Fordham Undergraduate Law Review

Volume 2 | Issue 1 Article 7

11-30-2020

Museum Exhibits or Ill-Gotten Gains: A Legal and Philosophical Look at Cultural Property Law

Anthony E. Gambino
Fordham University at Rose Hill

NOTE

MUSEUM EXHIBITS OR ILL-GOTTEN GAINS: A LEGAL AND PHILOSOPHICAL LOOK AT CULTURAL PROPERTY LAW

Anthony Elvis Gambino*

The foundation of cultural property laws was laid at the Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict. The convention, which usually revolved around the discussions on former laws of warfare, had to switch gears to respond to the Nazi's new tactic of intentionally stealing or destroying cultural property as a means to demoralize the enemy. The convention's focus was inclusivity, which defined cultural property as any "movable or immovable property of great importance to the cultural heritage of every people." However, that overly simplistic definition that intended to serve as a source of clarification, has been the catalyst of confusion and controversy in regard to who has custody of artifacts -- which many could claim are owned by all of humanity. Various alternate ideologies have emerged in trying to make sense of the ambiguity of who owns cultural property? In addition, a multitude of international efforts have formulated treaties that stem from Nazi Germany's desire to accumulate wealth and to psychologically dominate and disable the Indigenous people's culture through the seizure of famous works of art.

What will follow is a discussion on the impact of how cultural repatriation laws, established during the post-Nazi occupation of Europe, encouraged the discovery and return of looted art during Nazi occupation as well as the reopening of cases that are hundreds of years old. However, while noble in nature, many of these laws formed to initially protect artifacts are being used to justify not returning artifacts to their homeland. Some argue "the notion that identity, whether individual or group, must forever remain attached to a particular object is unsettling." A contemporary case where this idea was tested played out in the courts of the United Kingdom. Here, the UK rejected India's most recent demand to return its priceless artifacts like the "Kohinoor Diamond" and "Sultanganj Buddha" that were stolen, looted, and/or smuggled into England during British colonial rule.

* B.A. Candidate for Digital Technology & Emerging Media (major), Arabic (minor), and Marketing (minor), Fordham College at Rose Hill, Class of 2021. Under the invaluable guidance of the Fordham Undergraduate Law Review especially Jennifer Rivero (Co-Managing Editor), Thomas Reuter (Senior Editor), and Tyler Raciti (Editor-in-Chief) who pushed me to take a more critical and appreciative look at the museum world while writing this piece. I would also like to acknowledge the Fordham Museum of Greek, Roman, and Etruscan Art whose preservation and diligent approach to researching the provenance of antiquities is inspiring.

The British government is citing a law (British Museum Act 1963) that "justifies" the reasons for not returning the pieces. Other arguments employ a simpler ideology of whoever owned it originally, still owns it regardless of present circumstances. By using Kant's Categorical Imperative and Mill's ethical theory of Utilitarianism this Note will explore the benefits as well as the dangerous implications set within these cases and philosophical doctrines. Leading to the conclusion, that the idea of a 'universal museum, for all its Enlightenment virtues and educational potential, is still at its core a problematic imperialist perspective. What is needed is the creation of a third impartial council skilled in repatriation law that works in conjunction with museums, indigenous tribes, nations, and the court to ensure a more just and cosmopolitan future of museums.

I. INTRODUCTION

For years museums throughout the world, primarily in the West, have been dealing with some serious ethical issues in regard to the repatriation of cultural property. Two of the most hotly contested points are: Is it logical to repatriate historical objects to countries that cannot provide the same standard of care as a (Western) museum? Further, is it ethical for museums to acquire work from a country who is now in possession of artwork that was acquired through pillaging during war time? Although much of this "art grab" occurred during the Age of Imperialism (early eighteenth century through the late nineteenth century), and pressure from outside agencies such as the Intergovernmental Committee for Promoting the Return of Cultural Property have forced many museums to do some exhaustive vetting before acquiring a piece of art, it is still a point of contention today with many museums seeking "backdoor" deals to acquire new finds. Both museums and private collectors need to ask themselves, what were the conditions—political, economic, social—under which the piece was collected? By whom was this work acquired, and for what purposes? Can one justify possessing it today, and if not, what should happen to it? Even Fordham University once found itself embroiled in legal wrangling over a funerary relic from Italy that was being displayed in the Walsh library. A deal was reached where Walsh shared

"ownership" of the piece with the piece being lent back and forth between Walsh and its original home in the Republic of Italy.

By asking (and answering) these questions before acquisitions, one can avoid demands for reparations of cultural relics by native countries whose property was stolen, usually by force during colonization or wartime conflict. The issue of repatriation will almost inevitably involve conflicting attitudes — legal, moral and ethical. These affairs of repatriation often contain the added incendiary ingredient of emotion; an important aspect that property law must take into account. The law is doing more than just keeping a physical object safe and assigning ownership. This type of property has significant cultural/emotional value, as Vibeke Jensen, Director of the UNESCO Office in New York, stated when commenting on the destruction of 14 religious buildings in Timbuktu,"… this reflects the life of a community, its history and its identity...and its preservation helps to rebuild broken communities, re-establish identities, and link the past with the present and future...in addition, the cultural property of any people contributes to the cultural heritage of humankind."[292]

The legal issues revolving around the ownership of cultural property is still a burgeoning area and is continuously evolving. Cultural property law's groundwork was laid in 1954 at the Hague Convention on the Protection of Cultural Property. The convention which usually revolved around discussion of older laws of war, had to switch gears to respond to the Nazi's new warfare technique of intentionally stealing or destroying cultural property. The Nazi's looting campaign has been regarded as one of the "the most coherent attempt by one group of people to loot material on a systematic basis and on a breathtaking (…) scale."[293] The convention's strong focus was on inclusivity: they defined cultural property as any "movable or immovable property of great importance to the cultural heritage of every people."[294]

However, that overly simplistic definition intended to serve as the source of clarification, has been the catalyst of confusion and controversy in regard to who has custody of humanity's artifacts. Despite its controversy, the definition set up the pillars of safeguarding artifacts by outlining that 'the High Contracting Parties undertake to prepare in time of peace for the safeguarding of cultural property situated within their own territory against the foreseeable effects of an armed conflict, by taking such measures, as they

---

[292] UNESCOPRESS, Re-building Cultural Heritage in Mali, UNESCO, http://www.unesco.org/new/en/media-services/single-view/news/re_building_cultural_heritage_in_mali/.

[293] Kowalski, W.W. (2003), Claims for Works of Art and their Legal Nature, in: The International Bureau of the Permanent Court of Arbitration (Ed.) Resolution of Cultural Property Disputes. Papers emanating from the seventh PCA International Law Seminar.,

[294] Convention for the Protection of Cultural Property in the Event of Armed Conflict. The Hague, 14 May 1954.

consider appropriate.'[295] However, many of the laws established post Hague convention largely neglected two key aspects. Firstly, no concrete law pre-existed in relation to the restitution of either illegally exported or stolen cultural objects. Second, many of the laws laid out solutions to repatriation that were confusing, unfair, unjust, and completely disregarded the pervasive issue of holding and stealing stolen artifacts on the international market.

II. *ZUCKERMAN V. METRO. MUSEUM OF ART*

An ideal example of how blurred the lines can be in cultural property laws is found with the following case. In January 2017, Laurel Zuckerman as Ancillary Administratrix of the estate of Alice Leffmann (the "Leffmann estate"), submitted a memorandum in opposition to the motion of the Metropolitan Museum of Art (the "Museum" or "Defendant") to dismiss the Plaintiff's Amended Complaint (the "Complaint"). The Preliminary statement contests that this is a dispute over the ownership of a masterwork by Pablo Picasso entitled The Actor (L'Acteur) (the "Painting"), which is currently on display as part of a permanent collection at the MOMA. Through its motion, the Museum falsely depicts the 1938 sale of the painting as a run-of-the-mill commercial transaction in which a wealthy individual sold a painting in the open market at fair value to fund his international travels. This transaction, however, did not occur in a normal place, at a normal time, nor under normal circumstances.

Zuckerman alleges that the Picasso masterpiece was sold by his descendant to fund the Leffman's family's escape from the Nazis. It was during this dark period for Jews (especially German Jews) in Italy that Paul Leffmann sold The Actor in 1938 under duress, for well below its value, in order to finance his family's escape from persecution. The Met Museum acquired the piece in 1952 and Paul Leffman made the demand for the return of the painting in 2010.[296] That date proves crucial in the court's decision, stating that the United States Court of Appeals in Manhattan said Laurel Zuckerman, the great-grandniece of Paul Leffmann, waited too long to demand the painting's return.[297]

The decision read: "It is simply not plausible that the Leffmanns and their heirs would not have been able to seek replevin — a legal term for an action

[295] The Hague, op. cit, 3.
[296] Cascone, Sarah (2018), "Was the Met's Prized Picasso Sold Under Duress Because of the Nazis? A New Appeal Revives an Eight-Year-Old Legal Battle," (artnet), https://news.artnet.com/art-world/nazi-restitution-case-picasso-actor-metropolitan-museum-1325951.
[297] *Id.*

involving the return of property — of the painting prior to 2010."[298] The court added that the HEAR Act, a commonly cited law in restitution cases allowing heirs of victims of Nazi persecution to reclaim art, did not apply because of the lapse in time.[299] "This is not a case where the identity of the buyer was unknown to the seller or the lost property was difficult to locate," Judge Katzmann concluded.[300] Although the court did recognize that the work was sold under duress by her late relatives, due to the amount of time that had elapsed Chief Judge Robert Katzmann decided it would be unfair for the art museum to relinquish the Picasso masterpiece.[301] If this decision employs a time limit on when a claimant can regain the possession of the artwork, even if the artwork in question was noted to be illegally acquired, renders that this decision can be used to argue on behalf of almost all museums as their legal right to retain the artwork since a vast majority of the artwork being argued has been acquired 100s of years ago.

III. THE IMPLICATIONS OF *ZUCKERMAN V. METRO. MUSEUM OF ART*

The decision ruled in this case has the potential to become a default siting that would almost invariably side with that of the museum. With the decision relying heavily upon the fact that the plaintiff was aware of the location for an extended period of time and had ample opportunity to approach this issue years ago, how would such a ruling fair with a piece that has been sitting in a British museum for over 300 years? This precedent, if put into place, would essentially translate that all museums can keep artifacts as long as the statute of limitations has passed.

Employing this as a paradigm for all future cultural property cases is reminiscent of Kant's Categorical Imperative. Regardless of the potential "dicey" circumstances in which museums might have acquired possession of the artifacts, if a "sufficient" amount of time has passed and the nation had knowledge of the artifacts location but failed to reclaim the piece, then the piece deserves to remain in the possession of the present "owner." The one aspect it does neglect however is the concept of human dignity. An artifact does not necessarily possess qualities that deem it "human;" as discussed prior, these objects' importance however can transcend their physical nature and can potentially represent an entire race's cultural identity. By following the maxim based on time alone one can clear up any confusion on ownership and take a hard stance on the issue. However, it also poses an issue of potentially violating one's human dignity, an unethical practice.

---

[298] *Zuckerman v. The Metropolitan Museum of Art,* No. 18-634 at 15, (2d Cir. 2019).
[299] *Id*, at 4.
[300] *Id*, at 16.
[301] Zuckerman v. The Metropolitan Museum of Art, 23.

IV. THE CASE OF THE TOI MOKO FROM THE COLLECTION OF THE NATIONAL MUSEUM OF ETHNOLOGY

Taking a look at an even more delicate museum piece that blends both art and body, it is listed under inventory number RMV 360-5763.[302] This innocuous sequence of letters and numbers refers to the preserved head of a Māori individual which was housed at the National Museum of Ethnology in Leiden. The provenance of this specific head was unfortunately lost. However, these tattooed and preserved Māori heads were and still are a highly personal and sacred part of Māori culture.[303] Even more so, the head is considered to be the most sacred body part and the act of tattooing the head further enhances this sacredness.[304] The intricate patterning of facial moko produced what can be likened to fingerprints: individuals were identifiable by their moko, even after death.[305] The heads of family members or conquered enemies with moko were often preserved, a complex process that involved the smoking of the head and drying it in the sun.[306] The resulting preserved skin-covered skull would still display the ornate distinct tattoos that allowed identification of it as an individual and, thus, a revered deceased person could remain a member of his community forever.[307] Depending on the circumstance, these Toi Moko would be used in religious ceremonies.[308] There is no denying that the public has a deep fascination with death and a desire to possess the exotic which has engendered both a licit and an illicit market for human remains. In this specific case, the museum wrestled with the pros and cons of returning such a rare piece and whether or not the Te Papa (the national museum of New Zealand) qualified as a legitimate stakeholder to claim the remains.[309] They surmised three main reasons why they thought the turnover would be unjustified. As one of the most senior objects from the collection, the Toi Moko has "become part of a European museum tradition, the preservation of which also should be recognized as a

[302] Lubina, K. (2009). "Contested Cultural Property: the return of Nazi spoliated art and human remains from public collections." (Datawyse / Universitaire Pers Maastricht).
[303] Yates, Donna (2013), "Toi Moko", (Trafficking Culture).
[304] Newell, Jenny and King, Jonathan (2006), 'Human Remains from New Zealand: Briefing note for Trustees', (The British Museum).
[305] Yates, Donna (2013), "Toi Moko", (Trafficking Culture).
[306] Mulholland, Malcom (2011), "Mokomokai are home where they belong," (The Timaru Herald).
[307] *Id.*
[308] *Id.*
[309] Lubina, K. (2009). "Contested cultural property : the return of nazi spoliated art…" op cite 392.

highly serious responsibility (…)."[310] Furthermore, a return of the Toi Moko would harm the integrity of the collection and thereby would result in a "falsification of the history."[311] Finally, and the most pressing issue was the potential loss of future research on the Toi Moko.[312] This reason alone was considered far more important than the loss of the object for exhibition purposes.

Even with those legitimate reasons the SVCN Ethnological Ethics Committee clearly provided that the Toi Moko should be returned unconditionally or remain permanently in the National Museum of Anthology -- it would be unacceptable to have such a contentious piece systematically loaned to its "rightful owner" and then returned to the museum.[313] The National Museum of Ethnology, however, did express "it would be extremely helpful support for Te Papa's repatriation policy. Such a document would be an elegant companion to the New Zealand Government's mandate."[314] While it does not appear from the available documentation whether an explicit statement by one of the Māori was ever presented, or which other developments might have triggered the decision, by August 2005 the National Museum of Ethnology was ready to return the Toi Moko.[315] By letter, the director of the National Museum of Ethnology asked the Secretary of Culture to mandate the return of the Māori head to the Te Papa.[316] The Minister of Culture gave the mandate to the director of the museum, Steven Engelsman, to transfer the property of the Toi Moko.[317] On November 9th, 2005 the head was returned to representatives of the Te Papa during a small ceremony attended by curators, scientists, academics, and journalists.[318]

V. IMPLICATIONS OF THE TOI MOKO'S RETURN TO TE PAPA

Unlike Zuckerman vs. Metro Museum of Art, the duel was between two museums and was never brought to court. However, the murkiness of legality once again concerned the question of ownership between two parties. The

---

[310] *Id, 394.*
[311] *Id.*
[312] *Id.*
[313] National Maritime Museum Act 1934 (c.43), London: The Stationery Office, s 2(3)(b).
[314] 1 Engelsman, S., (2004), Letter to Mrs. Catherine Nesus - Repatriation Project Leader of the Te Papa.
[315] Lubina, K. (2009). "Contested cultural property : the return of nazi spoliated art…" op cite 400.
[316] Engelsman, S., (2004), Letter to Mrs. Catherine Nesus - Repatriation Project Leader of the Te Papa.
[317] Lubina, K. (2009). "Contested Cultural Property: The Return of Nazi Spoliated Art…" *op cit* 402.
[318] Kaam, A.v.,(2005), " Hoofd van Maori gaat terug," (Leidsch Dagblad,).

National Museum of Ethnology's decision to return the piece following the SVCN Ethnological Ethics Committee advice was ultimately born out of their own decision — not any legal framework forcing them. Both sides presented valid arguments on why they should be the final resting place for this piece, and the ultimate return reflected many of the tenets of utilitarianism. Citing the Cultural Heritage Preservation Act (CHP Act), which is reminiscent of the German Cultural Property Protection Act, aims to protect cultural objects deemed irreplaceable and indispensable and of national relevance in private collections, as well as public collections.[319] An object is irreplaceable if there are no similar objects present in the Netherlands.[320] In the case of the Toi Moko they determined it might have been irreplaceable, but it did not pass muster on being indispensable, they found it lacked any symbolic function.[321] Its unknown provenance therefore could not serve as memory of historically important persons or events.[322]

The Toi Moko, however, might have a "linking function." This notion of indispensability is described as the "functioning of an object or collection as an essential element in a development that is of great importance for the exercise of scholarly work, including cultural science studies."[323] While one could clearly argue that the Toi Moko is extremely relevant for scientific research and cultural science studies it seems unlikely that the object is of such great importance that it fulfills a 'linking function' and is thus indispensable. However, that's looking at solely one object. If the courts are to apply the same rationale that certain sole pieces serve as the key element that link together the importance of the entire collection, then every piece in the Royale Collection of Rarities falls under that premise because many would claim the greater importance of the collection is the sum of all its pieces. Yet a different matter is the status of the Toi Moko as part of the greater collection. This collection clearly satisfies the criteria of

[319] Gesetz zum Schutz deutschen Kulturgutes gegen Abwanderung in der Fassung der Bekanntmachung vom 8 Juli 1999 (BGBl. I S. 1754). Another source of inspiration is the Flemish Topstukkendecreet (Decreet van 24 januari 2003 "houdende bescherming van het roerend cultureel erfgoed van uitzonderlijk belang" (B.S. 14 maart 2003). According to Art. 5 § 1 the decree applies also to objects and collections owned by public authorities. Cf.: Draye, A.M., 2007, p. 390.

[320] Art. 2(2) CHP Act.

[321] Lubina, K. (2009). "Contested cultural property: the return of nazi spoliated art…" op cite 402.

[322] Art. 2(3)(a) CHP Act.

[323] Art. 2(3)(b) CHP Act. See also: Memorie van Toelichting, 27812, nr. 3, p. 8 para. 7. An example of an object listed for its "linking function" is a stone sculpture of a standing triumphing Jesus Christ. The sculpture dates from the Roman period and is one of very few similar sculptures that are present in the Netherlands. The sculpture is thus important for the studying of stone sculptures in the Maas area. Cf.: Raad voor Cultuur, 2001.

irreplaceability and indispensability.[324] Not only can the collection serve as memory of King William (1772-1843) as founder of the collection, which suggests a symbolic function, even more relevant is the collection's "linking function" and "reference function": the foundation of the collection is typical for the emergence of public collections out of private collections at the end of the 18th century within Europe.

While the loss of the Toi Moko cannot diminish the meaning and significance of the collection as a whole, it is important to note that the loss for the collection would be felt. To soften the blow, so to speak, the museum requested from Te Papa precise documentation to compensate for its loss for the Royal Collection of Rarities and thus to further ensure the collection's integrity.[325] Looking at this through a Utilitarian lens, a moral theory propagated — that everyone's purpose is to make life better by increasing the amount of good things (such as pleasure and happiness) in the world and decreasing the amount of bad things (such as pain and unhappiness).[326] By the Museum of Ethnology sacrificing the Toi Moko back to the Te Papa it can be said that it did suffer pain, but returning the sacred ceremonial head to an institution that qualified as a more appropriate stakeholder and place of origin the overall happiness of the Maori race was increased. This case can be used as a good model of reparation on multiple fronts; not only did the Te Papa provide a symbolic relief to the Museum of Ethnology, but the Toi Moko was also returned to another well respected institution where the head would be preserved safely and looked after.

One of the main core principles that comes under scrutiny in restitution of human remains cases is proof of being the appropriate stakeholder. What happens in a case that deals with something as sensitive as human remains, and an appropriate stakeholder who doesn't have the proper faculties to care for a precious potentially "irreplaceable and indispensable?" A potential solution that should always be employed is following the two principles established in the above case. The first one being, "Any decision-making process involving human remains should take due account of the views of all stakeholders, including those from the country of origin."[327] Even if the country of origin claiming the human remains is deemed appropriate, the holding institution does not sacrifice its autonomy in the decision-making process completely. The second tenet being, "the holding institution must share with the claimant the criteria that were decisive in the decision-making

[324] Art. 2(3)(a) CHP Act.
[325] Lubina, K. (2009). "Contested cultural property: the return of nazi spoliated art…" op cit. 402.
[326] Mill, John Stuart (1861), *Utilitarianism*.
[327]Lubina, K. (2009). "Contested cultural property: the return of nazi spoliated art…" op cit. 402.

process."[328] Once again applying this makes sure that both parties' authority is recognized appropriately in the claim. Implementing these two principles beyond cultural property in terms of human rains can potentially ensure a more Utilitarian approach to repatriation. This approach ensures that the appropriate stakeholder wins while also preventing the museum in possession of the item from being defamed, and the integrity of the collection is not harmed. This utilitarian approach might even encourage more institutions to forgo certain objects seeing that they retain some say and are not defamed.

VI. CONCLUSION

Despite these deliberations of ownership having the potential to be highly influenced by moral, ethical and emotional factors, the absolute legal decisions must be made via a series of existing and to-be established laws and criteria that although take into account the sensitive nature of the arguments, is able to defer to a clear and well defined series of principles. As we can see the laws already established can be applied in both effective and nefarious ways due to their wide range of interpretation and implementation afforded. Creating a third impartial council reminiscent of the SVCN Ethnological Ethics Committee that operates on international level is crucial. Looking at these cases through the lens of Kant's Categorical Imperative and Mill's Utilitarianism, one comes to the conclusion that while many of these "cosmopolitan" museums still house "grey area" exhibits (depriving some rightful nations of their nation's history), we can't forgo the other perspective in these matters completely. Favoring one side and maligning the other can only perpetuate this cycle further and drive many deals further "underground."

* * *

[328] Lubina, K. (2009). "Contested Cultural Property: The Return of Nazi Spoliated Art…" *op cit*.