respect of a painting now in the possession of the Tate Gallery (18 January 2001) (2005 HC 111) [25] or ‘impregnable’: e.g. Report of the Spoliation Advisory Panel in respect of a 12<sup>th</sup> century manuscript now in the possession of the British Library (23 March 2005) (2005 HC 406) [3]; Report of the Spoliation Advisory Panel in respect of three pieces of porcelain now in the possession of the British Museum London and the Fitzwilliam Museum, Cambridge (11 June 2008) (2008 HC 602) [12] and [28]. Nevertheless, in these claims a moral claim was found to exist despite the strict legal entitlement and the

‘valid title’ to objects.<sup>275</sup> Valid title is something that is only obtained following full due diligence<sup>276</sup> being the ‘Indisputable right to ownership of property, supported by full provenance of the item since discovery or production’.<sup>277</sup> Museums are therefore required to satisfy themselves that they have valid title to objects when acquiring them (by purchase or otherwise) and cannot hide behind the sometimes morally dubious strict legal title.<sup>278</sup> These heightened levels of due diligence clearly show a commitment to making every effort to discover the full history of an object.<sup>279</sup> Museums have effectively imposed on themselves obligations of good faith when acquiring objects, extending beyond their strict legal duties, further supported by their commitment to follow unratified conventions<sup>280</sup> and adopt the 1970 threshold.<sup>281</sup>

Whilst valid title focuses on the nature of the relationship between the object and the current possessor (the museum) a further notion is developing which looks to the relationship between the object and the originator and might be said to be claims-based;

---

objects would arguably be tainted and therefore taint the viewer in the manner suggested by Baroness Deech.

<sup>275</sup> See ICOMCoE (n 9) 14.

<sup>276</sup> Defined as ‘The requirement that every endeavour is made to establish the facts of a case before deciding a course of action, particularly in identifying the source and history of an item offered for acquisition or use before acquiring it.’ ICOMCoE (ibid) 14.

<sup>277</sup> ibid 15.

<sup>278</sup> ibid [2].

<sup>279</sup> ibid [2.3]

<sup>280</sup> ibid [7.2] and MACoE (n 9) [5.13].

<sup>281</sup> At p 258 above.

it is moral title to cultural heritage objects based on moral claims.<sup>282</sup> Whilst the MA Acquisitions Guidance (MAAcqGuide)<sup>283</sup> and MA Access Guidance (MAAccGuide)<sup>284</sup> calls it ‘moral right’ this is apt to cause confusion with the legal concepts of the right of integrity and attribution found in the CDPA 1988. It is suggested that ‘moral claim’ is more appropriate terminology, which gives rise to a moral title (entitlement).<sup>285</sup> The MA’s notion focuses on the continued relationship between the object and the original owner (or the community from which the object originates) as the MAAcqGuide states that museums, when acquiring objects for their permanent collection, should consider ‘The moral rights of individuals, groups, societies or peoples to hold the item’.<sup>286</sup> It is unclear whether this applies when acquiring directly from the community itself. This seems unlikely because in those circumstances the main concern would be legal title. Instead it appears that, in the same way that in acquiring objects a museum governing body should be alive to its obligations under the 1970 Convention,<sup>287</sup> part of the

---

<sup>282</sup> This was first envisaged in the context of auctions: Norman Palmer, ‘Itinerant Art in the European Community: Loans, Collective Title, Shared Enjoyment and the Mystique of Museum Property: A Common Lawyer’s Perspective’ (2006) 11 *Art Antiquity and Law* 275, 284. In the context of museums see Charlotte Woodhead, ‘Moral Claims Against Museums: The Emerging Concept of Moral Title to Objects of Cultural Heritage’ (2009) 2(2) *International Journal of the Inclusive Museum* 1.

<sup>283</sup> MAAcqGuide (n 26)

<sup>284</sup> MAAccGuide (n 237)

<sup>285</sup> It is helpful to use terminology that differs from an existing legal concept (moral rights of authors). However, it is also preferable to use the language of ‘claim’ rather ‘right’ because the claimants are not relying on an enforceable right *per se* but are making a claim based on moral grounds. This is reflected in the language of the Spoliation Advisory Panel and also in Derek Gillman, *The Idea of Cultural Heritage* (Revised edition, CUP 2010) 28.

<sup>286</sup> MAAcqGuide (n 26) 3.9.

<sup>287</sup> MACoE (n 9) [5.10]

acquisitional due diligence when acquiring objects originating from an identifiable community is any potential moral rights.<sup>288</sup> This term, in this context, has no legal basis and so is derived firmly from the moral duties under which the museum governing body acts. The MAAccGuide states that ‘Museums have an obligation to be familiar with, and to respect, the beliefs and moral rights of people with regard to particular objects within the collections’.<sup>289</sup> This notion recognises the cultural heritage principles, in terms of the community, symbolic and spiritual value, as well as the public legacy (the clear relationship between the community of origin and the object).<sup>290</sup> The obligation is phrased as ‘respect’ for the moral rights and does not equate to an obligation to return the object; consequently it does not override the strict legal title by giving a right to have the object transferred to them. However, it recognises moral entitlement as a vital consideration for museums. In auction practice there is a developing notion of requiring a consignor to have moral as well as legal title to the object by insisting on detailed provenance checks (in the absence of which sales are more difficult).<sup>291</sup> This would not,

---

<sup>288</sup> MAACquGuide (n 26) 3.9.

<sup>289</sup> n 237 G4. Rowland suggests that ‘moral ownership...is based on a principle of priority, i.e., that the creative property of having originated a cultural product transcends any later claim based on legality’: Michael Rowlands, ‘Cultural Rights and Wrongs: Uses of the Concept of Property’ in Katherine Verdery and Caroline Humphrey (eds), *Property in Question: Value Transformation in the Global Economy* (Berg, Oxford 2004) 221. Rowlands suggests that by taking that approach the moral ownership is prioritised over legal ownership (he refers in passing to UNESCO in this regard): *ibid* 222.

<sup>290</sup> This perhaps reflects what Bienkowski suggests is needed which is ‘an open and transparent deliberative democratic process’ rather than ‘the bureaucratic and essentialist process of establishing criteria of ownership and rights with its colonialist demands of proof and identity’: Bienkowski (n 242) 60. Brown acknowledges that transfer may not always be the aim of claimants, but that joint stewardship may be a suitable solution: Brown, ‘Exhibiting Indigenous’ (n 244) 151

<sup>291</sup> Palmer, ‘Itinerant Art’ (n 282) 284.

by itself give the original owner any particular claim in relation to that moral title; however the SAP recommendations give some indication of the recognition of such a title to which effect can be given and provide a useful case study of how moral title can be seen in practice.<sup>292</sup>

Gillman suggests that where a possessor has good title (i.e. legal title) then any claim to an object takes a moral form such that if ‘the claimant has a greater moral right to the property than the present individual or corporate owner, their claim should be enforceable through political channels or at international law’.<sup>293</sup> His position is that moral claims could be grounded on (a) ‘remedying historical inequity’, (b) ‘the overall utility [being] greater in one place than another’ or (c) ‘a collective right to the property’.<sup>294</sup> Of these three bases, (b) is the closest to considering the cultural heritage principles since (a) uses the process as a tool for redressing past wrongs and (c) focuses more on collective rights that exist (presumably recognised in another jurisdiction rather than one in which the object now resides since otherwise the possessor would not have good legal title).

The SAP is tasked with hearing such ‘moral claims’ in terms of assessing the strength of the moral claim to a cultural heritage object.<sup>295</sup> Gillman’s notion of moral claims seems to be at the international level where a claim is made against a possessor in

---

<sup>292</sup> Woodhead, ‘Moral title’ (n 282).

<sup>293</sup> Gillman (n 285) 28.

<sup>294</sup> *ibid*

<sup>295</sup> DCMS, ‘Spoliation Advisory Panel Terms of Reference’

<<http://webarchive.nationalarchives.gov.uk/20121204113822/http://www.culture.gov.uk/images/publications/SAPConstitutionandTOR11.pdf>> accessed 14 April 2013 [6].



another country (hence the reference to international law and political channels),<sup>296</sup> yet the latter term could be used to refer to political settlement occurring at the micro level through direct dialogue between claimants and museums.<sup>297</sup> As a government-backed initiative the SAP's foundation and *raison d'être* is inherently political yet its work is independent of the government; overall, the work of the SAP falls squarely within Gillman's first category, that of remedying past wrongs.<sup>298</sup>

A claimant who was dispossessed of a cultural heritage object during the Nazi Era and brings a claim before the SAP, thus engaging the SAP's jurisdiction, aligns with Gillman's notion of moral claims. However, it is argued in this thesis that the notion of moral *title* to cultural heritage objects can be seen impliedly in the recommendations of

---

<sup>296</sup> He uses the Parthenon Marbles as the example at the international level: Gillman (n 293) 28. However, claims for the return of CHOs such as the Benin Bronzes from the British Museum (as to which see Nigel Evans, Letter 1 March 1997 *The Independent* <<http://www.independent.co.uk/voices/letter-british-guilt-over-the-benin-bronzes-1270387.html>> accessed 4 January 2013) could feasibly fall within Gillman's analysis.

<sup>297</sup> For example between indigenous groups and museums. The terminology of 'moral claims' has been used at the micro-level, of claims against museums in the context of the 1970 date used in museum codes of ethics (discussed above at p 259) albeit in the context of criticising 'specious claims' which has been argued to be akin to blackmail when based on moral arguments and bad publicity rather than legal argumentation: Fitz Gibbon, 'Dangerous Objects' (n 81) 3. She further argues that American museum community 'must be willing to stand up for itself against specious "moral" arguments and unjustified threats of litigation' (ibid).

<sup>298</sup> At p 272 above.

the SAP. The SAP effectively adopts a fiction of the original owner having a moral title to the original object.<sup>299</sup> Moral title could arise at various stages.

First, it could exist in all situations where a person acquires legal title to any property and would be coterminous with legal title. However, in the usual course of things once the limitation period extinguishes legal title, the moral title would also fall away. However, in situations where the property is a CHO and the owner was dispossessed of it in morally repugnant circumstances, this would be sufficient to give the moral title a longevity allowing it to continue beyond the extinction of the legal title. Alternatively, moral title could be restricted solely to those situations where the original owner, who had legal title, was dispossessed of a cultural heritage object in morally repugnant situations. On both of these analyses the original owner's moral title would then need to devolve to his heirs. The only way for this to occur would be to treat it as a moral chose in action against the possessor-institution derived from his ancestor's original legal title and concurrent moral title.

The difficulty with this fiction is that technically this 'moral chose in action'<sup>300</sup> would only have arisen in 2000 upon the establishment of the SAP.<sup>301</sup> Alternatively, the moral action could be treated as being implied as early as 1943 by the Inter-Allied

---

<sup>299</sup> This is an idea put forward by the author of this thesis at the SLS Annual Conference in 2009 in a presentation entitled 'Moral title to personal property: legal, equitable or neither?'

<sup>300</sup> A direct analogy is drawn here with a legal chose in action, but is, by its very nature moral because it originates in the context of a moral rather than legal entitlement to submit a claim to the SAP.

<sup>301</sup> Alan Howarth MP HC Deb 17 February 2000, vol 344, cols 626-629W.

Declaration<sup>302</sup> when the state-parties reserved their positions to declare invalid transfers of property.

If the moral claim arose on the formation of the SAP, in circumstances where the original owner had by that time died, then this claim would have originated with the claimant, rather than with his ancestor; therefore the claimant would be claiming in his own right, rather than as the descendant of the original owner. Here the moral claim and any resultant moral title would be weaker than that of his ancestor since it is based on his own loss rather than the original owner's. However, this is inconsistent with the Panel's approach which appears to treat the claimant as stepping into the shoes of the original owner. In the *Tate Gallery* claim<sup>303</sup> the Panel assessed the strength of the original owner's claim<sup>304</sup> and then asked whether the claimant (her son) and other family members should be in any weaker position than she would have been were she still alive.<sup>305</sup> Whilst the Panel's main focus in answering this was whether the claimant's earlier visits to the museum and lack of a formal claim at that time prejudiced the strength of their claim,<sup>306</sup> the fact that that did not reduce the strength suggests that the claimant is treated as if it were his ancestor who was claiming.

A final interpretation of when moral title comes into being would be that it arises on the recommendation of the SAP that the claimant had a sufficiently strong moral claim to

---

<sup>302</sup> Inter-Allied Declaration against acts of dispossession committed in territories under enemy occupation or control, London, 5 January 1943.

<sup>303</sup> Report of the Spoliation Advisory Panel in respect of a painting now in the possession of the Tate Gallery (18 January 2001) (2005 HC 111).

<sup>304</sup> *ibid* [43].

<sup>305</sup> *ibid* [44].

<sup>306</sup> *ibid*

justify a remedy. In this way, in deciding which remedy to recommend, the SAP would be assessing how best to give effect to the moral title in a similar way to the discretionary nature of equitable remedies in the courts.

Despite the difficulties in establishing exactly when the claimant's moral title comes about there is a strong argument for saying that when the SAP recommends a remedy to give effect to a successful claim, which is then acted upon by the respondent, this crystallises the claimant's (new or prior) moral title. The means by which to give this title practical effect might be to 'convert' it into a legal title by returning the object. There is arguably a continuing moral title to the cultural heritage object where a commemorative notice<sup>307</sup> is placed next to the object when it is displayed by the respondent institution, such that if the institution failed to do this on a future occasion then the claimant could object (at least on moral grounds). Where an *ex gratia* payment is made but with no continuing duty on the respondent to display the history of the object, arguably the interference with the moral title would then be remedied such that the claimant would have no continuing moral title.

If moral title exists in this guise, it is very narrow in scope and would only apply to cultural objects of which their owners were dispossessed during the Nazi Era within the UK museum context. These moral claims have been treated differently from others relating to, for example, the Benin Bronzes and indigenous objects since no panels have been established to deal with these, nor have there been any comparable powers of transfer, save for the exception in the context of human remains.<sup>308</sup> Dispossessions at

---

<sup>307</sup> Under the SAP ToR (n 295) [13(d)].

<sup>308</sup> HTA, s 47 gives a power to the governing bodies of certain named national collections to transfer human remains from their collections: see generally Charlotte Woodhead, 'Ownership, Possession, Title

the hands of the Nazis have been treated in the UK as *sui generis* in terms of scale;<sup>309</sup> the difference has been the ‘methodical and systematic manner’ of dispossession as it was directed at specific people,<sup>310</sup> which was not just for the Nazis’ self-enrichment but also ‘formed an integral part of their attack on other races’.<sup>311</sup> However, the Panel’s jurisdiction and the power granted to national museum governing bodies extend to any object taken during the Nazi era (defined as 1933-1945<sup>312</sup>) and so the Panel ‘not without some hesitation’ accepted jurisdiction of a claim for the return of the twelfth century Beneventan missal<sup>313</sup> even though it had no direct connection with the actions of the Nazis, but instead the circumstantial evidence indicated that it was likely to have been lost at some point during the wartime, perhaps following the confusion caused by the Allied bombardment in 1943.<sup>314</sup> Since this dispossession was not part of the systematic pillaging and physical and cultural persecution of the Jews by the Nazis, but was instead lost either as a result of theft or pillage, moral title appears to be capable of deriving from less morally repugnant circumstances than the Holocaust. In this way, there is scope for arguing that moral title, as recognised in the decisions of the SAP, has

---

and Transfer: Human Remains in Museum Collections’ in Martin Dixon (ed), *Modern Studies in Property Law: Volume 5* (Hart Publishing 2009).

<sup>309</sup> Restitution of Objects Spoliated in the Nazi-Era: A Consultation Document, Department for Culture, Media and Sport, July 2006, [1.2] and Seventh Report of the Select Committee on Culture, Media and Sport, ‘Cultural Property: Return and Illicit Trade’ HC (1999-2000) 371-I [193].

<sup>310</sup> Hector Feliciano, ‘The Great Cultural Robbery: the Plunder of Jewish-Owned Art’ in Avi Beker (ed), *The Plunder of Jewish Property during the Holocaust* (Palgrave 2001) 165.

<sup>311</sup> DCMS Consultation (n 309) 8.

<sup>312</sup> SAP ToR (n 295) [1] and Holocaust (Return of Cultural Objects) Act 2009, s 3(3).

<sup>313</sup> Discussed in at 159 above. Report of the Spoliation Advisory Panel in respect of a 12<sup>th</sup> century manuscript now in the possession of the British Library (23 March 2005) (2005 HC 406) [2].

<sup>314</sup> *ibid* [52].

potential to extend beyond purely Holocaust-related dispossessions to have wider application in situations where claimants were dispossessed of objects and have a continuing connection with them, along the lines of the notion set out in the MA guidance discussed above.<sup>315</sup>

It has been seen that the decisions of the SAP do not fully take into account the competing types of cultural heritage value or the public legacy in terms of the cultural heritage value to the public in retaining the object.<sup>316</sup> Therefore, in this context the notion of moral title displacing legal title in some instances (or at least requiring institutions to forego their strict legal entitlement) does not, by itself, achieve any greater level of recognition of the cultural heritage principles or norms. However, as a concept that might be expanded to other types of repatriation requests, it has the potential to give effect more fully to the cultural heritage principles. For example, it has been shown in the SAP recommendations that a moral claim can be satisfied by a display of the object's history, rather than outright return.<sup>317</sup> This will usually recognise the Nazi Era provenance and also the claimants' relationship to the object. Indirectly this can be said to give effect to the historical value of the cultural heritage. This remedy has the potential to give effect to the public legacy by recognising the different types of cultural heritage value, such that not only could the object speak for itself in terms of the aesthetic value, but the historical and cultural value could be communicated and specifically the role that the object played within a culture. Whilst the display of an account of the object's history is the only non-traditional remedy on

---

<sup>315</sup> Text to n 286 and n 289.

<sup>316</sup> Above at p 196.

<sup>317</sup> Report of the Spoliation Advisory Panel in respect of Eight drawings now in the possession of the Samuel Courtauld Trust (24 June 2009) (2009 HC 757).

the SAP's remedial menu, other more unusual remedies and long term loans could be used as remedies for wrongful interference with moral title in the future. Thus Brown's notion of 'civil society' solutions<sup>318</sup> could be given effect in a structured forum.

#### **4.7 Conclusion**

The two principal codes of ethics governing English museums demonstrate the way in which assessments can be made about cultural heritage taking into account the cultural heritage principles and norms in a nuanced and systematic way. These principles and norms are addressed in a logical order such that assessments can and should be made when making decisions about the acquisition, care of and disposal of cultural heritage objects. This is demonstrated in the focus on the intangible elements including the value to others, rather than being preoccupied by retention of the physical object for the sake of hoarding where value can be more fully realised elsewhere. The principal impediment to the effectiveness of this regime is external in nature and is caused by the legislative barriers and the lack of legal recognition of cultural heritage objects, in general. A further shortcoming of museum codes is their scope. Whilst their influence and nature as a localised form of soft law should not be underestimated, they nevertheless lack the widespread application to impact on practice outside the museum profession and obviously do not apply to non-members. However, their general tenor and flexible nature are clear grounds for future development in the broader area of cultural heritage law, as proposed in the next chapter.

Reliance on traditional notions of ownership has clearly been displaced in museum practice in favour of ethical guardianship or stewardship. However, this emphasis effectively makes the legal doctrine of trusteeship more meaningful for the general

---

<sup>318</sup> Brown, *Who Owns Native Culture?* (n 243) 242.

public in the sense of museum governing bodies avoiding portraying themselves as owners of the objects within their collections, but rather as caring for their collections for the benefit of everyone else. In this way, the emphasis is placed on the trustees' obligations towards the public.<sup>319</sup> However, since many non-national museums are not established as trusts (notably many local authority museums) this 'caring for' element has only ethical rather than legal force in some, but not all museums.<sup>320</sup>

In the context of the legal entitlement to the collections, the recognition of valid rather than legal title demonstrates that museums are alive to their moral obligations in terms of avoiding benefiting from objects to which others may lay a moral claim. Presently, the concept of moral title is reserved for those situations where museums are legally permitted to transfer objects from their collections. Where non-national museums decide to accede to requests from originating communities or from the Nazi Era dispossessed owners this implicitly acknowledges the claimant's moral title to the cultural heritage object by responding to this either through transfer or some other, more inventive solution. In the case of claims heard by the SAP this appears to suggest that the original owner or his heirs have a moral title to claim the object which can be recognised by the SAP by money, by an account of the object's history or by recommending return; in the last case this is realised by the transfer of legal title to the claimants. However, the applicability of moral title is inconsistent because of the statutory bars on national museums transferring items other than Nazi Era tainted cultural objects or human remains; if it were to be recognised more widely it has the

---

<sup>319</sup> See *Hanbury & Martin* (n 265) 530-533.

<sup>320</sup> Those museums not established as charities but which are members of the MA or ICOM would be subject to the codes of ethics which provide for the maintenance of the collection in trust for the benefit of the public: MACoE (n 9) [1] and ICOMCoE (n 9) [2].



potential to provide for more unusual (and perhaps more effective) means of dispute resolution.

# Chapter Five

## A scheme to meet the challenges

---

### 5.1 Introduction

This chapter sets out a proposed scheme to meet many of the challenges identified in this thesis. The proposal builds on the ethical obligations and *quasi*-legal principles identified in the preceding chapter and gives these a more structured formulation so that they can inform decision-making. This is an integrated scheme within which to deal with all types of cultural heritage<sup>1</sup> in a holistic manner, covering conservation, acquisition, disposal and dispute resolution. The proposed scheme focuses on the cultural principles and norms and treats cultural heritage more broadly as an intangible legal concept, independent of the subject matter itself and applies irrespective of who is claiming the subject matter.

As was seen in Chapter 3, there are strong declaratory norms present in the international legal framework applicable to England. However, the principal shortcoming of the English domestic legal regime is that there is no provision for a consistent valuing process of cultural heritage which facilitates the upholding of either the public legacy or the norms as identified in Chapter 2. Due to these shortfalls English domestic law fails to take account of the plural and dynamic nature of cultural heritage value, which would have permitted more effective recognition of the norms. Had the law focused on the intangible dimension of cultural heritage more fully then it is argued that the cultural heritage principles and norms might have been more fully recognised. The law does not assess consistently *why* the object is important for cultural heritage reasons or *how* best

---

<sup>1</sup> The full effectiveness of this proposal would need to be tested in the context of cultural heritage places and practices.

to protect that intangible dimension. Whether or not a valuing exercise is undertaken depends on the owner's status; the cultural heritage value of collections is assumed in the case of national museums, but only recognised when non-national museums have been established as charities.<sup>2</sup> Whilst courts do recognise the risk to cultural heritage (as an intangible element) from harm that would befall the subject matter, this is not translated into normative action.<sup>3</sup>

Retentive statutory bars on deaccessioning from national museum collections contribute to maintaining a culturally rich nation, rather than a nation rich in its own culture and perpetuate the notion of the universal, encyclopaedic museum, without taking into account possible claims from cultural groups to whom the cultural heritage object is a vital part of a cultural process.<sup>4</sup> Even mechanisms established to give effect to such claims have not addressed the full spectrum of cultural heritage value because of the influences of redressing past wrongs or the preoccupation with retaining collections.<sup>5</sup> Such approaches are clearly at the expense of a longer-term view of what is the appropriate course of action to take and fail to take a holistic approach to value.<sup>6</sup> Whilst the codes analysed in Chapter 4 acknowledge these varied types of value enjoyed by others, legal restrictions on de-accessioning or trusts or conditions prevent normative action in some instances. Furthermore, since these codes are limited to the professional members who subscribe to them and do not affect the many other decision-makers who deal with cultural heritage, there is a clear lack of coverage. Some developing *quasi-*

---

<sup>2</sup> See Chapter 3.

<sup>3</sup> Recall, for example *Re Wedgwood Trust Ltd (In Administration)* [2012] Pens LR 175 (Ch).

<sup>4</sup> I.e. a strong cultural heritage value to that community.

<sup>5</sup> The SAP and the national museums' powers under the HTA, s 47. See pp 188- 194 above.

<sup>6</sup> Clearly seen in the SAP decisions.

legal principles such as valid/moral title and stewardship demonstrate progressive means by which to view cultural heritage and to give greater effect to the cultural heritage principles and norms; this proposal seeks to give effect to some of their key elements.

There is a clear lacuna in the current legal, ethical and *quasi*-legal regimes in England in terms of taking full account of the cultural heritage principles and norms. The proposal comprises a short piece of legislation requiring designated decision-makers to take into account, and give effect to, the cultural heritage principles and norms when exercising their powers.<sup>7</sup> This requirement would apply not only to museums and existing bodies dealing with cultural heritage (including the Acceptance in Lieu Panel (“AILP”), the Reviewing Committee on the export of works of art and objects of cultural interest (“Reviewing Committee”) and the Spoliation Advisory Panel (“SAP”)) but also courts and tribunals. To aid the interpretation and application of the principles and norms, codes of practice would be formulated.<sup>8</sup> These are easily adaptable to reflect the dynamic and plural nature of cultural heritage value, the public legacy and the varying degree to which the norms should be given effect.<sup>9</sup>

This proposed legislation therefore formalises the relevant considerations that need to be taken into account when determining how best to uphold and give effect to the relevant cultural heritage principles and norms. By requiring decision-makers to engage directly with these differing elements it is submitted that this will be an effective means by which to meet cultural heritage policy in England. A further key element of the proposed legislation is the requirement to engage in consultation with stakeholders

---

<sup>7</sup> Appendix 1.

<sup>8</sup> Cl 6.

<sup>9</sup> Discussed at p 293 below.

(something which is acknowledged as an important element of the appropriate treatment of cultural heritage<sup>10</sup>) and accords with the open and transparent nature of decision-making by public bodies.<sup>11</sup> The translation of the requirement of consultation into a legal obligation means that the views of appropriate stakeholders are taken into account when important decisions<sup>12</sup> are made regarding cultural heritage.

## **5.2 The need for comprehensive legislation**

Some commentators doubt law to be a suitable means for resolving cultural heritage disputes,<sup>13</sup> yet the current proposal seeks to address concerns about the rigidity of law by avoiding an inflexible legal framework. Instead it provides a mechanism to use principles focusing on the intangible element of cultural heritage to achieve greater consistency across the domestic treatment of cultural heritage. In effect, the legal proposal would provide ‘a structure and continuity in the face of changing attitudes and

---

<sup>10</sup> Moira G Simpson, *Making Representations: Museums in the Post-Colonial Era* (Revised edition Routledge 2001) 52. Silberman suggests that ‘Heritage interpretation involving both visitors and experts...transforms ‘interpretation from a monologue to a public conversation’: Neil A Silberman, ‘Heritage interpretation and human rights: documenting diversity, expressing identity, or establishing universal principles?’ (2012) 18 *International Journal of Heritage Studies* 245, 252.

<sup>11</sup> UK Government, *Consultation Principles*

<[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/255180/Consultation-Principles-Oct-2013.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/255180/Consultation-Principles-Oct-2013.pdf)> accessed 31 December 2013.

<sup>12</sup> These are particularised below and are set out in Clause 1(1) of the CH(PaN)B

<sup>13</sup> Sarah Harding, ‘Value, Obligation and Cultural Heritage’ (1991) 31 *Arizona State Law Journal* 292, 358. Brown reminds us that we should be ‘mindful of law’s limitations and hazards’ when dealing with indigenous cultures: Michael F Brown, *Who Owns Native Culture?* (Harvard University Press 2003) 249

sensitivities’<sup>14</sup> and ‘a set of standards that captures the significance’<sup>15</sup> providing a ‘multigenerational mechanism’<sup>16</sup> to ‘make better informed judgments and predictions about the direction this body of law may be taking’.<sup>17</sup>

Use of codes of practice rather than legislative amendments has been advocated in certain fields of practice involving cultural heritage objects such as the art market.<sup>18</sup> Nevertheless, such suggestions deal with particular issues in a piecemeal manner and it has been seen how this can cause inconsistent results.<sup>19</sup> It is argued in this thesis that a holistic approach is needed for the treatment of cultural heritage and it is argued here that this proposal provides such a solution.<sup>20</sup> Even if a Code of Practice (“COP”) were drafted to cover all aspects of cultural heritage practice, there might be a lack of enforceability. Part of the success of the museum codes of ethics is the professional embarrassment resulting from sanction and the preventive effect of the threat of sanction.<sup>21</sup> A comprehensive code, used by many different decision-makers, might not

---

<sup>14</sup> Hilary A Soderland, ‘Values and the Evolving Concept of Heritage: The First Century of Archaeology and Law in the United States’ in George S Smith, Phyllis Mauch Messenger and Hilary A Soderland (eds), *Heritage Values in Contemporary Society* (Left Coast Press, Inc 2010) 138

<sup>15</sup> Harding (n 13) 345.

<sup>16</sup> Derek Fincham, ‘The Distinctiveness of Property and Heritage’ (2011) *Penn State Law Review* 641, 658.

<sup>17</sup> *ibid*

<sup>18</sup> Janet Ulph, ‘Markets and Responsibilities: Forgeries and the Sale of Goods Act 1979’ (2011) *JBL* 261, 280

<sup>19</sup> Specifically in the case of Nazi Era claims and equally strong moral claims for other objects held by national museums: discussed at p 191.

<sup>20</sup> See Patty Gerstenblith, ‘Identity and Cultural Property: The Protection of Cultural Property in the United States’ (1995) 75 *Boston University Law Review* 559 and Fincham (n 16) 643 in the US context.

<sup>21</sup> At 204 above.

achieve such widespread recognition without either professional consensus<sup>22</sup> or formal sanction. It is argued here that using codes of practice within a legal framework provides a more effective mechanism for upholding the cultural heritage principles and norms. Furthermore, unlike a non-binding code, the proposed COP would bind the courts and tribunals, which is an important feature of this proposal.<sup>23</sup>

A further reason for justifying a code rather than legislation in the context of the art market was because of the difficulties involved in amending the Sale of Goods Act 1979 without further complicating its provisions and applicability.<sup>24</sup> However, the independent nature of the proposed short Bill means that it does not require complicated amendments to other legislation. Instead, it requires decision-makers to take into account the cultural heritage principles and norms as a factor when exercising their powers. Furthermore, this scheme can be implemented without large-scale changes to governance structures or the introduction of major new legal concepts.<sup>25</sup>

The proposed legislation would give clear legal force to the upholding of the cultural heritage principles and norms. Consequently, where it is evident that a decision-maker has failed to take these into account when reaching its decision stakeholders are able to ask permission to seek judicial review of the decision. In this way, the cultural heritage principles and norms have legal force.

---

<sup>22</sup> Essential to professional codes of ethics: Gary Edson (ed), *Museum Ethics* (Routledge 1997) 112.

<sup>23</sup> N.B. the effect of the proposal on the Wedgwood claim: p 264 above.

<sup>24</sup> Ulph (n 18) 279.

<sup>25</sup> Although in this proposal cultural heritage, as an intangible concept, is more fully recognised in law.

### **5.3 The proposed legal scheme: the Cultural Heritage (Principles and Norms) Bill (CH(PaN)B)**

A modest change in law could make a significant difference to more fully reflecting the cultural heritage principles and norms in practice. The primary operative provision of the CH(PaN)B, which requires the designated decision-makers to take into account, and give effect to, the cultural heritage principles and norms,<sup>26</sup> is engaged when designated decision-makers<sup>27</sup> make decisions or exercise any powers relating to the acquisition, continued retention or transfer of cultural heritage.<sup>28</sup> Cultural heritage is treated as intangible in nature, thereby concentrating on the value to people as manifested through the public legacy. This therefore facilitates the fuller legal recognition of the intangible dimension of cultural heritage. Designated decision-makers include national and non-national museums (of varying corporate structures), those making decisions about archaeological excavations (either university-based or by private research bodies)<sup>29</sup> and courts and tribunals.<sup>30</sup> Furthermore, the inclusion of existing bodies in this category (specifically the Reviewing Committee, the SAP and the AILP) ensures that in future their recommendations take account of the full variety of types of value, rather than being preoccupied with the national viewpoint or with redressing past wrongs.<sup>31</sup>

In Chapter 3 the advantages of the charitable trust as a mechanism by which to account for the cultural heritage principles and norms were seen. This proposal does not require

---

<sup>26</sup> Cl 1(1).

<sup>27</sup> Defined in cl 4.

<sup>28</sup> Cl. 1(1).

<sup>29</sup> Cls 4(1)(i) and 4(1)(k) respectively.

<sup>30</sup> Cl 4(1)(a).

<sup>31</sup> Discussed below at pp 311-313.



institutions to change their governance structures by establishing charitable trusts, although this would go some way to the greater fulfilment of the cultural heritage principles and norms.<sup>32</sup> 700 museums<sup>33</sup> are run by the 410 principal local authorities, and only 23 local authorities have established charitable trusts taking responsibility for museums.<sup>34</sup> Whilst local authorities were encouraged to explore changing museums to trusts,<sup>35</sup> a requirement to do so would place significant administrative and financial burdens on them. Instead, the CH(PaN)B requires all museum governing bodies, regardless of their legal structures, to take into account and give effect to the cultural heritage principles and norms without major structural change. This provides a more articulated process rather than requiring major institutional changes.

### **5.3.1 Developing a system of principles: the codes of practice**

The details of the relevant cultural heritage principles and norms<sup>36</sup> would be particularised in statutory codes of practice issued by the Secretary of State;<sup>37</sup> these could be updated periodically to reflect the dynamic nature of cultural heritage value. The code(s) would apply to all major decisions regarding the fate of cultural heritage. The MACoE could either be transposed wholesale, thereby applying to all museums regardless of professional membership, or direct reference could be made to it in the

---

<sup>32</sup> At 175 above.

<sup>33</sup> Sixth Report from the Culture, Media and Sport Select Committee, 'Caring for our Collections' (2006-07 HC 176-I) [13].

<sup>34</sup> *ibid* [46].

<sup>35</sup> Nicholas Goodison, *Goodison Review: Securing the Best for our Museums: Private Giving and Government Support* (HM Treasury 2004) 18 and p 208 above.

<sup>36</sup> Cls 2(2)-(4).

<sup>37</sup> Cl 6.

COP. The transposition option is advantageous in that it would avoid museums who are members of the MA having to adopt yet another soft law document in their day-to-day work. However, the disadvantages to this approach include first, the fact that the contents of the code itself would be outside the control of the Secretary of State and he would have to rely on the MA to effect any changes. Secondly, the MACoE deals with broad principles when dealing with disputes<sup>38</sup> rather than practical procedural issues to ensure that the cultural heritage principles and norms are given effect to. In the case of either approach being adopted, the aim is not to belittle or cast aside the important normative nature of the existing codes of ethics.<sup>39</sup> In fact, this proposal seeks to give more force to these provisions either directly (through transposition of the MACoE into English law) or indirectly by the MA and ICOM Codes informing the development of the COP. It would be possible to develop either a comprehensive code covering all aspects of museum practice (including disputes) or separate codes dealing with specific issues. If a separate code relating to disputes were adopted, then the drafting of the code could be informed by, and reflect, the overarching principles regarding the treatment of claims as set out in the ICOMCoE and MACoE.<sup>40</sup> However, as a COP, it should include more specific guidance on the specific factors to take into account when determining claims so as to more effectively uphold the cultural heritage principles and norms. The DCMS Human Remains Guidance<sup>41</sup> is one of the few occasions in England where

---

<sup>38</sup> At pp245-247 above.

<sup>39</sup> Discussed in Chapter 4.

<sup>40</sup> In Appendix 2 a Code of Practice dealing with the cultural heritage principles and norms has been drafted which focuses primarily on the balancing of the cultural heritage principles and norms in the context of dispute resolution. The MACoE would continue to be applicable in respect of overarching ethical issues in the day-to-day management of museums.

<sup>41</sup> DCMS *Guidance for the Care of Human Remains in Museums* PP 847 (DCMS 2005).

guidance provides details of the factors to take into consideration when dealing with claims for return. In turn, museums have published details of their claims processes, often similar in nature and scope to that of the DCMS.<sup>42</sup> Therefore the DCMS Guidance would be particularly informative when drafting the code. However, this document could not be adopted on its own, but would need supplementing by more general guidance on the cultural heritage value and public legacy factors to balance when dealing with claims. Several Scottish approaches to repatriation policies have potential to inform the development of codes of practice governing disputes. These were outside the scope of discussion in Chapter 4 because the primary analysis was of the English regime. However, these policies are relevant to the current discussion as they provide examples of more comprehensive policies on repatriation claims, giving more detailed procedural guidance and outlining factors relevant to deciding claims. Such a comprehensive approach to repatriation claims was absent in English museum documents, focusing either on human remains or failing to particularise the claims process and the criteria for assessment.<sup>43</sup> Whilst this means using material from another jurisdiction no issues arise about transposing legal concepts or different cultural influences since similar issues arise in museums both sides of the border. The ‘influential model’<sup>44</sup> of Glasgow City Council,<sup>45</sup> commended by the Select

---

<sup>42</sup> E.g. ‘The British Museum Policy on Human Remains’ <<http://www.britishmuseum.org/pdf/Human%20Remains%206%20Oct%202006.pdf>> accessed 27 October 2012 and ‘Policy on Human Remains held by the University of Oxford’s Museums’ *Oxford University Gazette* Supplement (2) to No. 4787 (15<sup>th</sup> November 2006).

<sup>43</sup> E.g. Manchester Museum and the Pitt Rivers Museum, Oxford.

<sup>44</sup> Neil Curtis, ‘Repatriation from Scottish Museums: Learning from NAGPRA’ (2010) 33 *Museum Anthropology* 234, 237.

Committee,<sup>46</sup> looks at the following factors when deciding whether or not to transfer a requested object from its collection:

1. 'The status of those making the request...
2. The continuity between the community which created the object/s and the current community on whose behalf the request is made.
3. The cultural and religious importance of the object/s to the community.
4. How the object/s have been acquired by the museum and their subsequent future use.
5. The fate of the object/s if returned.'<sup>47</sup>

This approach has much to commend it, but still focuses primarily on *who* is claiming the object, rather than considering the cultural heritage principles and norms more holistically. A more object-focused approach was developed at Aberdeen University in the following terms:

1. 'Identity of the item
2. History of possession and/or ownership of the item
3. Connection between the item and the claimant
4. Significance of the item to the claimant and to the University
5. Consequences of return to the claimant or retention by the University.'<sup>48</sup>

---

<sup>45</sup> Memorandum submitted by Glasgow City Council Seventh Report of the Select Committee on Culture, Media and Sport, 'Cultural Property: Return and Illicit Trade' (1999-2000 HC 371-II) Minutes of Evidence 18 May 2000.

<sup>46</sup> Seventh Report, vol I (ibid) [199(x)].

<sup>47</sup> Glasgow evidence (n 45).

These criteria can be characterised according to four groups: those relating to the object; the claimant; the object's significance; and the consequences of the decision.<sup>49</sup> The Aberdeen criteria look at the significance and connection with the University as well as the claimant<sup>50</sup> and so these have the potential to take into account wider value and public legacy considerations than the Glasgow criteria. However, still there is no explicit consideration of the connection with the wider public and community, which would be a valuable addition to a future COP. An important factor that Curtis highlights (as someone based at Aberdeen) was the Aberdeen policy's focus on the educative, rather than prescriptive role of the criteria;<sup>51</sup> in this way the policy did not specify a threshold to meet to satisfy the significance requirement and used the terminology 'consequences of return' rather than 'fate' of the object to encourage dialogue about proper treatment.<sup>52</sup> Contrastingly, the Edinburgh policy states that 'the normal expectation' is that return would be to a museum or similar institution to ensure future conservation and access for research purposes.<sup>53</sup> Set hurdles for claimants to surmount in terms of the significance of the object to them might be inappropriate. Nevertheless, more specific guidance of the types of value that would be relevant to take into account and the way in which different types of value are of significance to claimant groups, the

---

<sup>48</sup> Aberdeen University Museums, *Repatriation Procedure* <[http://www.abdn.ac.uk/museums/documents/Museums\\_Repatriation\\_Procedure.pdf](http://www.abdn.ac.uk/museums/documents/Museums_Repatriation_Procedure.pdf)> accessed 10 April 2013.

<sup>49</sup> Curtis (n 44) 239.

<sup>50</sup> *ibid* 239.

<sup>51</sup> *ibid* 240.

<sup>52</sup> *ibid*

<sup>53</sup> Edinburgh University, 'Guidelines for deciding on requests for repatriation of items from the University collections' <[http://www.ed.ac.uk/polopoly\\_fs/1.13157!/fileManager/collectionspolicy.pdf](http://www.ed.ac.uk/polopoly_fs/1.13157!/fileManager/collectionspolicy.pdf)> accessed 11 April 2013.

museum and to other stakeholders would aid decision-makers and would need to be included in any COP.

Whilst the Glasgow criteria addressed the circumstances of the object's acquisition, this was not a consideration in the Aberdeen criteria. The circumstances of acquisition are relevant when assessing public legacy and so would be an important factor to include in the final COP.<sup>54</sup> Articulated criteria ensure fair treatment of claims<sup>55</sup> and the *quasi*-legal nature of the process facilitates 'careful consideration of each case on its own terms'.<sup>56</sup> Whilst the COP(s) accompanying the CH(PaN)B are envisaged as being longer and more detailed than these criteria and the accompanying policy, these serve as important points of reference for the development of such codes by experts to be approved by the Secretary of State.

### **5.3.2 Consultation with stakeholders**

Clause 1(2) provides for consultation with stakeholders so far as possible when designated decision-makers are assessing the cultural heritage principles and norms. This provision aims, not only to give effect to the consultative element of stewardship,<sup>57</sup> but also to provide a means of more effectively valuing cultural heritage. Stakeholders have an opportunity to apply for judicial review where it is clear that the

---

<sup>54</sup> This is a factor in the criteria developed by Edinburgh Policy (ibid)

<sup>55</sup> ibid

<sup>56</sup> ibid pp 278-279

<sup>57</sup> As to which see p 265 above. By providing a mechanism by which consultation can take place and the balancing of viewpoints is undertaken by decision-makers this goes some way to providing real collaboration between decision-makers and stakeholders; this reflects the approach advocated by Kirsch in the context of museums and communities where he talks of the heterarchical nature of disputes where no one view takes automatic dominance over another: Stuart Kirsch 'Science, Property, and Kinship in Repatriation Debates' (2011) 34 Museum Anthropology 91, 94.

cultural heritage principles and norms have been ignored.<sup>58</sup> This is unlikely to result in a flurry of litigation unless decision-makers fail to address any of the principles or norms in their decisions. By undertaking a transparent process of consideration (perhaps through online publication of important decisions, which is often already done) litigation would be avoided, but the inclusion of this clause gives a legal strength to the provisions by means of enforcement through judicial review.

This stakeholder involvement aims to create an ethos of stewardship (emphasising museums' roles as ethical guardians rather than owners) without creating a legal doctrine of stewardship. Recognising stewardship as a legal concept would require significant structural changes to national and non-national museums. Whilst the former are already governed by statute and so changes could be made, the varied forms of the latter would make any overarching legal concept of stewardship logistically difficult to achieve. Consultation with stakeholders was the key component of the notion of stewardship absent from the legal regime.<sup>59</sup> There is clearly a greater role to be played by the public so that museums should: 'Consult and involve groups from communities they serve and their representatives to promote a sense of shared ownership in the work of the museum'.<sup>60</sup> In this way, a system which encourages and mandates wider consultation in decision-making would further develop the notion set out in the UK Museums Association Code of Ethics ("MACoE") that museums should not do anything which indicates too strongly their ownership of objects.<sup>61</sup>

---

<sup>58</sup> CI 5(1).

<sup>59</sup> At p 269 above.

<sup>60</sup> Museums Association, Code of Ethics for Museums (UK Museums Association, London 2008) [4.1].

<sup>61</sup> Discussed in Chapter 4.

The consultation process is engaged whenever a stakeholder makes a claim for the return of cultural heritage or where they seek involvement in the treatment of cultural heritage within the context of museums.

Part of the problem encountered with repatriation claims made to English national museums is the perception that the museums ‘own objects’, despite the sentiments expressed by the MACoE<sup>62</sup> and those working in museums.<sup>63</sup> Regardless of these sentiments it is the museums’ governing bodies that have the final say in the proper treatment of objects. If museums were to focus on their role as ethical guardians or stewards, they could take into account various viewpoints. Whilst the public generally trusts museums,<sup>64</sup> further public engagement through wider consultation (easily facilitated by technological advancements) would more fully promote the notion of stewardship of collections.

### **5.3.3 Effecting the principles and norms**

Perhaps the most tangible difference made by the proposal would be the means by which to give effect to the cultural heritage principles and norms. The first is to provide a general power for the governing bodies of national museums to deaccession objects from their collections reflecting the power in section 47 of the Human Tissue Act 2004 (“HTA”).<sup>65</sup> This provides a wide power which can be exercised ‘if it appears to them to

---

<sup>62</sup> MACoE (n 60) [1.3].

<sup>63</sup> E.g. Neil MacGregor, ‘To Shape the Citizens of “That Great City, the World” in James Cuno (ed), *Whose Culture? The Promise of Museums and the debate of antiquities* (Princeton University Press 2009) 43.

<sup>64</sup> Britain Thinks, *Public perceptions of – and attitudes to – the purposes of museums in society* (Museums Association 2013) 26.

<sup>65</sup> Note the limitations regarding trusts and conditions discussed at p 306 below.



be appropriate to do so for any reason, whether or not relating to their own functions'.<sup>66</sup>

The reason for adopting this approach rather than the one taken in the Holocaust (Return of Cultural Objects) Act 2009 (H(RCO)A)<sup>67</sup> (where the power to transfer only arises after the SAP's recommendation and the Secretary of State's approval) is that in the CH(PaN)B the decision-making remains with the museum. This proposal does differ from the HTA in two ways. First, in the CH(PaN)B a decision must be made within the framework of a statutory COP<sup>68</sup> and requires the decision-makers to take into account the cultural heritage principles and norms. This requirement prevents individual museums from creating additional burdens for potential claimants to surmount which was seen in the context of section 47 of the HTA and the British Museum.<sup>69</sup> A second difference from the HTA is that the CH(PaN)B requires decision-makers to consult with stakeholders. This requirement, discussed above, allows the power to be exercised in a more fully informed manner, giving effect to the cultural heritage principles and norms. Unlike the H(RCO)A, there is no proposed sunset clause<sup>70</sup> because (unlike the case of Nazi Era object) there has been no comprehensive provenance research project identifying all objects with potentially tainted provenance. It would be unrealistic to provide a small window of opportunity within which to bring all possible claims without the necessary information for potential claimants.

---

<sup>66</sup> Cl 3(1)(g), reflecting the wording of HTA 2004, s 47(2).

<sup>67</sup> s 2.

<sup>68</sup> Cl 1(3)

<sup>69</sup> Seen at p 200 above.

<sup>70</sup> *ibid* s 4(7).

The CH(PaN)B's power to transfer would prevent national museums from fencing themselves in behind legal prohibitions,<sup>71</sup> allowing them to take account of the different types of value and the public legacy obligations. They could make reasoned decisions which may legitimately result in the retention for the general public, (and might be accompanied by a restriction on access) but could equally result in returning an object to its community of origin. In this way the cultural heritage principles may be better fulfilled without being locked into a stalemate of opposing rights seemingly at odds with one another.

Through a wider ability to accede to repatriation claims following an assessment of the cultural heritage principles and norms, there would be greater recognition of moral claims and moral title. Whilst these concepts would have an indirect statutory recognition, as a means of giving effect to the cultural heritage principles and norms, they would not be recognised as legal concepts in themselves. It would be difficult to give effect to moral title as a new breed of property, not least because of the *numerus clausus*<sup>72</sup> difficulty in developing new rights. Furthermore, the analysis of exactly when and how moral title might come into effect in the context of the SAP demonstrated the difficulty of conceptualising it in legal terms. Museums can therefore transfer legal title to the object to the claimant to give effect to a moral claim, thereby indirectly recognising moral title and demonstrating to the public the moral satisfaction of claims which may enhance the public's trust in them as institutions. Clauses 3(1)(d) and (e) of the CH(PaN)B provide for alternative means of recognising this title and more effectively upholding the cultural heritage principles and norms through collaborative

---

<sup>71</sup> See cl 3(1)(f) and p 313 below.

<sup>72</sup> E.g. *Hill v Tupper* (1863) 159 ER 51, 53 (Pollock CB).

remedies or commemorative action which can give effect to the associative value of the cultural heritage object by memorialising its connection with people or an event.

#### **5.3.4 Failure of a decision-making body to take into account the cultural heritage principles and norms or to consult with stakeholders**

Two particular instances where the provisions of the CH(PaN)B would be engaged are of importance from the point of what happens where a decision-making body fails to take into account the cultural heritage principles and norms. These arise

- (a) where a museum received a request from a claimant for the transfer of a CHO;<sup>73</sup>
- and
- (b) where a museum made the decision to de-accession a CHO.<sup>74</sup>

In the first situation, were a museum to decide not to accede to the claimant's request without having taken into account the relevant cultural heritage principles and norms the claimant could seek permission to judicially review the decision. If the decision was judicially reviewed the decision would then need to be reconsidered. On this second occasion the cultural heritage principles and norms would be taken into account and given effect to. Therefore, the CH(PaN)B would make a tangible difference to the claimant and give legal force to him having access to a process which requires the decision-maker to take into account the cultural heritage principles and norms. In the second example, that of de-accessioning of a CHO without having taken into account the relevant cultural heritage principles and norms, a stakeholder could again seek

---

<sup>73</sup> A corresponding example is the Maqdala Treasure: see p 313 below.

<sup>74</sup> A corresponding example is found in the context of local authority museums: see p 312 below.

permission to judicially review the decision. However, in this situation the CHO is likely to have already been transferred to a third party, in which case private property rights would now exist which would need to be balanced with the cultural heritage principles and norms. Since the Administrative Court judicially reviewing the local authority's decision to de-accession without giving due attention to the cultural heritage principles is determining a question relating to the transfer of cultural heritage,<sup>75</sup> clause 1(1) of the CH(PaN)B would be engaged. Consequently the powers under clause 3 would be available to the Court. In this regard it would be possible to make an order relating to the CHO in question which could include a compulsory purchase order of the property.<sup>76</sup> The analysis in Chapter 3 shows that the interference in the peaceful enjoyment of possessions under Article 1 of the First Protocol of the European Convention on Human Rights (ECHR) can be justified in the name of the preservation and provision of access to cultural heritage.<sup>77</sup> It is clear that such an order would be unusual and unlikely to be made without the court first seeking advice of experts regarding the cultural heritage principles and how best to give effect to the norms. Nevertheless, this could be used in those situations where the cultural heritage principles and norms are so strong as to justify interference with third party rights.

---

<sup>75</sup> Even if it were a retrospective rather than prospective transfer, which would be the case here.

<sup>76</sup> This presupposes that had the original decision been made in accordance with clause 1 the CHO would have remained in the local authority museum.

<sup>77</sup> This is clear from the case of *Beyeler v Italy* (2001) 33 EHRR 52 [113] and has more recently been confirmed in the case of *Albert Frst von Thurn und Taxis v Germany* (Application No 26367/10 [23]).

## 5.4 Critical analysis of the proposal

### 5.4.1 Limits of the proposal

This proposal makes significant inroads into making English law more effective in upholding the cultural heritage principles and norms, as will be demonstrated below in the context of some practical applications of the CH(PaN)B. There are, however, some defects in the legal regime which will not be overcome by this modest proposal. First, the CH(PaN)B does not impose on owners a general duty to preserve or care for cultural heritage objects. This would require a significant interference with private property rights and most likely depend on a system of listing cultural heritage objects. Both of these factors would need further detailed consideration outside the scope of this thesis. Secondly, this proposal does not bring all archaeological objects found in England into the public fold; the Treasure Act 1996 (TA) therefore remains unaffected. Culturally valuable objects will remain in private ownership with no duties of preservation or access. Nevertheless, as was demonstrated above, the Portable Antiquities Scheme (PAS) dovetails with the TA to provide a means by which the evidential value of the objects can be preserved through the recording process, thereby providing the public with access to that information.<sup>78</sup> Nevertheless, from a practical point of view it may be unfeasible to introduce a legal requirement to report all finds of portable antiquities due to the cost of administering the sheer number of these and the cost of providing rewards to an increased number of finders. In 2011 over 97,000 objects were voluntarily reported under the PAS and 970 finds of treasure were reported.<sup>79</sup> Further research would need to be undertaken to assess whether it is

---

<sup>78</sup> At p 169 above.

<sup>79</sup> Michael Lewis (ed), *The Portable Antiquities Scheme Annual Report 2011* (The British Museum 2012)

desirable to extend the remit of the TA to fully account for the cultural heritage principles and norms in all found objects, or whether the current systems provide a necessary balance.

The third aspect of the legal system that remains unchanged is the artificial associative value created by the imposition of a condition in a bequest or other gift, described as the ‘dead hand of the benefactor’.<sup>80</sup> Therefore the powers to transfer objects to third parties and the specific powers given to the governing bodies of the national museums continue to be subject to any trust or condition<sup>81</sup> and the power does not extend to the Wallace Collection Board.<sup>82</sup> Trusts and conditions remained unaffected by the powers in either the HTA or the H(RCO)A which shows that even when repatriation of human remains and the return of spoliated cultural objects were involved trusts and conditions still took priority. A full analysis of a viable mechanism for circumventing conditions imposed in trusts and other gifts is too large for consideration in this thesis, but demonstrates further avenues for research. The unfortunate consequence of this is that, at present, in the CH(PaN)B, the Wallace Collection Board is exempt from the requirement to take account of the cultural heritage principles and norms due to their restrictive powers under the MGA 1992.

#### **5.4.2 Potential disadvantages**

A possible disadvantage with the scheme would be enhanced administrative burdens of taking into account the cultural heritage principles and norms and in particular the requirement to consult with stakeholders. There should be little additional burden when assessing the principles and norms in the case of museums, the Reviewing Committee,

---

<sup>80</sup> At p 215 above.

<sup>81</sup> Cls 3(1)(b) and (g).

<sup>82</sup> Cl 4(1)(f).

the AIL and the SAP since they already receive expert advice and submissions and so the additional information with which they need to be presented is minimal. Museums are already entreated to carry out these valuing exercises as part of their professional obligations<sup>83</sup> and so this should not impose additional burdens. Furthermore, the definition of decisions relating to ‘continued retention’<sup>84</sup> means that this requirement only arises when faced with a claim and so would not arise during their regular collections reviews. Courts and tribunals would need to receive expert evidence, which may produce an additional burden for the parties, but which has the potential to produce a more fully reasoned solution. Where there is a potential administrative burden is with the requirement of wider consultation with stakeholders. Rights to be consulted exist in law already and much could be learned from these examples. These include trustees of land<sup>85</sup> who are under a duty, when exercising any of their functions, to consult with the beneficiaries of full age<sup>86</sup> and ‘so far as consistent with the general interest of the trust [to] give effect to the wishes of those beneficiaries’ or in the case of a dispute to the views of the majority.<sup>87</sup> A wider-scale example is evident in the requirement that where an order is made to create, divert or extinguish a path certain bodies must be served with notice of the order before it is confirmed by the Secretary of State. These bodies include, by way of example, the Open Spaces Society and the Ramblers Association.<sup>88</sup>

---

<sup>83</sup> Discussed in Chapter 4.

<sup>84</sup> CI 7(1).

<sup>85</sup> Trusts of Land and Appointment of Trustees Act 1996, s 1(1)(b)

<sup>86</sup> *ibid* s 11(1)(a)

<sup>87</sup> *ibid* s 11(1)(b)

<sup>88</sup> Public Path Orders Regulations 1993, SI 1993/11 reg 3 and sch 3.

It should be noted that the requirement in the CH(PaN)B is subject to the proviso that consultation is only required so far as appropriate and smaller-scale consultation may be required in some situation; indeed, courts and tribunals are exempt from this requirement<sup>89</sup> to avoid any risk of prejudicing the proceedings. Opportunities for online response to the proposed action would suffice. This type of stakeholder consultation already takes place. For example Manchester Museum consulted on the appropriate treatment of human remains within its collections.<sup>90</sup> With increased availability of online discussions this is more easily facilitated and should not result in too great an administrative burden.

Secondly, a potential concern about the scheme is increased litigation, particularly in the context of testing the scope of the factors to take into account and the requirement to consult with stakeholders. Nevertheless, the opportunity to apply for judicial review would only arise where the decision-maker failed to take into account the principles and norms (by failing to follow the COP(s)) or where there was no consultation.

## **5.5 The proposed decision-making process in practice**

Any decision-making process governed by the CH(PaN)B starts by assessing the cultural heritage value to determine why the cultural heritage is important, how important it is (in terms of degree) and to whom it is important. The legal valuing exercise would depend on experts and museums acting as the public's agents, although museums already act as our agents in this regard. The proposal provides for the public

---

<sup>89</sup> Cl 1(2)

<sup>90</sup> Manchester Museum, 'Findings and outcomes of a consultation on the care and retention of Ancient British human remains in the collection of the Manchester Museum' September 2011 <[http://issuu.com/manchestermuseum/docs/consultation\\_outcomes\\_on\\_human\\_remains](http://issuu.com/manchestermuseum/docs/consultation_outcomes_on_human_remains)> accessed 14 April 2013.



to more greatly inform the decision-makers about the full range of types of value that they experience towards cultural heritage and so this will be more fully reflected in the decisions.

Stage 2 assesses the public legacy and would take into account the strength of the link between different people and the cultural heritage; seemingly, this appears a subjective exercise. In fact this can be objectively discerned from expert advice and consultation with stakeholders. The decision-maker would consider the obligations to present and future generations, whilst being aware of the past. Unlike the SAP's current approach, the need to redress past wrongs would be *a* factor, not the sole factor.<sup>91</sup> Therefore one considers both the circumstances of loss and acquisition. Improper acquisition of the object by the museum (according to the provenance standards of the time) may taint it. Continued possession, use and public access without acknowledging the tainting, either through an account of the object's history, return, or an *ex gratia* payment, would be contrary to the public legacy. At this stage other factors including cultural rights would be considered and in the case of ceremonial objects and human remains particular consideration would be given to the appropriateness of access and repatriation to give effect to obligations under the UN Declaration on the Rights of Indigenous Peoples.<sup>92</sup>

The next stage would be to assess how best to preserve cultural heritage. This may be done by recognising that, regardless of the museum's legal title, a third party has a moral claim to the object. If successful, this might give rise to a moral title, but not automatically an entitlement to the legal title.<sup>93</sup> Moral title might be satisfied by giving an opportunity for the claimants to contribute to decisions about the object. For

---

<sup>91</sup> The effect of the CH(PaH) on the SAP is discussed below at p 311.

<sup>92</sup> art 12.

<sup>93</sup> Cf. the rule in *Saunders v Vautier* (1841) Cr & Ph 240 (Ch).

example, this might require consultation with a moral title holder when loan requests are received or for the commercialisation of the object by selling postcards or replicas and could include a right to share in any profits. In short, there is much scope for innovative remedies. It is worth considering now some practical applications of the CH(PaN)B to previously resolved, and ongoing, disputes. These examples have been selected to represent the full breadth of decision-making involving cultural heritage. These include decisions by courts, the *quasi*-legal structures of the SAP and Export Reviewing Committee and museums with differing legal structures and involve material of differing nature. Particular emphasis will be placed on how the system may overcome some of the pitfalls of the legal and ethical systems that were identified in previous chapters.

### **5.5.1 The Wedgwood Collection**

The cultural heritage value of the Wedgwood collection was acknowledged in *Re Wedgwood Trust Ltd (In Administration)*<sup>94</sup> as being of universal importance, but this could not affect the overall decision. Under the CH(PaN)B the judge could, in response to a recognition of this value and the strength of the public legacy in maintaining the collection intact for future generations, make an order staying the action to provide an opportunity for a buyer to come forward to purchase the collection for the public.<sup>95</sup> This demonstrates that the requirement to take into account and give effect to the cultural heritage principles and norms does not unduly impede owners' property rights, but rather tries to strike a balance between those property rights and the public legacy imbedded in the value of it as a collection. The CH(PaN)B could therefore make a

---

<sup>94</sup> [2012] Pens LR 175 [56].

<sup>95</sup> In a similar vein to the deferring of export licences.

concrete attempt at fulfilling the norm of preservation and access by keeping the collection together.

### 5.5.2 Spoliation Advisory Panel decisions

The principal effect on the SAP would be the requirement to take into account the wider cultural heritage value and public legacy considerations, thereby avoiding the primary focus on the claimant. The SAP would need to consider the cultural heritage value to the public in retaining the object, particularly where either the claimant is many generations removed from the original owner of the object or where it is likely that the claimant would sell the object on its return.<sup>96</sup> In such circumstances retention by the museum and an *ex gratia* payment might be more appropriate for fulfilling the cultural heritage principles and norms. From the point of view of the remedies available to the SAP (to give effect to the cultural heritage principles and norms) the impact of these proposals would be less dramatic. This is because the statutory bars on transfer were already lifted for Nazi Era cultural objects.<sup>97</sup> Furthermore, the SAP can recommend the display of an account of the object's history.<sup>98</sup> However, the CH(PaN)B further provides for an account of the history to be provided when an image of the object is displayed online or reproduced commercially which contributes to further recognition of moral claims and the memorialising of key events in history.<sup>99</sup> Nevertheless, the ability to enter into loans and other arrangements provides additional remedies for the

---

<sup>96</sup> See pp 194-203 above.

<sup>97</sup> H(RCO)A.

<sup>98</sup> DCMS, 'Spoliation Advisory Panel Terms of Reference' <<http://webarchive.nationalarchives.gov.uk/20121204113822/http://www.culture.gov.uk/images/publications/SAPConstitutionandTOR11.pdf>> accessed 14 April 2013 [13(d)]

<sup>99</sup> Cl 3(1)(d).

SAP.<sup>100</sup> This could include the Panel recommending that where a museum retains an object, the claimant may have a share in the profits derived from merchandising.

### **5.5.3 Export Reviewing Committee – Earl of Elgin’s papers**

The CH(PaN)B would require the Reviewing Committee to take account of the full range of types of cultural heritage value and the relationship between the object and other people, rather than just taking the national viewpoint. It took the Secretary of State to act contrary to the recommendation of the Reviewing Committee to show a full appreciation of this value when dealing with the Earl of Elgin’s papers.<sup>101</sup> The Reviewing Committee, comprising experts from various disciplines, is best placed to assess cultural heritage value in the context of export licences and make recommendations accordingly to the Secretary of State. The CH(PaN)B would ensure that the committee would be able to (and indeed would have to) take account of these types of value when determining whether to grant or defer an export licence. It would thus be unimpeded by a remit focusing solely on the national viewpoint, thereby ensuring that the cultural heritage principles and norms are fully addressed.

### **5.5.4 Local authority museums**

It will be recalled that whereas local authority museums not established as trusts are legally free to sell objects from within their collections, the MACoE restricts this to those sales which are not financially motivated and of objects that do not form part of the museum’s ‘core collection’.<sup>102</sup> It was earlier seen that the risk of acting in contravention of this principle is expulsion from the organisation and loss of funding

---

<sup>100</sup> Cl 3(1)(f).

<sup>101</sup> See pp 160-161 above.

<sup>102</sup> At p 249 above.

opportunities which acts as a deterrent to contravening this principle.<sup>103</sup> However, in these financially austere times there may be an increased risk of councils having to sell or transfer culturally important objects. Whilst consultation with the public was recommended by the MA's Ethics Committee when determining whether or not sell an object,<sup>104</sup> the CH(PaN)B would provide a more regulated requirement to take into account the full cultural heritage value to different people, the public legacy and also the relevant norms. Consequently, the preservation of the cultural value of the collection is more strongly protected in law. Local authorities are not required, but are permitted by the Public Libraries and Museums Act 1964, to establish museums. Nevertheless where they do so, they would be bound by the provisions of the CH(PaN)B. A possible negative effect of this proposal would be that some local authorities may be reluctant to establish museums or decide to close them down as a result of being placed under increased legal obligations. However, the enactment of the CH(PaN)B might encourage more of them to establish trusts to administer their collections, something which would be an encouraging development.<sup>105</sup> This potential effect would need to be debated in Parliament, following a full impact assessment.

#### **5.5.5 The Maqdala Treasure**

In its first report of 2003-2004 the Select Committee described the Maqdala Treasure located in the British Museum and which includes some Ethiopian Tabots<sup>106</sup> of sacred significance to the Ethiopian Orthodox Church, as perhaps one of the clearest examples

---

<sup>103</sup> At p 236 above.

<sup>104</sup> At p 263 above.

<sup>105</sup> Discussed at p 207 above.

<sup>106</sup> First Report from the Culture, Media and Sport Select Committee, 'Cultural Objects: Developments since 2000' (2003-04 HC 59) [57].

of where a museum should be able to give effect to a moral claim.<sup>107</sup> The British Museum, in deference to the religious significance of the Tabots, restricts access yet cannot return them to the community to whom they are most culturally valuable. An assessment of the cultural heritage value of these objects would reveal the strong religious and cultural significance to members of the church in Ethiopia, as well as the cultural value associated with the chapter of history in which they were taken. This would need to be balanced against the value to the visiting public to the museum. However, this latter value may be reduced, in part, because access to the Tabots is already restricted and so the cultural value may be much less than the value to communities in Ethiopia. A further value to be considered would be the research value, assuming that researchers had access to these objects in the British Museum. There is clearly a public legacy aspect connecting the Tabots to the community of origin as well as the tainting of these objects as part of the British Museum's collection originating from open looting and plunder during colonial times.<sup>108</sup> If the CH(PaN)B were in force this would provide a situation in which it would be appropriate to engage the power of transfer in Clause 3(1)(f).

#### **5.5.6 Returning to the silver spoon**

If the silver spoon satisfied the criteria for cultural heritage<sup>109</sup> then this status would be relevant in two situations under the CH(PaN)B. First, in circumstances where I agreed to sell the spoon and then breached the contract by failing to deliver it, usually a court would specifically enforce the contract if the object were considered rare and damages

---

<sup>107</sup> *ibid* [58].

<sup>108</sup> *ibid* [57].

<sup>109</sup> See p 65 above.

deemed inadequate.<sup>110</sup> However, in being required to take into account the cultural heritage principles and norms the court might decline to grant specific performance if the historical and associative value would be better satisfied by retention by the original owner. A second consequence which might need greater policy consideration, would be the relevance of the cultural heritage value when making a bankruptcy order. The cultural heritage value might justify staying an action, but the CH(PaN)B, by itself, would not make the spoon exempt property from the bankrupt's estate.<sup>111</sup>

## **5.6 Reflections on the proposal**

### **5.6.1 Shifting the focus away from *who* is claiming or *what* is claimed**

This proposal seeks to address the suggestion that we need to think of cultural heritage outside the property and rights framework<sup>112</sup> such that the arguments of stakeholders are not purely polarised, but can be addressed in an atmosphere of cooperation.<sup>113</sup> This proposal supports Carpenter and others' position that 'cultural property considerations do not always mandate a shift in title'.<sup>114</sup> An approach that refrains from focusing solely on the individuals concerned avoids resolution

in a political way with a compromise between the conflicting interests. This pragmatic approach often can be effective in balancing the different interests involved. However, it also can lead to short-term solutions that do not take into

---

<sup>110</sup> *Falcke v Gray* (1859) 62 ER 250 (Ch) 252.

<sup>111</sup> Insolvency Act 1986, s 283

<sup>112</sup> *Harding* (n 13) 302.

<sup>113</sup> *ibid* 345.

<sup>114</sup> Kristen A Carpenter, Sonia K Katyal & Angela R Riley, 'In Defense of Property' (2009) 118 *Yale Law Journal* 1022, 1124. Here, 'cultural heritage' can be substituted for 'cultural property'.

account the inherent value of cultural items and may even endanger their existence.<sup>115</sup>

By focusing on the full range of types of cultural heritage value and the public legacy aspect of cultural heritage, one can take a longer-term view of the appropriate treatment of cultural heritage. Avoiding polarisation also avoids addressing solely the property rights of ownership or possession at common law such that neither stewardship<sup>116</sup> nor the views of other stakeholders are endangered. This is often still the case even though property rights can exist in a multitude of forms.<sup>117</sup> Nevertheless, this proposal demonstrates that the development of new property rights is not the only way of taking account of the cultural heritage principles and norms in English law.

In Chapter 2 it was explained that Merryman's notion of preservation, truth and access as the elements of his cultural property policy differs from the approach taken to norms in this thesis; specifically this thesis treats the preservation of the intangible dimension of cultural heritage as being the key focus and this may include the ultimate destruction of the object. Merryman's concept of truth was subsumed in 'public legacy' for the purposes of this thesis and access in this thesis can include restrictions on access. In a later paper he described his approach as an 'object oriented' rather than 'nation

---

<sup>115</sup> Frank G Fechner, 'The Fundamental Aims of Cultural Property Law' (1998) 7 *International Journal of Cultural Property* 376, 377.

<sup>116</sup> See David Lowenthal, 'Stewarding the Past in a Perplexing Present' in Erica Avrami, Randall Mason & Marta de la Torre (eds), *Values and Heritage Conservation: Research Report* (The Getty Conservation Institute 2000) 22.

<sup>117</sup> Calls for approaching the property aspect of cultural heritage in a wider manner than simply ownership and possession have been found in recent works: Carpenter and others (n 114) and Fincham (n 16).



oriented' policy.<sup>118</sup> The approach in this chapter differs from Merryman's object-oriented approach in two principal ways. First, rather than focusing on the object itself, the proposed system focuses on cultural heritage (as defined in this thesis) and so looks at the intangible dimension rather than the physical manifestation. Secondly, the proposed approach can apply to all types of cultural heritage manifestations including places and practices rather than just objects. The approach put forward in this thesis aligns more closely with the functional approach to cultural heritage which focuses on the preservation for the sake of the people rather than the object themselves<sup>119</sup> (which thereby concentrates more fully on the intangible dimension of cultural heritage). This proposal espouses a legal concept of cultural heritage which matches that of the professional and academic practice;<sup>120</sup> in this way it avoids focusing on the object itself, specifically as a form of property which has often been the approach of lawyers in the past.<sup>121</sup> Whilst the intangible dimension of cultural heritage is given indirect legal recognition (in terms of being a consideration in decision-making) it is not proposed to give this effect as an intellectual property right enjoyed by the community.<sup>122</sup> Instead, it cannot be 'enjoyed' in the sense of being property, but is a feature of the important

---

<sup>118</sup> John Henry Merryman, 'The Nation and the Object' (1994) 3 *International Journal of Cultural Property* 61, 64.

<sup>119</sup> Markus M Müller, 'Cultural Property Protection: Legitimacy, Property, and Functionalism' (1998) 7 *International Journal of Cultural Property* 395, 398-399 and Tolina Loulanski, 'Revising the Concept for Cultural Heritage: The Argument for a Functional Approach' (2006) 13 *International Journal of Cultural Property* 207, 216.

<sup>120</sup> See generally Chapter 2.

<sup>121</sup> See generally Chapter 1.

<sup>122</sup> E.g. John Carman, *Against Cultural Property* (Duckworth 2005) 94.

places, objects and practices that is considered when making important decisions about the subject matter.

### **5.6.2 Not a single-issue approach**

It is argued that the CH(PaN)B would provide a mechanism that would have a good chance of receiving parliamentary support for several different reasons. It puts forward a holistic approach to the treatment of cultural heritage by dealing with cultural heritage irrespective of origin<sup>123</sup> location or ownership.<sup>124</sup> It is also made in the context of existing parliamentary support for giving effect to moral claims<sup>125</sup> and it seeks to avoid inconsistent treatment<sup>126</sup> which is something which Parliament sought to avoid through the enactment of Holocaust (Return of Cultural Objects) Act 2009 (“H(RCO)A”).<sup>127</sup>

---

<sup>123</sup> Due to the wide definition of cultural heritage found in the CH(PaN)B, cl 2(1) and the lack of any requirement of a particular country of origin.

<sup>124</sup> The CH(PaN)B applies to decisions involving publically owned cultural heritage (when made in museums or by English Heritage or the National Trust) as well as decisions involving privately owned cultural heritage (when a matter comes before a court or Tribunal, the Spoliation Advisory Panel or the Export Reviewing Committee): CH(PaN)B, cl 4(1).

<sup>125</sup> This is evident from the passage of the Holocaust (Return of Cultural Objects) Act 2009 and the HTA, s 47. Furthermore, the Select Committee’s strong views regarding the Maqdala treasure (see text to n 106 above).

<sup>126</sup> By making no distinction between stakeholders, thereby treating equally indigenous peoples, Nazi Era dispossessed owners or anyone else having a prior claim to the cultural heritage: CH(PaN)B, cl 5 and sch 1.

<sup>127</sup> It had been pointed out that the position before the enacting of the legislation where objects lost in the same circumstances could be returned to the pre-war owners by non-national museums but not by national museums led ‘to unjust, unfair and sometimes downright ludicrous outcomes’: Andrew Dismore MP HC Deb HC 15 May 2009, vol 492, col 1166.

The statutory means by which to give effect to the cultural heritage principles and norms put national and non-national museums on an equal footing in terms of their ability to respond to the moral imperative, but also place claimants on an equal footing. Therefore all claimant groups have their moral claim legally recognised and the shift in focus moves from purely politically motivated facilitation of claims to a more holistic approach. The individual concerns and experiences of claimants, specifically the symbolic value of the subject matter of cultural heritage as part of a culture that has been subjected to persecution and ill-treatment, is a factor to take into account, not least when assessing the public legacy aspect of the cultural heritage under consideration by a decision-making body. A key benefit is this consistency of approach as the facilitation of transfers from national museums will open up the possibility of other equally deserving claimant groups being able to bring claims.<sup>128</sup> It is clear that there is parliamentary support for giving effect to moral claims for return, as demonstrated by the transfer of the Beneventan Missal (which was lost in circumstances unconnected to the actions of the Nazis) by legislation that was clearly enacted in response to the Nazi dispossessions of cultural objects.<sup>129</sup> Here, the object was lost purely in the confusion of war, although it was acquired in circumstances where the museum ought to have done more to determine its provenance. Given that return was permitted in that situation, there is little justification to refuse other worthy claimants the return of the objects of which they were dispossessed.<sup>130</sup> Furthermore, the Culture, Media and Sport Select Committee have demonstrated an awareness of the strong moral arguments for

---

<sup>128</sup> See p 191 above.

<sup>129</sup> See p 190 above and Charlotte Woodhead, 'Redressing historic wrongs, returning objects to their rightful owners or laundering tainted objects? 21st century UK remedies for Nazi Era injustices' (2013) (in press).

<sup>130</sup> *ibid*

transferring other CHOs from national museum collections where these were taken during times of war.<sup>131</sup>

Whilst concern is often raised about the risk of emptying museums through repatriation requests<sup>132</sup> this has not been the experience of the USA in the context of the Native American Graves Protection and Repatriation Act 1990<sup>133</sup> or in Scottish museums.<sup>134</sup> Even though the concerns about the depletion of museum collections continue, nevertheless, there is clearly broad support for giving effect to moral claims as demonstrated in the foregoing paragraph and the recent experience of enacting the H(RCO)A and section 47 of the HTA which did not lead to wide scale emptying of collections may well diminish the impact of any such concern.

Rather than focusing on a single institution such as the British Museum and therefore predominantly on a single issue, of certain Greek sculptures, as has been the case with previous Bills<sup>135</sup>, the current proposal may curry more favour when viewed in the wider debate of the appropriate treatment of cultural heritage. The CH(PaN)B would, it is submitted, have more chance of legislative success than previous attempts to facilitate the transfer of cultural heritage objects from national collections in an environment of

---

<sup>131</sup> Select Committee First Report 2003-2004 (n 106) [58].

<sup>132</sup> See Rosa Prince, 'David Cameron refuses to return Koh i Noor diamond to India' *The Telegraph* 29 July 2010.

<sup>133</sup> Gerstenblith (n 20) 430.

<sup>134</sup> Curtis (n 44) 243.

<sup>135</sup> British Museum Act 1963 (Amendment) Bill HL Bill (1983-1984) and British Museum Act 1963 (Amendment) Bill HC Bill (2008-2009).

giving effect widely to the moral imperative of museums.<sup>136</sup> Andrew Dismore's failed Private Members' Bill,<sup>137</sup> that was introduced at the same time as the 2009 Act, applied solely to the British Museum and so was seen as aimed at a single issue of those same Greek sculptures (even though its ambit would have been wider). However, there was no justification for treating the British Museum separately from the other national museums.

Finally, the fact that the focus of the Bill is on engaging the public more fully in the decision-making processes may well prove particularly advantageous with regards to the likelihood of it being enacted. Consultation and transparency of decision-making are highlighted in current government policy in the context of developing policy and legislation.<sup>138</sup> Whilst these would not be directly applicable in the context of decisions made by the designated decision-making bodies set out clause 4 of the CH(PaN)B, the ethos of the government's *Consultation Principles* might arguably contribute to the encouragement of a Bill with such a strong involvement of the public in consultation with the decision-makers.

---

<sup>136</sup> In the sense that museums subject themselves to moral codes of ethics: MACoE (n 60). Morphy suggests that where partnerships develop (rather than handing over control) this corresponds with 'the ideology of the museum' that there are 'multiple audiences and multiple rights holders' and that there is a clear moral obligation to include originators in any decision-making processes: Howard Morphy, 'Scientific Knowledge and Rights in Skeletal Remains' in Paul Turnbull & Michael Pickering (eds), *The Long Way Home: The Meaning and Values of Repatriation* (Museums and Collections, Berghahn Books 2010) 158-159.

<sup>137</sup> British Museum Act 1963 (Amendment) Bill HC Bill (2008-2009).

<sup>138</sup> UK Government Consultation Principles (n 11).

### **5.6.3 Why only a domestic solution to a matter of international concern?**

The proposed scheme is a direct response to the lacunae found in the English system. By putting forward this proposal the author is not dismissing future developments at the international level that might more comprehensively and coherently take into account and apply the cultural heritage principles and norms; international law already provides strong legal norms for states in the field of cultural heritage and the proposed scheme may serve to inform future developments regarding the treatment of the cultural heritage principles and norms in international dispute resolution. However, this would need to be considered carefully in light of risks in unifying legal norms across nations, particularly where objects are of ‘merely modest, local interest’.<sup>139</sup>

This thesis does not express a view on the desirability, or otherwise, of an international dispute resolution mechanism specifically for cultural heritage.<sup>140</sup> Instead, the proposed scheme provides a mechanism by which the cultural heritage principles and norms can be more fully articulated and realised in English law at the practical level of decision-making without waiting for international legal norms to percolate down to the decision-making processes that take place regularly in practice.

## **5.7 Conclusion**

The aim is to provide a legal solution consisting of the removal of the statutory bar on deaccessioning from national museums, together with a short statute placing decision-making bodies under a requirement to consider the intangible dimension of cultural heritage. Thus, a legal framework can exist supported by principles to be applied by

---

<sup>139</sup> Fechner (n 115) 377.

<sup>140</sup> As to which see Alessandro Chechi, ‘Evaluating the establishment of an international cultural heritage court’ (2013) 18 *Art Antiquity and Law* 31.

decision makers which does not unduly interfere with the processes. This provides an opportunity to engage with careful assessments of how best to uphold the cultural heritage principles and give effect to the corresponding norms.

Rather than transforming the *quasi*-legal principles of stewardship and moral title into legal concepts, this proposal seeks to give them legal effect as possible means of resolving disputes within a legal framework; as such they retain their flexibility and provide a means by which to give effect to the cultural heritage principles and norms.

This is a modest proposal to make inroads into ameliorating some of the primary lacunae in the current regime in England dealing with cultural heritage objects. It does not solve all of the problems identified in the preceding chapters, and the full practical impact of the proposals in some areas would need to be addressed further, but it is submitted that the essential element needed to meet the various challenges identified in this thesis is that decisions concerning cultural heritage should be made in a transparent and open manner. It is hoped that this proposal achieves that. Rather than focusing on the object or the person claiming the object, decisions should be made by focusing on cultural heritage in its intangible form so that the cultural heritage principles and norms guide any decisions or dispute-resolution.

# Conclusion

---

Cultural heritage has come to be considered as intangible in nature rather than the physical subject matter itself.<sup>1</sup> By focusing on the intangible dimension of cultural heritage one can fully account for the diverse types of value experienced by those engaging with these objects, places or practices. It is clear that a value-based approach has developed in the field of heritage conservation,<sup>2</sup> specifically in the UK by English Heritage in the context of places.<sup>3</sup> Whilst no single taxonomy of value exists, there is significant overlap between the different types to make it a useful mechanism for decision-making not only in the curation and conservation of cultural heritage but also in dispute resolution. It is clear that even when faced with varied subject matter (places, objects or practices) similar assessments can be carried out which take into account the plural types of value.<sup>4</sup>

The notion of public legacy, as set out in Chapter 2, reflects the strong protective feelings people have towards cultural heritage, shown by the desire to pass on what has gone before to future generations in a form of intergenerational equity. This doctrine acts as a safeguarding mechanism to prevent too much falling within the ambit of cultural heritage. Furthermore, where there is a strong societal impetus to right past wrongs this can be taken into account, but it is argued that this should not be

---

<sup>1</sup> See p 45 above.

<sup>2</sup> At p 70 above.

<sup>3</sup> English Heritage, 'Conservation Principles: Policies and Guidance' (EH 2008) <<http://www.english-heritage.org.uk/content/publications/publicationsNew/guidelines-standards/conservation-principles-sustainable-management-historic-environment/conservationprinciplespoliciesandguidanceapril08web.pdf>> accessed 4 August 2012.

<sup>4</sup> See Chapter 5.



determinative of the treatment of cultural heritage; instead it is another factor when determining the relevant action to take.

These two elements form the principles of cultural heritage and lead to the norms of preservation and access.<sup>5</sup> The approach to preservation adopted in this thesis avoids focusing solely on physical preservation. It also takes account of the cultural use and any practices to which objects or places may have a connection. Preservation, therefore, counter-intuitively may result in the ultimate destruction of a cultural heritage object in order to preserve cultural heritage (in an intangible sense). Treating cultural heritage as an intangible concept surrounding objects, places and practices, means that preservation also relates to the associations with a place or person, the preservation of the context (usually archaeological) and the preservation of the role played by the object or place in a cultural practice.

The norm of access does not mean providing unfettered public access to all cultural heritage; occasionally it is appropriate to control access to the object, place, practice or to the information about the cultural heritage. In this way, certain sacred or ceremonial cultural heritage requiring secrecy may need to be maintained by restricting or preventing access completely.

The analysis undertaken in Chapter 3 revealed that English law recognises the principles and norms in an inconsistent manner. The law fails to value cultural heritage for its own sake and treats it differently depending on who owns objects and in what context it is found. Strong notions of public legacy and the desire to preserve national collections intact were found, yet no corresponding duties were placed on private owners of cultural heritage unless the owners had received a taxation advantage or the

---

<sup>5</sup> At pp 100-104 above.

object was a fixture in a listed building. Only if a non-national museum was established as a charity were duties placed on its governing body and only because of the public interest in the charity's purpose, rather than because of its cultural heritage value. Where museums were not established as such, nothing in law prevented them from dispersing their collections.

English legal recognition of the norm of preservation tends to be in the context of the physical preservation of objects or the preservation of context and association. Whilst the latter two suggest an appreciation of cultural heritage's intangible nature and focus on preserving it, there is no recognition of the preservation of the role an object has within a cultural practice or its general importance to a cultural group; therefore claims for the return of objects from national museum collections go unanswered except for limited statutory exceptions which are more concerned with redressing past wrongs than upholding the cultural heritage principles.

The ethical system found in the museum context, together with the development of *quasi-legal* principles more effectively upholds the cultural heritage principles and norms. Rather than being preoccupied with nationalist concerns or redressing past wrongs, the codes of ethics provide a system whereby the cultural heritage value and the public legacy can be assessed, balanced and acted upon through the norms of preservation and access. These norms were recognised in their entirety, rather than perpetuating traditional notions of physical preservation and public access. However, these efforts are stymied by legislative barriers and these codes are limited to their members and certainly do not extend to other *quasi-legal* decision-making bodies such as the Export Reviewing Committee.

In the final chapter it was argued that the key means of upholding the cultural heritage principles and norms is to treat cultural heritage as an intangible legal concept when making decisions about the fate of its subject matter (i.e. the objects, places or practices). By providing a system by which decision-makers engage with this intangible dimension, the principles and norms can be more effectively upheld, thereby giving effect to the near universal desire to care for heritage. Whilst museum codes of ethics provide ethical precepts for those who work in and govern museums, other decision-making bodies mandated by law do not engage with the valuing of cultural heritage in any consistent way. By requiring the consideration of the intangible dimension of cultural heritage by these decision-makers, greater effect can be given to the principles and norms. The proposed changes in the law do not require physical preservation or public access regardless of how culturally important an object is. Instead, if the consideration of the principles and norms is undertaken in a nuanced way, appropriate decisions can be made about the treatment of cultural heritage and how best to resolve disputes.

The proposed legal system requires all those decision-makers who engage with important questions about cultural heritage to consider the plural and dynamic nature of cultural heritage value, the public legacy and how best to effect the norms of preservation and access. This puts all cultural heritage on an equal footing in the sense that when decisions are made all elements of the cultural heritage value, the strength of the link of the cultural heritage across the generations (the public legacy) and the desire to preserve and provide access would be taken into consideration. In sum, this provides the most effective means by which to uphold the cultural heritage principles and norms, enabling us to pass on cultural heritage to future generations, yet respectfully treat the cultural heritage of the present generations.

# Appendix 1

---

## **Cultural Heritage (Principles and Norms) Bill**

*An Act to provide for designated decision-makers to take account of the cultural heritage principles and norms.*

### **1 Consideration of cultural heritage principles and norms**

- (1) When a designated decision-making body determines any question or exercises any powers relating to the acquisition, continued retention or transfer of cultural heritage, that body shall consider (and give effect to, so far as possible) the cultural heritage principles and norms as part of the decision-making process or in the exercise of those powers.
- (2) When making assessments about the cultural heritage principles and norms a designated decision-making body shall, so far as practicable and appropriate in the circumstances, consult with relevant stakeholders. In the case of courts and tribunals this requirement shall not apply.
- (3) When making assessments about the cultural heritage principles and norms a designated decision-making body shall observe the codes of practice issued by the Secretary of State or follow any other codes prescribed under section 6(2).
- (4) The duty under subsection (1) above shall be interpreted to include the following:
  - a) where a designated decision-making body responds to claims by any person or body listed in Schedule 1; and
  - b) Where a designated decision-making body makes a decision relating to major conservation work which is likely to affect the cultural heritage.

## **2 Cultural heritage principles and norms**

- (1) For the purposes of this Act ‘cultural heritage’ means the intangible facet of objects, places or practices which are of significance or value to particular individuals, a particular community, a nation or to mankind to such a degree that its loss or destruction would be a misfortune to the culture, identity, heritage or religious practices of those people. This definition does not prejudice any other designations referring to the same material in other legal instruments.
- (2) The term ‘subject matter of cultural heritage’ shall mean the objects, places or practices that are the tangible or intangible manifestations of cultural heritage as defined in section 2(1).
- (3) ‘Cultural heritage principles’ means the different types of value and the public legacy as prescribed in codes of practice made by the Secretary of State under section 6.
- (4) ‘Public legacy’ means the relationship between peoples and cultural heritage, especially the strength of that relationship. Guidance on assessing public legacy shall be prescribed in codes of practice made by the Secretary of State under Section 6.
- (5) ‘Cultural heritage norms’ means the norms of preservation and access as prescribed in codes of practice made by the Secretary of State under section 6.

## **3 Giving effect to the cultural heritage principles and norms**

- (1) To give effect to the cultural heritage principles or norms, a designated decision-making body may, in addition to its existing powers,

- a) adjourn or stay proceedings or make any other order in a court or in any other action;
- b) transfer cultural heritage to a third party (this power does not affect any condition or trust subject to which any object is held);<sup>1</sup>
- c) give a right of use or access to a third party;
- d) display an account of the history of the cultural heritage object next to it whenever it (or an image of it) is publicly displayed, communicated to the public through digital or other media and/or reproduced commercially;
- e) request the Government to make an *ex gratia* payment to a third party;
- f) enter into an agreement by way of loan or other arrangement;
- g) in the case of any of the bodies referred to in section 4(1)(g), the power to transfer any object from the collection if it appears to them to be appropriate to do so for any reason, whether or not relating to their own functions.<sup>2</sup> This power does not affect any condition or trust subject to which any object is held.<sup>3</sup>

#### **4 Designated decision-making bodies**

(1) For the purpose of this Act each of the following shall be considered a ‘designated decision-making body’:

- a) a court or tribunal in England;
- b) the Export Reviewing Committee;
- c) the Acceptance in Lieu Panel;
- d) the Spoliation Advisory Panel;

---

<sup>1</sup> The wording of this provision adopts part of the wording of Holocaust (Return of Cultural Objects) Act 2009, s 2(6).

<sup>2</sup> The wording of this provision adopts part of the wording of HTA, s 47(2)

<sup>3</sup> The wording of this provision adopts part of the wording of H(RCO)A, s 2(6).

- e) English Heritage;
- f) the National Trust
- g) the governing bodies of the museums under the Museums and Galleries Act 1992 (except for the trustees of the Wallace Collections), National Heritage Act 1983, British Library Act 1972, British Museum Act 1963 and Imperial War Museum Act 1920;
- h) any body corporate established as, or carrying on the activities of, a museum;
- i) local authorities (within the meaning of section 1 of the Local Government Act 2000, as amended by section 77 of the Local Government and Public Involvement in Health Act 2007);
- j) universities;
- k) charities established for ‘the advancement of the arts, culture, heritage or science’ under section 3(1)f) of the Charities Act 2011;
- l) other research institutes; and
- m) the Secretary of State. It shall be sufficient for the Secretary of State to demonstrate that the decision-making body providing advice to him on the exercise of any of his powers shall have considered the cultural heritage principles and norms.

## **5 Stakeholders**

(1) Where a designated decision-making body undertakes one of the acts mentioned in section 1 and fails to take into account the cultural heritage principles or norms, or observe the codes of practice, stakeholders may seek permission for judicial review of that decision or exercise of power.

(2) For the purposes of this Act ‘stakeholders’ mean those persons set out in Schedule 1.

(3) The Secretary of State may by order, for the purposes of section 4(2), designate any class of person as being a stakeholder.

## **6 Codes of Practice**

(1) The Secretary of State may prepare and issue codes of practice for the purpose of -

- a) giving practical guidance to designated decision-making bodies;
- b) laying down standards expected of designated decision-making bodies;
- c) advising stakeholders.

(2) The Secretary of State may designate as a code of practice for the purposes of this Act any code of ethics, code of practice, guidance or other guidelines published by-

- (a) any professional body;
- (b) any government department;
- (c) any international organisation.

## **7 Interpretation**

(1) In this Act -

“transfer” shall mean transfer of the legal or equitable title by way of gift, loan, sale or other disposition.

“acquisition” shall mean acquisition by way of gift, bequest, loan, purchase or other means of acquisition.



**8. Extent**

This Act extends to England only.

**SCHEDULE 1**

**STAKEHOLDERS**

1. Any cultural community from whom the cultural heritage originated.
2. Any other individual, body corporate or state having a prior claim to the cultural heritage.
3. Researchers.
4. The visiting public to a museum.
5. The Commission for Looted Art in Europe.
6. The National Council for Metal Detecting.
7. The Museums Association.
8. The Arts Council.
9. English Heritage.
10. National Trust.

# Appendix 2

---

## Code of practice

### BACKGROUND

1. This code of practice is prescribed by clause 6 of the Cultural Heritage (Principles and Norms) Bill.
2. This code gives practical guidance to designated decision-making bodies and lays down the standards expected of designated decision-making bodies.

### INTERPRETATION

3. For the purposes of this Code of Practice the following terms shall have the following meanings:
  - (a) *The Bill* - shall mean the Cultural Heritage (Principles and Norms) Bill.
  - (b) *Decision-maker* - shall mean any of the designated decision-making bodies under clause 4(1) of the Bill.
  - (c) *A decision* - shall mean any decision to undertake an act which is subject to clause 1 of the Bill.
  - (d) *Stakeholder claimants* - shall mean those stakeholders under paragraphs 1 or 2 of the Schedule to the Bill who make any claim regarding cultural heritage (whether or not for the transfer of the cultural heritage in question).
  - (e) *Community* - shall not be restricted to lineal descendants but shall be interpreted widely to mean any community who is connected with the cultural heritage.

### OTHER DOCUMENTS TO BE READ IN CONJUNCTION WITH THIS CODE OF PRACTICE

4. The Code of Ethics published by the Museums Association shall be treated as a code of practice for the purposes of clause 6(2) of the Act for any decision-maker listed in clause 4(1)(f)-(k) and should be read in conjunction with the overriding principles and provisions relating to the assessment of the cultural heritage principles and norms set out below.
5. The Constitution and Terms of Reference of the Spoliation Advisory Panel shall apply to the Spoliation Advisory Panel together with this code.
6. The Waverley Criteria applicable to the Export Reviewing Committee shall be interpreted in the light of this code.
7. The Acceptance in Lieu Guidelines applicable to the Acceptance in Lieu Panel shall be interpreted in the light of this code.

## **BASIC PRINCIPLES – OVERRIDING INTEREST**

8. When making any decision to which clause 1(1) of the Bill applies a decision-maker shall act in a proportionate,<sup>1</sup> equitable and fair manner. In achieving this a decision-maker shall be guided by the following ethical principles:
  - (a) Non-maleficence<sup>2</sup>
  - (b) Respect for diversity of belief<sup>3</sup>
  - (c) Respect for the cultural heritage value of cultural heritage
  - (d) Respect for the public legacy (including solidarity by furthering humanity through cooperation and consensus<sup>4</sup>)
  - (e) Beneficence – doing good, providing benefits to individuals, communities or the public in general<sup>5</sup>
9. Any resultant decision which affects the rights or interests of stakeholders shall be a fair and just one.<sup>6</sup>
10. Decisions are made in the context English principles and procedure.<sup>7</sup>

## **STAKEHOLDER CLAIMANTS**

11. Where a decision is being made in the context of a claim by any cultural community from whom the cultural heritage originated or by any other individual, body corporate or state having a prior claim to the cultural heritage the following provisions apply:
  - (a) Evidence concerning the identity of the claimant and the cultural link between the claimant and the cultural heritage shall be considered. A decision-maker may request that stakeholder-claimants provide this evidence to the decision-maker.

## **CONSULTATION**

12. When advertising consultations, the decision-maker shall provide a proportionate timeframe<sup>8</sup> within which to receive responses.

---

<sup>1</sup> See Johanna Gibson, *Community Resources: Intellectual Property, International Trade and Protection of Traditional Knowledge* (Globalization and Law, Ashgate 2005) 287.

<sup>2</sup> This originates from the ethical principles in the DCMS *Guidance for the Care of Human Remains in Museums* PP 847 (DCMS 2005) 15

<sup>3</sup> *ibid*

<sup>4</sup> *ibid*

<sup>5</sup> *ibid*

<sup>6</sup> This notion originates from the Washington Conference Principles but, unlike the Spoliation Advisory Panel's Terms of Reference, is not limited to a just and fair solution as between the parties: DCMS, 'Spoliation Advisory Panel Terms of Reference'. <<http://webarchive.nationalarchives.gov.uk/20121204113822/http://www.culture.gov.uk/images/publications/SAPConstitutionandTOR11.pdf>> accessed 23 December 2013.

<sup>7</sup> This statement is particularly relevant in the context of decision-making bodies such as the Spoliation Advisory Panel: see Charlotte Woodhead, 'Nazi Era spoliation: establishing procedural and substantive principles' (2013) 18 *Art Antiquity and Law* 167

<sup>8</sup> This accords with the UK Government, *Consultation Principles* <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/255180/Consultation-Principles-Oct-2013.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/255180/Consultation-Principles-Oct-2013.pdf)> accessed 31 December 2013, 2.

13. Consultations shall be undertaken in conformance with the latest version of the UK Government's *Consultation Principles*.

## **REPORTING THE DECISION**

14. The decision-maker shall publish within a reasonable period of time the results of the consultation undertaken pursuant to clause 1(2) of the Bill.

## **Relevant criteria to take into account to give effect to the cultural heritage principles and norms**

## **ESTABLISHING THE CULTURAL HERITAGE VALUE**

15. No single type of value shall have automatic priority over any other. The relative importance of the different cultural heritage principles shall vary on a case-by-case basis.<sup>9</sup>
16. The following elements comprise the cultural heritage value and a decision-maker shall consider all of the following types of value that are relevant to the cultural heritage under consideration:
- (a) the cultural value – an assessment of the contribution that the cultural heritage makes to the cultural practices of any relevant stakeholders and the possessor institution.
  - (b) the religious or sacred value – an assessment of the contribution that the cultural heritage makes to the religious or sacred practices of current generations.
  - (c) the symbolic value – an assessment of whether the cultural heritage plays a symbolic role in memorialising an event, person, place or practice.
  - (d) the aesthetic value – an assessment of the way in which people draw sensory and intellectual stimulation from the cultural heritage.<sup>10</sup> This includes the contribution that the cultural heritage makes to the study of some particular branch of art.<sup>11</sup>
  - (e) the historical value – an assessment of the connection between the cultural heritage and a historic event, person, practice or place. This may be a connection with history or pre-history. This value may be closely linked to the evidential value.

---

<sup>9</sup> This express provision for not giving precedence to any one criterion was set out in the Aberdeen Procedure: Aberdeen University Museums, *Repatriation Procedure* <[http://www.abdn.ac.uk/museums/documents/Museums\\_Repatriation\\_Procedure.pdf](http://www.abdn.ac.uk/museums/documents/Museums_Repatriation_Procedure.pdf)> accessed 10 April 2013

<sup>10</sup> This phrasing draws from the English Heritage Principles English Heritage, 'Conservation Principles: Policies and Guidance' (EH 2008) <<http://www.english-heritage.org.uk/content/publicationsNew/guidelines-standards/conservation-principles-sustainable-management-historic-environment/conservationprinciplespoliciesandguidanceapril08web.pdf>> accessed 4 August 2012: [46] 'Aesthetic value derives from the ways in which people draw sensory and intellectual stimulation from a place.'

<sup>11</sup> This phrasing draws from the third Waverley criterion.

- (f) the communal value – an assessment of the meanings of the cultural heritage for the people who are connected with it, or for whom it figures in their collective experience or memory.<sup>12</sup> This type of value is closely connected to the historical value (particularly associative) and aesthetic value.
- (g) the evidential value – an assessment of the potential of the cultural heritage to yield evidence about past human activity.<sup>13</sup> This includes consideration of the archaeological value of the cultural heritage as well as the value of the heritage for the study of some particular branch of history or learning.<sup>14</sup>

**In the case of a decision involving stakeholder claimants the following provisions apply**

Value to claimant

- 17. In the case of stakeholder claimant decisions, the decision-maker shall consider whether there is a clear link between the originating community or individual and a modern-day community or individual as well as the strength of that link.
- 18. Where a link is established, the decision-maker shall consider whether the modern-day community or individual continues to have a link with the cultural heritage under consideration.
- 19. Where a link remains between the modern-day community or individual and the cultural heritage under consideration a decision-maker shall consider the nature of the link between the subject matter of cultural heritage and the modern-day community or individual. Where there is a strong current religious, sacred, symbolic or cultural value or where the cultural heritage is directly connected to the identity of the community or individual a presumption is raised that the decision-maker should give effect to the cultural heritage norms by means of clause 3 of the Bill. This presumption can be rebutted if there is a stronger cultural heritage value to the possessor institution or to another stakeholder or if there are public legacy considerations to the contrary.
- 20. In the case of stakeholder claimants where a right to cultural heritage exists under the customary law of the modern-day community a presumption is raised that the decision-maker should give effect to the cultural heritage norms by means of clause 3 of the Bill. This presumption can be rebutted if there is a stronger cultural heritage value to the

---

<sup>12</sup> This phrasing reflects the English Heritage Principles (n 10): [54] ‘Communal value derives from the meanings of a place for the people who relate to it, or for whom it figures in their collective experience or memory... Communal values are closely bound up with historical (particularly associative) and aesthetic values.’

<sup>13</sup> This phrasing draws from the English Heritage Principles (n 10): [35] ‘Evidential value derives from the potential of a place to yield evidence about past human activity.’

<sup>14</sup> This phrasing draws from the third Waverley criteria.

possessor institution or to another group or if there are public legacy considerations to the contrary.

#### Value to other stakeholders

21. The decision-maker shall take into account the cultural heritage value to the institution currently in possession of the cultural heritage and consider the strength of this value. When considering this value the decision-maker may take into account the status of the possessor-institution including:
  - (a) (where applicable) its status as a museum;
  - (b) any duties its owes to the public; and
  - (c) the legal duties of its governing body.
22. The decision-maker shall take account of the specific cultural heritage value to researchers. This may also include the scientific and archaeological value of the cultural heritage and any future potential (but not yet scientifically proven) research that may be possible.<sup>15</sup>
23. The decision-maker shall also consider whether the research value of the cultural heritage can be realised if the cultural heritage is transferred from the possessor-institution.
24. The decision-maker shall also consider the value to the local community of the possessor-institution. When considering this value the decision-maker may also be taken into account the instrumental value of the cultural heritage, including the value for education purposes.
25. The decision-maker shall also consider the cultural heritage value to the general public and any other stakeholders.
26. The decision-maker shall balance all of these different types of value to reach a decision that is in accordance with the overriding principles set out above.

---

<sup>15</sup> This therefore takes into account the precautionary principles, as discussed above in Chapter 2.

### Competing types of value

27. Where there are equally strong types of cultural heritage value enjoyed by different stakeholders it shall be for the decision-maker to balance these, taking account of the public legacy, to determine how best to give effect to the cultural heritage principles.

### **PUBLIC LEGACY**

28. A decision-maker shall take into account the public legacy. This aims to uphold the public's trust in the decision-maker as an institution.
29. Provided that the instrumental value of the decision does not conflict with the overall cultural heritage value a decision-maker may take into account any of the following when reaching a decision about the instrumental value of the cultural heritage and specifically the likely impact of the decision on any of the following:
  - (a) regeneration of communities,
  - (b) the identity of a group
  - (c) community cohesion

### Provenance of the cultural heritage

30. The decision-maker shall assess the circumstances of the dispossession and consider whether the original dispossession was
  - (a) directly compelled by direct force or the force of circumstances (including persecution or times of inequality of power relations such as colonial times),
  - (b) misleading (including, but not limited to, taking advantage of an inequality of power relationship),
  - (c) a sale at a significant under value
  - (d) voluntary
31. The public legacy considerations in favour of return may be stronger for (a)-(c) above than for (d).
32. As part of the decision-making process the decision-maker shall take into account the circumstances in which the object was acquired to determine whether the possessor-institution has valid title.
33. The decision-maker shall assess the circumstances in which the possessor institution acquired the cultural heritage. Where the possessor acquired the cultural heritage in circumstances in which he was aware, or ought to have been aware of the circumstances of dispossession there is a strong public legacy argument for the return of the object.

34. When assessing whether the possessor-institution undertook appropriate levels of provenance research the decision-maker shall measure the actions of the institution according to the standards of provenance research in place at the time of acquisition.<sup>16</sup>

## **Preservation**

### Present and future use of the cultural heritage

35. The decision-maker shall take into consideration the traditional role of the cultural heritage within an originator or connected community and any future continued use should it be returned.
36. The decision-maker shall take into consideration whether the cultural heritage will be passed on to future generations if it were to be returned to a stakeholder claimant or if it were to remain in its current location.
37. In a situation where there is the potential for the physical integrity of the cultural heritage to be diminished through use in a cultural practice, this shall be balanced against the other types of value that may be at risk in the event of the destruction or deterioration of the physical manifestation of the cultural heritage.

## **Access**

38. The norm of access shall mean not only to physical access or digital access but also the restriction of access. In this way, stakeholders may request that the decision-maker prevent access to cultural heritage in appropriate circumstances.
39. A decision-maker shall assess whether suitable access can be provided through digital media and duplicates of the cultural heritage, provided that such duplicates do not conflict with any sacred or religious value of the cultural heritage to other stakeholders.
40. When assessing the norm of access the decision-maker shall take into account any risk to the preservation of the cultural heritage value.

## **GIVING EFFECT TO THE CULTURAL HERITAGE PRINCIPLES AND NORMS: REMEDIES**

### **Returning cultural heritage subject to conditions**

41. Where a decision-maker decides to make a transfer of cultural heritage under clause 3(1)(g) it shall not make the transfer subject to conditions.
42. In circumstances where the decision-maker wishes to make a transfer subject to conditions then this should be informed by direct consultation with the proposed transferee and be as a result of compromise.

---

<sup>16</sup> This accords with the approach taken by the Spoliation Advisory Panel (n 6).



## **MISCELLANEOUS PROVISIONS**

### **The Waverley Criteria and pre-eminent objects for the purposes of the Acceptance in Lieu Panel**

43. Where a decision is made by the Acceptance in Lieu Panel or the Export Reviewing Committee the considerations made by the decision-maker shall not be restricted to considering the national viewpoint.

# Table of cases

---

---

## ENGLAND AND WALES

---

- Attorney-General v The Trustees of the British Museum* [2005] Ch 397 (Ch)
- Attorney-General v Antrobus* [1905] 2 Ch 188 (Ch)
- Co-Operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1
- De Préval v Adrian Alan* (unreported 6 February 1997, Arden J)
- Duke of Somerset v Cookson* (1735) 3 Peere Williams 390 (Ch)
- Elitestone v Morris* [1997] 1 WLR 687 (HL)
- ex parte Greenhouse* (1815) 56 ER 36 (Ch)
- Falcke v Gray* (1859) 62 ER 250 (Ch)
- Garcia v De Aldama* [2002] EWHC 2087 (Ch)
- Government of the Islamic Republic of Iran v The Barakat Galleries Ltd* [2009] QB 22 (CA)
- Hill v Tupper* (1863) 159 ER 51
- Holland v Hodgson* (1872) LR 7 CP 328 (Exch)
- Kingdom of Spain v Christie, Manson & Woods Ltd* [1986] 1 WLR 1120 (Ch)
- Kurtha v Marks* [2008] EWHC 336 (QB)
- Parker v British Airways Board* [1982] QB 1004 (CA)
- Pusey v Pusey* (1684) 1 Vern 273 (Ch)
- R (the Lord Chancellor) v Chief Land Registrar* [2005] EWHC 176 (Admin)
- R v Ghosh* [1982] QB 1053 (CA)
- R v Farhad Hakimzadeh* [2010] 1 Cr App R (S) 10 (CA)
- R v William Simon Jacques* [2011] 2 Cr App R (S) 39 (CA)
- Ruxley Electronics & Construction Ltd v Forsyth* [1996] 1 AC 344 (HL)
- Street v Mountford* [1985] AC 809
-

---

*Re Ellenborough Park* [1956] Ch 131

*Re Mariette* [1915] 2 Ch 284

*Re Pinion* [1965] 1 Ch 85

*Re Wedgwood Trust Ltd (In Administration)* [2012] Pens LR 175 (Ch)

*Saunders v Vautier* (1841) Cr & Ph 240 (Ch)

*Tulk v Moxkay* (1845) 47 ER 1345

*Waverley Borough Council v Fletcher* [1996] QB 334 (CA)

*Wednesbury Corp v Ministry of Housing and Local Government (No 2)* [1966] 2 QB 275 (CA)

---

#### **AUSTRALIA**

*Mabo v Queensland* (1992) 175 CLR 1

#### **EUROPEAN COURT OF HUMAN RIGHTS**

*Albert Fürst von Thurn und Taxis v Germany* (Application No 26367/10)

*Beyeler v Italy* (2001) 33 EHRR 52

*Kozacioğlu v Turkey* 2334/03 19 February 2009 (Grand Chamber)

# Legislation

---

## UNITED KINGDOM STATUTES

Ancient Monuments and Archaeological Areas Act 1979

British Museum Act 1963

Charities Act 2011

Copyright Designs and Patents Act 1988

Dealing in Cultural Objects (Offences) Act 2003

Export Control Act 2002

Financial Services and Markets Act 2000

Holocaust (Return of Cultural Objects) Act 2009

Human Tissue Act 2004

Imperial War Museum Act 1920

Inheritance Act 1984

Law of Property Act 1925

Limitation Act 1980

Local Government Act 2000

Local Government and Public Involvement in Health Act 2007

Museums and Galleries Act 1992

National Heritage Act 1983

Planning (Listed Buildings and Conservation Areas) Act 1990

Public Libraries and Museums Act 1964

Sale of Goods Act 1979

Theft Act 1968

Torts (Interference with Goods) Act 1977

Treasure Act 1996

Trusts of Land and Appointment of Trustees Act 1996

#### **UNITED KINGDOM SECONDARY LEGISLATION**

Iraq (United Nations Sanctions) Order 2003, SI 2003/1519

Public Path Orders Regulations 1993, SI 1993/11

The Export of Objects of Cultural Objects (Control) Order 2003, SI 2003/2759

The Return of Cultural Objects Regulations 1994, SI 1994/501

Treasure (Designation) Order 2002, SI 2002/2666

#### **UNITED KINGDOM BILLS**

British Museum Act 1963 (Amendment) Bill HC Bill (2008-2009)

British Museum Act 1963 (Amendment) Bill HL Bill (1983-1984)

#### **EUROPEAN UNION LEGISLATION**

##### **Directives**

Council Directive (EC) 7/93 of 15 March 1993 on the Return of cultural objects unlawfully removed from the territory of a Member State [1993] OJ L074

##### **Regulations**

Council Regulation (EC) 2009/116 of 18 December 2008 on the export of cultural goods [2009] OJ L 039

##### **Treaties**

Consolidated Version of the Treaty on the Functioning of the European Union [2010] OJ C83/61

## **UNITED STATES LEGISLATION**

Native American Graves Protection and Repatriation Act 1990

## **INTERNATIONAL LEGISLATION**

### **United Nations Economic, Social and Cultural Organization**

Convention concerning the protection of the World Cultural and Natural Heritage UNESCO, Paris (adopted 16 November 1972, entered into force 17 December 1975) 1037, UNTS 151

Convention for the Protection of Cultural Property in the Event of Armed Conflict UNESCO, The Hague (adopted 14 May 1954, entered into force 7 August 1956) 249 UNTS 240

Convention for the Safeguarding of the Intangible Cultural Heritage UNESCO, Paris (adopted 17 October 2003, entered into force 20 April 2006) 2368, UNTS 3

Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property UNESCO, Paris (adopted 14 November 1970, entered into force 24 April 1972) 823, UNTS 231

Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property UNESCO, Paris (adopted, 14 November 1970, entered into force 24 April 1972 823) UNTS 231

Convention on the Protection of the Underwater Cultural Heritage UNESCO, Paris (adopted 2 November 2001, entered into force 2 January 2009) 41 ILM 40

### **Council of Europe**

Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe, Rome (as amended) (adopted 4 November 1950, entered into force 3 September 1953) ETS 177

Council of Europe Framework Convention on the Value of Cultural Heritage for Society (adopted 27 October 2005, entered into 1 June 2011) CETS 199

European Convention on the Protection of the Archaeological Heritage (Revised) Council of Europe, Valetta (adopted 16 January 1992, entered into force 25 May 1995) 1992 ETS 14

European Cultural Convention, Council of Europe, Paris (adopted 19 December 1954, entered into force 5 May 1955) CETS 018

#### **United Nations**

United Nations Vienna Convention on the Law of Treaties 1969

#### **International Institute for the Unification of Private Law (Unidroit)**

Convention on Stolen or Illegally Exported Cultural Objects, UNIDROIT (adopted 24 June 1995, entered into force 1 July 1998), 34 ILM 1322

#### **OTHER INTERNATIONAL INSTRUMENTS**

#### **United Nations Economic, Social and Cultural Organization**

Declaration concerning the Intentional Destruction of Cultural Heritage, UNESCO (adopted 17 October 2003)

Universal Declaration on Cultural Diversity, UNESCO (adopted 2 November 2001)

Declaration on the Responsibility of the Present Generations Towards Future Generations, UNESCO (adopted 12 November 1997)

Constitution of the United Nations Education, Scientific and Cultural Organization (adopted 16 November 1945, entered into force 4 November 1946)

Agenda for UNESCO, 25<sup>th</sup> Session of the World Heritage Committee, Helsinki, December 2001, WHC-01/CONF 208/23, 22 November 2001

UNESCO, 27<sup>th</sup> Session of the World Heritage Committee, Paris 10 December 2003,

UNESCO, 29<sup>th</sup> Session of the World Heritage Committee, Paris 9 September 2005, WHC-05/29/COM/22

#### **World Intellectual Property Organization**

*Elements of a Sui Generis System for the Protection of Traditional Knowledge* WIPO/GRTKP/IC/4/8 (30 September 2002)

*Traditional Knowledge – Operational Terms and Definition* WIPO/GRTKF/IC/3/9 (20 May 2002)

*The Protection of Traditional Cultural Expressions/Expressions of Folklore - Factual Extraction* WIPO/GRTKF/IC/12/4(b) (31 January 2008)

*The Protection of Traditional Cultural Expressions: Draft Articles*

WIPO/GRTKF/IC/25/4 (4 April 2013).

*The Protection of Traditional Knowledge: Draft Articles* WIPO/GRTKF/IC/25/6 (30 May 2013).

*Consolidated Document relating to Intellectual Property and Genetic Resources* WIPOGRTKF/IC/25/5(30 May 2013) .

25<sup>th</sup> Session of the IGC *The Protection of Traditional Knowledge*  
WIPO/GRTKF/IC/25/6 (30 May 2013)

### **World Trade Organization**

General Agreement on Tariffs and Trade (WTO 1947)

### **United Nations**

International Covenant on Economic, Social and Cultural Rights, OHCHR General Assembly Resolution 2200A (XXI) 1966 (adopted 16 December 1966, entered into force 3 January 1976)

United Nations Declaration on the Rights of Indigenous Peoples (adopted 13 September 2007) ) 61/295 2008

Universal Declaration of Human Rights, General Assembly Resolution 217 A (III) 1948 (adopted 10 December 1948)



# Official Documents

---

## **Hansard**

Alan Howarth MP HC Deb 17 February 2000, vol 344, cols 626-629W

Andrew Dismore MP, Public Bill Committee, 'Holocaust (Stolen Art) Restitution Bill' HC (2008-09) col 4

Andrew Dismore MP HC Deb HC 15 May 2009, vol 492, col 1166

Barbara Follett MP HC Deb Public Bill Committee 10 June 2009, vol 493, col 6

Baroness Buscombe HL Deb 12 September 2003, vol 652, col 555

Baroness Deech, HL Deb 10 July 2009 vol 712 cols 907-908

David Shaw MP, HC Deb 8 March 1996, vol 273, col 563

Earl Attlee, HL Deb 10 July 2009, vol 712, col 911

Iain Sproat, HC Deb 8 March 1996, vol 273, col 584

Lembit Öpik MP, Public Bill Committee, 'Holocaust (Stolen Art) Restitution Bill' HC (2008-09) col 14.

Lord McIntosh of Haringey, HL Deb 12 September 2003, vol 652, col 557

Lord Renfrew of Kaimsthorn HL Deb 12 September 2003, vol 652, col 552

# Bibliography

---

- Abungu G, 'The Declaration: A Contested Issue' [2004] *ICOM News* 5
- ACCP Editorial Board, 'Conclusion: Museums at the Center of Public Policy' in Fitz Gibbon K (ed), *Who Owns the Past? Cultural Policy, Cultural Property and the Law* (Rutgers University Press 2005)
- Adler A, 'Against Moral Rights' (2009) 79 *California Law Review* 263
- Ahmad Y, 'The Scope and Definitions of Heritage: From Tangible to Intangible' (2006) 12 *International Journal of Heritage Studies* 292
- Aikawa-Faure N, 'From the Proclamation of Masterpieces to the Convention for the Safeguarding of Intangible Cultural Heritage' in Smith L and Akagawa N (eds), *Intangible Cultural Heritage* (Key Issues in Cultural Heritage, Routledge 2009)
- Alberge D, 'Tate makes public appeal in race to raise £6m to save Rubens for the nation' *The Times* (London, 6 June 2008).
- Alberti SJMM, 'Objects and the Museum' (2005) 96 *Isis* 599
- Altschul JH, 'Archaeological Heritage Values in Cross-cultural context' in Smith GS, Mauch Messenger P and Soderland HA (eds), *Heritage Values in Contemporary Society* (Left Coast Press, Inc 2010)
- Kwame Anthony Appiah, *Cosmopolitanism: Ethics in a World of Strangers* (Penguin Books 2006 )
- Audi A, 'A Semiotics of Cultural Property Argument' (2007) 14 *International Journal of Cultural Property* 131
- Avery T, 'Values not Shared: The Street Art of Melbourne's City Laneways' in Gibson L and Pendlebury J (eds), *Valuing Historic Environments* (Ashgate 2009)
- Bailey M, 'Disputed Moore pulled from sale' *The Art Newspaper*, January 2013
- Baird MF, "'The breath of the mountain is my heart": indigenous cultural landscapes and the politics of heritage' (2013) 19 *International Journal of Heritage Studies* 327
- Bator P, *International Trade in Art* (University of Chicago Press, London 1983)
- Beales I, *The Editors' Codebook* (Editors' Code of Practice Committee 2012)
- Besterman T, 'Cultural equity in the sustainable museum' in Marstine J (ed), *The Routledge Companion to Museum Ethics* (Routledge 2011)
- Besterman T, 'Museum Ethics' in Macdonald S (ed), *A Companion to Museum*

*Studies* (Blackwell Publishing 2006)

Bienkowski P, 'Whose Past? Archaeological Knowledge, Community Knowledge, and the Embracing of Conflict' in G Scarre & R Coningham (eds) *Appropriating the Past: Philosophical Perspectives on the Practice of Archaeology* (CUP 2013)

Biondi A, 'The Merchant, the thief and the Citizen: the circulation of works of art within the EU' (1997) 34 CML Rev 1173

Blake J, 'On Defining the Cultural Heritage' (2000) 49 ICLQ 61

Bohe N, 'Politics, Leverage, and Beauty: Why the courtroom is not the best option for cultural property disputes' (2011) 1 Creighton International & Comparative Law Journal 100

Brown MF, 'Can Culture Be Copyrighted?' (1998) 39 *Current Anthropology* 193

\_\_\_\_\_, *Who Owns Native Culture?* (Harvard University Press 2003)

\_\_\_\_\_, 'Heritage as Property' in Verdery K and Humphrey C (eds), *Property in Question: Value Transformation in the Global Economy* (Berg 2004)

\_\_\_\_\_, 'Heritage Trouble: Recent Work on the Protection of the Intangible Cultural Property' (2005) 12 *International Journal of Cultural Property* 40

\_\_\_\_\_, 'Exhibiting Indigenous Heritage in the Age of Cultural Property' in Cuno J(ed), *Whose Culture? The Promise of Museums and the debate of antiquities* (Princeton University Press 2009)

Brummer C, *Soft Law and the Global Financial System: Rule making in the 21<sup>st</sup> Century* (CUP 2012)

Bruning SB, 'Articulating Culture in the Legal Sphere: Heritage Values, Native Americans and the Law' in Smith GS, Mauch Messenger P and Soderland HA (eds), *Heritage Values in Contemporary Society* (Left Coast Press, Inc 2010)

Buck L, 'Holborn Paolozzi fails to sell' *The Art Newspaper* January 2013

Bunker EC, 'The Acquisition and Ownership of Antiquities in Today's Age of Transition' in Fitz Gibbon K (ed), *Who Owns the Past? Culutral Policy, Cultural Property and the Law* (Rutgers University Press 2005)

Bush S, 'The Protection of British Heritage: Woburn Abbey and The Three Graces' (1996) 5 *International Journal of Cultural Property* 269

Cameron C, 'Value and integrity in cultural and natural heritage: from Parks Canada to World Heritage' in Clark K (ed) *Capturing the Public Value of Heritage: The proceedings of the London conference* (English Heritage 2006)

Carman J & Stig Sørensen ML, 'Heritage Studies: An outline' in Stig Sørensen ML

- & Carman J (eds), *Heritage Studies: Methods and Approaches* (Routledge 2009)
- \_\_\_\_\_, *Against Cultural Property* (Duckworth 2005)
- \_\_\_\_\_, *Valuing Ancient Things: Archaeology and Law* (Leicester University Press 1996)
- Carpenter KA, 'A Property Rights Approach to Sacred Sites Cases: Asserting a Place for Indians as Nonowners' (2004) 52 *UCLA Law Review* 1061
- \_\_\_\_\_, 'Real Property and Peoplehood' (2008) 27 *Stanford Environmental Law Journal* 313
- Carpenter K, Katyal S & Riley A, 'In Defense of Property' (2009) 118 *Yale Law Journal* 1022
- Cechi A, 'Evaluating the establishment of an international cultural heritage court' (2013) 18 *Art Antiquity and Law* 31
- Cheng JM, 'The Problem of National Treasure in International Law' (2010) 12 *Oregon Review of International Law* 141
- Clark K, 'From significance to sustainability' in Clark K (ed) *Capturing the Public Value of Heritage: The proceedings of the London conference* (English Heritage 2006)
- \_\_\_\_\_, 'Introduction' in Clark K (ed) *Capturing the Public Value of Heritage: The proceedings of the London conference* (English Heritage 2006)
- \_\_\_\_\_, 'Values in Culture Resource Management' in Smith GS, Mauch Messenger P and Soderland HA (eds), *Heritage Values in Contemporary Society* (Left Coast Press Inc 2010)
- Clavir M, *Preserving What is Valued* (UBC Press 2002)
- Clouse C, 'Narratives of Value and the *Antiques Roadshow*: "A Game of Recognitions"' (2008) 41 *Journal of Popular Culture* 3
- Coombe R, 'Possessing Culture: Political Economies of Community Subjects and their Properties' in Strang V, & Busse M (eds), *Ownership and Appropriation* (ASA Monographs, Berg 2011)
- Coombe RJ & Turcotte JF, 'Indigenous Cultural Heritage in Development and Trade: Perspectives from the Dynamics of Cultural Heritage Law and Policy' in Graber CB, Kuprecht K & Lai JC (eds), *International Trade in Indigenous Cultural Heritage: Legal and Policy Issues* (Edward Elgar 2012)
- Coningham R, Cooper R & Pollard M, 'What value a unicorn's horn? A study of archaeological uniqueness and value' in Scarre C & Scarre G (eds), *The Ethics of Archaeology: Philosophical Perspectives on Archaeological Practice* (CUP 2006)

Cotler I, 'The Holocaust, 'Thefticide' and Restitution: a Legal Perspective' (1998) 20 *Cardozo Law Review* 601

Crewdson R, 'Cultural Property – A fourth estate?' (1984) 18 *LS Gaz* 126

\_\_\_\_\_, 'Waverley Adrift' (1997) 6 *International Journal of Cultural Property* 353

Cuno J, 'Introduction', Cuno J (ed) *Whose Culture? The Promise of Museums and the Debate over Antiquities* (Princeton University Press, 2009)

\_\_\_\_\_, *Museums Matter: In praise of the Encyclopedic Museum* (The University of Chicago Press 2011)

\_\_\_\_\_, *Who Owns Antiquity? Museums and the Battle over our Ancient Heritage* (Princeton University Press Oxford 2008)

Curtis N, 'Repatriation from Scottish Museums: Learning from NAGPRA' (2010) 33 *Museum Anthropology* 234

Darvill T, 'Value Systems in Archaeology' in Cooper MA, Firth A, Carman J & Wheatley D (eds), *Managing Archaeology* (Routledge 1995)

de Montebello P, 'And What Do You Propose Should Be Done With Those Objects?' in Cuno J (ed), *Whose Culture? The Promise of Museums and the debate of antiquities* (Princeton University Press 2009)

Declaration on the Importance and Value of Universal Museums [2004] *ICOM News* 4

Dupuy P-M, 'Soft law and the International Law of the Environment' (1991) 12 *Michigan Journal of International Law* 420

Edson G (ed), *Museum Ethics* (Routledge 1997)

Emmerich A, 'Improving the Odds: Preservation through Distribution' in Fitz Gibbon K (ed), *Who Owns the Past? Culutral Policy, Cultural Property and the Law* (Rutgers University Press 2005)

Fechner FG, 'The Fundamental Aims of Cultural Property Law' (1998) 7 *International Journal of Cultural Property* 376

Feliciano H, 'The Great Cultural Robbery: the Plunder of Jewish-Owned Art' in Beker A (ed), *The Plunder of Jewish Property during the Holocaust* (Palgrave 2001)

Fincham D, 'The Distinctiveness of Property and Heritage' (2011) *Penn State Law Review* 641

Flessas T, 'Cultural Property Defined, and Redefined as Nietzschean aphorism'

(2003) 24 *Cardozo Law Review* 1067

\_\_\_\_\_, 'The Ends of the Museum' LSE Law, Society and Economy Working Papers 14/2013 < [http://www.lse.ac.uk/collections/law/wps/WPS2013-14\\_Flessas.pdf](http://www.lse.ac.uk/collections/law/wps/WPS2013-14_Flessas.pdf)> accessed 24 December 2013

Forrest C, *International Law and the Protection of Cultural Heritage* (Routledge 2010)

Forster MM, 'Quarantine at Grosse Île' (1995) 41 *Canadian Physician* 841

Francioni F & Lenzerini F, 'The Destruction of the Buddhas of Bamiyan and International Law' (2003) 14 *EJIL* 619

Francioni F, 'The Human Dimension of International Cultural Heritage Law: An Introduction' (2011) 22 *EJIL* 9

Frigo M, 'Cultural Property v. Cultural heritage: A "battle of concepts" in international law?' (2004) 86 *IRRC* 367

\_\_\_\_\_, 'Ethical Rules and Codes of Honor Related to Museum Activities: A Complementary Support to the Private International Law Approach Concerning the Circulation of Cultural Property' (2009) 16 *International Journal of Cultural Property* 49

Gammon S, Ramshaw G and Waterton E, 'Examining the Olympics: heritage, identity and performance' (2013) 19 *International Journal of Heritage Studies* 119

Ganz G, *Quasi-Legislation: Recent Developments in Secondary Legislation* (Modern Legal Studies, Sweet & Maxwell 1987)

Garrard D, 'Monuments versus Moveables' in Scarre G & Coningham R (eds) *Appropriating the Past: Philosophical Perspectives on the Practice of Archaeology* (CUP 2013)

Geismar H, 'Cultural Property, Museums, and the Pacific: Reframing Debates' (2008) *International Journal of Cultural Property* 109

Gerstenblith P, 'Identity and Cultural Property: The Protection of Cultural Property in the United States' (1995) 75 *Boston University Law Review* Rev 559

Gibson J, *Community Resources: Intellectual Property, International Trade and Protection of Traditional Knowledge* (Globalization and Law, Ashgate 2005)

Gibson L and Pendlebury J, 'Introduction: Valuing Historic Environments' in Gibson L and Pendlebury J (eds), *Valuing Historic Environments* (Ashgate 2009)

Gibson L, 'Cultural Landscapes and identity' in Gibson and Pendlebury in Gibson L and Pendlebury J (eds), *Valuing Historic Environments* (Ashgate 2009)

- Gillman D, *The Idea of Cultural Heritage* (Revised edition, CUP 2010)
- Gray K, 'Property in Thin Air' (1991) 50 CLJ 252
- Griffiths A, 'Codes of Conduct' (1997) 2 *Art Antiquity and Law* 173
- Hamilakis Y, 'Responses' to Alan Audi, 'A Semiotics of Cultural Property Argument' (2007) 14 *International Journal of Cultural Property* 131
- Harding S, 'Value, Obligation and Cultural Heritage' (1999) 31 *Arizona State Law Journal* 292
- \_\_\_\_\_, 'Defining Traditional Knowledge – Lessons from Cultural Property' (2003) 11 *Cardozo Journal of International and Comparative Law* 511
- Harrison R, *Heritage: Critical Approaches* (Routledge 2013)
- Harvey DC, 'Heritage Pasts and Heritage Presents: temporality, meaning and the scope of heritage studies' (2001) *International Journal of Heritage Studies* 319
- Heal S, 'MA takes first steps to discipline Bury council' (2006) 106(11) *Museums Journal* 8
- Heal S, 'The great giveaway' (2006) 106 *Museums Journal* 32
- Hewison R and Holden J, 'Public value as a framework for analysing the value of heritage: the ideas' in Clark K (ed) *Capturing the Public Value of Heritage: The proceedings of the London conference* (English Heritage 2006)
- Holden J, *Cultural Value and the Crisis of Legitimacy: Why culture needs a democratic mandate* (DEMOS 2006)
- Holtorf C, 'Heritage Values in Contemporary Popular Culture' in Smith GS, Mauch Messenger P and Soderland HA (eds), *Heritage Values in Contemporary Society* (Left Coast Press, Inc 2010)
- \_\_\_\_\_, 'The Past People Want: Heritage for the Majority?' in G Scarre & R Coningham (eds) *Appropriating the Past: Philosophical Perspectives on the Practice of Archaeology* (CUP 2013)
- Hutchinson J, 'Re-interpreting cultural nationalism' (1999) 45(3) *Australian Journal of Politics and history* 392
- Impey E, 'Why do places matter? The new English Heritage *Conservation Principles*' in Clark K (ed) *Capturing the Public Value of Heritage: The proceedings of the London conference* (English Heritage 2006)
- Jenkins T, 'The censoring of our museums' *New Statesman* 11 July 2005
- Jensen UJ, 'Cultural Heritage, Liberal Education, and Human Flourishing' in Avrami

- E, Mason R & de la Torre M (eds), *Values and Heritage Conservation: Research Report* (The Getty Conservation Institute 2000)
- Jokilehto J, 'Human rights and cultural heritage. Observations on the recognition of human rights in the international doctrine' (2012) 18 *International Journal of Heritage Studies* 226
- Jones JD, 'Property and Personhood Revisited' (2011) 1 *Wake Forest Journal of Law & Policy* 93
- Joyner C, 'Legal Implications of the Concept of the Common Heritage of Mankind' (1986) 35 *ICLQ* 190
- Kelsen H, 'What is the Pure Theory of Law?' (1959) 34 *Tulane Law Review* 269
- Kirsch S, 'Science, Property, and Kinship in Repatriation Debates' (2011) 34 *Museum Anthropology* 91
- Last K, 'The Resolution of Cultural Property Disputes: Some Issues of Definition' in The International Bureau of the Permanent Court of Arbitration, *The Resolution of Cultural Property Disputes: Papers Emanating from the Seventh PCA International Law Seminar*, 23 May 2003 (Kluwer 2004)
- Lawson FH and Rudden B, *The Law of Property* (2<sup>nd</sup> edn, OUP 1982)
- \_\_\_\_\_, *The Law of Property* (3<sup>rd</sup> rev edn, OUP 2002)
- Leach J, 'Owning Creativity: Cultural Property and the Efficacy of Custom on the Rai Coast of Papua New Guinea' (2003) 8 *Journal of Material Culture* 123
- Leach J, 'Creativity, Subjectivity and the Dynamic of Possessive Individualism' in Ingold T & Hallam E (eds), *Creativity and Cultural Improvisation* (ASA Monographs, Berg 2007)
- Leadbeater C, 'Dresden: Past glory is revived in this rebuilt wonder' *The Independent* Sunday 10 February 2013.
- Lie J, *Modern Peoplehood* (Harvard University Press 2004)
- Locke J, *Second Treatise of Government* (1690) (Public Domain Book 2011)
- Logan W, 'Cultural diversity, cultural heritage and human rights: towards heritage management as human rights-based cultural practice' (2012) *International Journal of Heritage Studies* 231
- Loulanski T, 'Revising the Concept for Cultural Heritage: The Argument for a Functional Approach' (2006) 13 *International Journal of Cultural Property* 207
- Lowenthal D, *The Past is a Foreign Country* (CUP 1985)



\_\_\_\_\_, 'Stewarding the Past in a Perplexing Present' in Avrami E, Mason R & de la Torre M (eds), *Values and Heritage Conservation: Research Report* (The Getty Conservation Institute 2000)

\_\_\_\_\_, 'Natural and cultural heritage' (2005) 11 *International Journal of Heritage Studies* 81

\_\_\_\_\_, 'Patrons, Populists, Apologists: Crises in Museum Stewardship' in Gibson L and Pendlebury J (eds), *Valuing Historic Environments* (Ashgate 2009)

Lucy WNR and Mitchell C, 'Replacing private property: The case for stewardship' (1996) CLJ 566

M'Bow A-M, 'A plea for the return of an irreplaceable cultural heritage to those who created it' (7 June 1978) Appendix 12 in Simpson E (ed), *The Spoils of War* (The Bard Graduate Center for Studies in the Decorative Arts 1997)

Macdonald S and Fyfe S, *Theorizing Museums* (Sociological Review Monograph Series, Blackwell Publishers 1996)

MacDonald DB, 'Daring to compare: the debate about a Maori "holocaust" in New Zealand' (2003) 5 *Journal of Genocide Research* 383

MacGregor N, 'To Shape the Citizens of "That Great City, the World" in Cuno J (ed), *Whose Culture? The Promise of Museums and the debate of antiquities* (Princeton University Press 2009)

Macmillan F, 'Copyright, Creativity and Cultural Property Rights: The Case of Arts Festivals' Cultivate Working Paper No 1 (2010) (HERA Joint Research Programme on Copyrighting Creativity: Creative Values, Cultural Heritage Institutions and Systems of Intellectual Property)

\_\_\_\_\_, 'The protection of cultural heritage: common heritage of mankind, national cultural "patrimony" or private property?' (2013) 64 *Northern Ireland Legal Quarterly* 351

Malpass P, 'Whose Housing Heritage?' in Gibson L and Pendlebury J (eds), *Valuing Historic Environments* (Ashgate 2009)

Manisty E & Smith J, 'The Deaccessioning of objects from public institutions: Legal and related considerations' (2010) 15 *Art Antiquity and Law* 1

Marceau C, 'The Ethics of Collecting: universality questioned' (2007) 59 *Museum International* 80

Mares MA, 'The Moral Obligations Incumbent upon Institutions, Administrators, and Directors in Maintaining and Caring for Museum Collections' in Genoways HH (ed), *Museum Philosophy for the Twenty First Century* (Alta Mira Press 2006)

Marstine J, 'The contingent nature of the new museum ethics' in Marstine J (ed), *The*

*Routledge Companion to Museum Ethics* (Routledge 2011)

Mason P and Kuo I-L, 'Visitor Attitudes to Stonehenge: International Icon or National Disgrace?' (2008) 2 *Journal of Heritage Tourism* 168

Mason R, 'Assessing Values in Conservation Planning: Methodological Issues and Choices' in de la Torre M (ed), *Assessing the Values of Cultural Heritage: A research report* (The Getty Conservation Institute 2002)

\_\_\_\_\_, 'Theoretical and Practice Arguments for Values-Centered Preservation' (2006) *Cultural Resource Management Journal* 21

Mattinson D, 'The value of heritage: what does the public think?' in Clark K (ed) *Capturing the Public Value of Heritage: The proceedings of the London conference* (English Heritage 2006)

Macdonald S, *Memorylands: Heritage and Identity in Europe Today* (Routledge 2013)

Mackenzie S, 'Dealing in cultural objects: a new criminal law for the UK' (2007) 71 *Amicus Curiae* 8

Merenstein A, 'The Zuni Quest for Repatriation of the War Gods: An alternative basis for claim' (1992) *American Indian Law Review* 589

Merryman J H, 'Thinking about the Elgin Marbles' (1984-1985) 83 *Michigan Law Review* 1881

\_\_\_\_\_, 'Cultural Property Ethics' (1998) 7 *International Journal of Cultural Property* 28

\_\_\_\_\_, 'The Nation and the Object' (1994) 3 *International Journal of Cultural Property* 61

\_\_\_\_\_, 'International Art Law: from Cultural Nationalism to a Common Cultural Heritage' (1983) 15 *New York Journal of International Law and Politics* 757

\_\_\_\_\_, 'The Public Interest in Cultural Property' (1989) 77 *Cal LR* 339

\_\_\_\_\_, 'Two Ways of Thinking about Cultural Property' (1986) 80 *American Journal of International Law* 831

Mezey N, 'Paradoxes of Cultural Property' (2007) 107 *Columbia Law Review* 2004

Miller D, *Material Culture and Mass Consumption* (Blackwell 1987)

Mordaunt Crook J, *The British Museum* (Allen Lane The Penguin Press 1972)

Morphy H, 'Scientific Knowledge and Rights in Skeletal Remains' in Turnbull P & Pickering M (eds), *The Long Way Home: The Meaning and Values of Repatriation*

(Museums and Collections, Berghahn Books 2010)

Müller M, 'Cultural Property Protection: Legitimacy, Property, and Functionalism' (1998) 7 *International Journal of Cultural Property* 395

Murphy T, 'Legal Fabrications and the Case of 'Cultural Property' in Pottage A, Mundy M and Arup C, *Law, Anthropology, and the Constitution of the Social: Making Persons and Things* (CUP 2004)

Nicholas L, *The Rape of Europa* (Macmillan 1994)

Nickel JW, 'Intrinsic Value and Cultural Preservation' (1999) 31 *Arizona State Law Journal* 360

O'Donnell T, 'The Restitution of Holocaust Looted Art and Transitional Justice: The Perfect Storm or the Raft of Medusa?' (2011) 22 *EJIL* 49

O'Keefe P, 'Codes of Ethics: form and function in cultural heritage management' (1998) 7 *International Journal of Cultural Heritage Law* 32

\_\_\_\_\_, 'The Heritage Value of a Private Collection' in Rénold MA & Byrne-Sutton Q, *La libre circulation des collections d'objets d'art* (Schulthess Polygraphischer Verlag 1993)

O'Keefe PJ and Prott LV (eds), *Cultural Heritage Conventions and other instruments: A compendium with commentaries* (IAL publishing 2011)

O'Keefe R, 'World Cultural Heritage: Obligations to the International Community as a whole?' (2004) 53 *ICLQ* 189

Okamura K, 'A consideration of Heritage Values in Contemporary Society' in Smith GS, Mauch Messenger P and Soderland HA (eds), *Heritage Values in Contemporary Society* (Left Coast Press Inc 2010)

Palmer N, 'Itinerant Art in the European Community: Loans, Collective Title, Shared Enjoyment and the Mystique of Museum Property: A Common Lawyer's Perspective' (2006) 11 *Art Antiquity and Law* 275

\_\_\_\_\_, *Museums and the Holocaust* (IAL publishing 2000)

Pantazatos A, 'Does Disapora Test the Limits of Stewardship? Stewardship and the ethics of care' (2010) 62 *Museum International* 96

Paterson RK, 'Resolving Material Culture Disputes: Human Rights, Property Rights and Crimes Against Humanity' (2006) 14 *Willamette Journal of International Law and Dispute Resolution* 155

Pearce S, 'The Making of Cultural Heritage' in Avrami E, Mason R & de la Torre M (eds), *Values and Heritage Conservation: Research Report* (The Getty Conservation Institute 2000)

Pickering M, 'Despatches From the Front Line? Museum Experiences in Applied Repatriation' in Turnbull P & Pickering M (eds), *The Long Way Home: The Meaning and Values of Repatriation* (Museums and Collections, Berghahn Books 2010)

Poole AG, *Stewards of the Nation's Art: Contested Cultural Authority, 1890-1939* (University of Toronto Press 2010)

Prince R, 'David Cameron refuses to return Koh i Noor diamond to India' *The Telegraph* 29 July 2010

Prott L & O'Keefe P, *Law and the Cultural Heritage, Volume 1 Discovery and Excavation* (Abingdon 1984)

\_\_\_\_\_, 'Cultural Heritage' or 'Cultural Property'?' (1992) 1 *International Journal of Cultural Property* 307

Prott LV, 'Principles for the Resolution of Disputes Concerning Cultural Heritage Displaced during the Second World War' in Simpson E (ed), *The Spoils of War* (The Bard Graduate Center for Studies in the Decorative Arts 1997)

Prott L, *Commentary on the UNIDROIT Convention* (IAL publishing 1997)

Radin MJ, 'Property and Personhood' (1981) 34 *Stan L Rev* 957

Porsdam H, 'Epilogue Cultural Heritage and Law: The Case of Cultural Looting' in Porsdam H and Elholm T (eds), *Dialogues on Justice: European Perspectives on Law and Humanities* (De Gruyter 2012)

Renfrew C, *Loot, Legitimacy and Ownership* (Duckworth 2000)

Reynolds N, '£1.5m beauty is British Museum's newest treasure' *The Telegraph* 9 March 2004

Riegl A, 'The Modern Cult of Monuments: Its Character and its origins' (1903) (Kurt W Forster & Diane Ghirardo tr) in K Michael Hayes (ed) *Oppositions Reader* (Princeton Architectural Press 1998)

Rowlands M, 'Cultural Rights and Wrongs: Uses of the Concept of Property' in Verdery K and Humphrey C (eds), *Property in Question: Value Transformation in the Global Economy* (Berg 2004)

Rose, CM 'Romans, roads, and romantic creators: traditions of public property in the information age' (2003) 66 *Law and Contemporary Problems* 89

Ruskin J, *The Seven Lamps of Architecture* (Dana Estes & Company Publishers 1849)

Russell I, 'Heritages, Identities, and Roots: A critique of arborescent models of heritage and identity' in Smith GS, Mauch Messenger P and Soderland HA (eds), *Heritage Values in Contemporary Society* (Left Coast Press, Inc 2010)

Saumarez Smith C, 'Museums, Artefacts, and Meanings' in Vergo P (ed), *The New Museology* (Reaktion Books 1989)

Sax J, 'Is Anyone Minding Stonehenge? The Origins of Cultural Property Protection in England' (1990) 78 Cal LR 1543

\_\_\_\_, *Playing Darts with a Rembrandt* (The University of Michigan Press 1999)

Scafidi S, *Who Owns Culture?: Appropriation and Authenticity in American Law* (Rutgers University Press 2005)

Scott J, 'War and Cultural Heritage: Return of a Beneventan Missal' (2005) 10 *Art Antiquity and Law* 299.

Scovazzi T, 'The Return of the Benev. VI29 Missal to the Chapter Library of Benevento from the British Library' (2011) 16 *Art Antiquity and Law* 285

Shapiro D, 'Repatriation: A modest proposal' (1998-1999) 31 *New York University Journal of International Law and Politics* 95

Shaw S and Schwartz R, *UNU-IAS Report: Trading Precation: The Precautionary Principle and the WTO* (UNU-IAS 2005)

Silberman NA, 'Heritage interpretation and human rights: documenting diversity, expressing identity, or establishing universal principles?' (2012) 18 *International Journal of Heritage Studies* 245

Simpson MG, *Making Representations: Museums in the Post-Colonial Era* (Revised edition Routledge 2001)

Smith A, *Nationalism* (Wiley 2013)

Smith C, 'Foreword' in Smith GS, Mauch Messenger P and Soderland HA (eds), *Heritage Values in Contemporary Society* (Left Coast Press, Inc 2010)

Smith GS, Mauch Messenger P and Soderland HA, 'Introduction' in Smith GS, Mauch Messenger P and Soderland HA (eds), *Heritage Values in Contemporary Society* (Left Coast Press, Inc 2010)

Smith L, 'Deference and Humility: The Social Values of the Country House' in Gibson L and Pendlebury J (eds), *Valuing Historic Environments* (Ashgate 2009)

Smith L, *Uses of Heritage* (Routledge 2008)

Soderland HA, 'Values and the Evolving Concept of Heritage: The First Century of Archaeology and Law in the United States' in Smith GS, Mauch Messenger P and Soderland HA (eds), *Heritage Values in Contemporary Society* (Left Coast Press, Inc 2010)

- Stark JC, 'The art of ethics: Theories and applications to museum practice' in Marstine J (ed), *The Routledge Companion to Museum Ethics* (Routledge 2011)
- Stig Sørensen ML & Carman J, 'Introduction' in Stig Sørensen ML & Carman J (eds), *Heritage Studies: Methods and Approaches* (Routledge, 2009)
- Tainter JA & Lucas GJ, 'Epistemology of the significance concept' (1983) 48 *American Antiquity* 707
- Thompson J, *Taking Responsibility for the Past: Reparation and Historical Justice* (Polity Press 2002)
- Throsby D, 'Cultural Capital and Sustainability Concepts in the Economics of Cultural Heritage' in M de la Torre (ed), *Assessing the Values of Cultural Heritage: A research report* (The Getty Conservation Institute 2002)
- Osei Tutu JJ, 'A Sui Generis Regime for Traditional Knowledge: the Cultural Divide in Intellectual Property Law' (2011) 15 *Marquette Intellectual Property Review* 147
- Ulph J, 'Markets and Responsibilities: Forgeries and the Sale of Goods Act 1979' (2011) JBL261
- \_\_\_\_\_, 'The sale of items in museum collections' in Hopkins, N *Modern Studies in Property Law: Volume 7* (Hart Publishing 2012)
- Ulph J and Smith I, *The Illicit Trade in Art and Antiquities: International Recovery and Criminal and Civil Liability* (Hart Publishing 2012)
- Vergo P, *Introduction* in Vergo P (ed), *The New Museology* (Reaktion Books 1989)
- Vinson I, 'ICCROM's Contribution to the Ethics of Heritage' (2009) 61 *Museums International* 90
- Vismann C, 'The Love of Ruins' (2001) 9 *Perspectives on Science* 196
- Waldron J, 'Superseding Historic Injustice' (1992) 103 *Ethics* 4
- Warner K, 'Theft of Cultural Heritage: *R v Hakimzadeh* (2010) 15 *Art Antiquity and Law* 95
- Warren J (ed), *The Legal Status of Museum Collections in the United Kingdom* (Museums and Galleries Commission 1996)
- Warren KJ, 'A Philosophical Perspective on the Ethics and Resolution of Cultural Properties Issues' in Messenger PM (ed), *The Ethics of Collecting Cultural Property: Whose Culture? Whose Property?* (2<sup>nd</sup> edn, University of New Mexico Press 1999)
- Watkins D, 'The Value of Art or the Art we value?' (2006) 11 *Art Antiquity and Law* 251

Weiner A, *Inalienable possessions: the paradox of keeping-while giving* (University of California Press 1992)

Welsh PH, 'The Power of Possessions: The Case Against Property' (1997) 21 *Museum Anthropology* 12

Whittingham S, 'Breach of Trust Over Gifts of Collections' (1995) *International Journal of Cultural Property* 255

Wine H, 'The Missing Goya: Section 11 of the Theft Act 1968' (2001) 6 *Art Antiquity and Law* 301

Wingfield C, 'Placing Britain in the British Museum: Encompassing the Other' in Knell SJ, Aronsson P, Amundsen AB, Barnes AJ, Burch S, Carter J, Gosseline V, Hughes SA and Kirwan A, *National Museums: New Studies from Around the World* (Routledge 2011)

Woodhead C, 'A debate which crosses all borders' (2002) 7 *Art Antiquity and Law* 317

\_\_\_\_\_, 'Ownership, Possession, Title and Transfer: Human Remains in Museum Collections' in Dixon M (ed), *Modern Studies in Property Law: Volume 5* (Hart Publishing 2009)

\_\_\_\_\_, 'Moral Claims Against Museums: The Emerging Concept of Moral Title to Objects of Cultural Heritage' (2009) 2(2) *International Journal of the Inclusive Museum* 1

\_\_\_\_\_, 'Cultural heritage principles and interference with property rights' (2011) 42 *Cambrian Law Review* 52

\_\_\_\_\_, 'Nazi Era spoliation: establishing procedural and substantive principles' (2013) 18 *Art Antiquity and Law* 167

Wylie A, 'The Promise and Perils of an Ethic of Stewardship' in Pels P & Meskell L (eds), *Embedding Ethics: Shifting Boundaries of the Anthropological Profession* (Berg Publishers 2005)

Young JO, 'The Values of the Past' in G Scarre & R Coningham (eds) *Appropriating the Past: Philosophical Perspectives on the Practice of Archaeology* (CUP 2013)

Yu PK, 'Cultural Relics, Intellectual Property, and Intangible Heritage' (2008) 81 *Temple Law Review* 433

Yusef A, 'Definition of Cultural Heritage' in Francesco Francioni & Federico Lenzerini, *The 1972 World Heritage Convention: A Commentary* (OUP 2008)

## **POLICIES, CONSULTATIONS, GUIDANCE AND DECISION-MAKING**

Arts Council England, *Accreditation Scheme for Museums and Galleries in the United Kingdom: Accreditation Standard* (2011)

Arts Council England, *UK Export Licensing for Cultural Goods: Procedures and guidance for exporters of works of art and other cultural goods – An Arts Council England Notice* (Arts Council England 2012)

Charity Commission, RR10- *Museums and Galleries* (Version 08/02)

DCMS *Guidance for the Care of Human Remains in Museums* PP 847 (DCMS 2005)

\_\_\_\_\_, *Combating Illicit Trade: Due diligence guidelines for museums, libraries and archives on collecting and borrowing cultural material* PP 846 (DCMS 2005)

\_\_\_\_\_, *Export Controls on Movable Cultural Interest – Statutory Guidance on the Criteria to be taken into consideration when making a decision about whether or not to grant an export licence* (DCMS 2005)

\_\_\_\_\_, *Guidance for the Care of Human Remains in Museums* PP 847 (DCMS 2005)

\_\_\_\_\_, *Restitution of Objects Spoliated in the Nazi-Era: A Consultation Document*, (DCMS 2006)

\_\_\_\_\_, *The 1970 UNESCO Convention – Guidance for Dealers and Auctioneers in Cultural Property*, Department for Culture, Media and Sport, PP638, January 2004

\_\_\_\_\_, *Treasure Act 1996 Code of Practice* (2<sup>nd</sup> Revised edition)

\_\_\_\_\_, *Export of Objects of Cultural Interest 2006-2007* (DCMS 2007)

DCMS and Arts Council, *Export of Objects of Cultural Interest 2011/12* (TSO 2012)

Heritage Lottery Fund, *Strategic Framework 2013-2018: A lasting difference for heritage and people* (HLF 2013)

*ICOM Code of Ethics for Museums* (International Council of Museums, Paris 2006)

Inter-Allied Declaration against acts of dispossession committed in territories under enemy occupation or control, London, 5 January 1943

International Law Association, Resolution No 2/2008 *Guidelines for the Establishment and conduct of safe havens* (Rio de Janeiro, 2008)



*Loans between National and Non-national Museums: New Standards and Practical Guidelines* (National Museum Directors' Conference, London 2003)

Museums Association, *Code of Ethics for Museums* (UK Museums Association, London 2008)

Museums Libraries and Archives Council, *Export of Objects of Cultural Interest 2010/11* (TSO 2011)

National Museum Directors' Conference, Statement of Principles and Proposed Actions on Spoliation of Works during the Holocaust and World War II period (NMDC 1993)

\_\_\_\_\_, *Loans Between National and Non-national Museums: New Standards and Practical Guidelines* (NMDC 2003)

\_\_\_\_\_, *Too much stuff? Disposal from museums*, National Museum Directors Conference (NMDC 2003)

Oxford University, 'Policy on Human Remains held by the University of Oxford's Museums' *Oxford University Gazette* Supplement (2) to No. 4787 (15<sup>th</sup> November 2006).

Statement of Principles on Spoliation of Works of Art during the Nazi, Holocaust and World War II period, Museums and Galleries Commission, April 1999 (reprinted in N Palmer, *Museums and the Holocaust* (IAL publishing 2000) Appendix XI

#### UNPUBLISHED PAPERS

Woodhead C, 'Redressing historic wrongs, returning objects to their rightful owners or laundering tainted objects? 21st century UK remedies for Nazi Era injustices' (2014) (in press).