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## **The changing tide of title to cultural heritage objects in UK museums**

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### **Introduction**

Frequently museums are entreated to transfer cultural heritage objects from their collections to the objects' 'rightful owners';<sup>1</sup> these will usually be individuals, communities or nations who lost possession of the objects during wartime or colonial oppression, or who were the victims of looting. Many museums, now in possession of these objects, may have acquired them in good faith many years ago. The effect of limitation periods may mean that in legal terms the museum has good title<sup>2</sup> since the original owner's title has been extinguished.<sup>3</sup> However, it is clear that in museum practice, evident in its professional ethical norms, that there is a shift from reliance on traditional conceptions of ownership to a more ethical sense of guardianship which takes account of third party claims and seeks to ensure that museums have an ethical entitlement to objects. In circumstances where the museum has clear legal title claims made by original owners or the originators of the objects would necessarily need to be made on moral grounds. Campfens describes such objects as being 'tainted by the existence of some moral right operating in favour of the former owners' and as representing a grey area.<sup>4</sup> It is these grey areas that provide the context in which the discussions in this paper take place. This paper offers a theoretical approach to moral claims which relies on the concept of title to property, albeit a moral title. It thus shifts the focus away from the more generalised concept of 'rightful owners'. Moral title, which it is argued, is separate from legal title and which would have no legal force in itself,<sup>5</sup> would come about where there is a strong moral claim to the object which has been identified based on objective criteria. The resultant moral title would lead to the recommendation of one of a number of different remedies. In this way, rather than focusing on ownership which suggests that the object is necessarily transferred to the claimant,

instead, a moral title may give rise to a lesser entitlement than the transfer of legal title, such as the right to have an account of the object's history displayed next to an object which is retained by a museum. The on-going nature of moral title may be useful to ensure that museums which retain previously contested cultural objects follow the terms of the recommendation. It is argued that one can interpret various ethical norms and the recommendations of certain alternative dispute resolution panels as recognising in practice an underlying moral entitlement enjoyed by claimants. Therefore the methodology used is an interpretative analysis<sup>6</sup> of the way in which claims based on moral grounds are approached and resolved in the context of the Nazi dispossessions of cultural objects, specifically the work of the UK Spoliation Advisory Panel (the Panel)<sup>7</sup> and the ethical norms found in museum codes of ethics.<sup>8</sup> Moral title, is not though a subjective concept, but results from the response made to claimants who, Campfens opines, have 'legitimate expectations that are based, not on any individual idea of morality, but rather on ethical codes and other soft law norms, supported by examples of previous restitutions'.<sup>9</sup> The Panel recommendations provide such a body of restitution decisions and provide scope for developing practices and theoretical concepts to apply to other types of claim for cultural objects.

This paper provides a contribution to the debate on the way in which to frame claims to cultural objects based on the moral strength of the claim rather than providing a fully formed and finalised concept. It is acknowledged that moral title could come into existence at a number of different points in time. This paper will explore the different options and offer a suggested solution. This paper therefore puts forward a framework for the future development of mechanisms for resolving claims to cultural objects and more specifically to provide the firm foundation of an underlying principle of moral title that can encourage the resolution of disputes on a consistent and coherent basis.<sup>10</sup>

The approach taken here is from an English common law perspective and the focus is on the way in which museums in England deal with claims to contested objects held by them in their collections.<sup>11</sup> It is acknowledged that the development of moral title may also be evident in the work of the other European Panels established to hear Nazi Era claims. However, the primary focus will be on the decisions of the Panel which illustrates a limited

notion of responding to moral claims based on the moral strength of the claimant's case and any moral obligation on the museum in possession of the cultural object at issue.

The first section will analyse the existing legal context in which claims to cultural objects may be made. The discussion will then focus on the different types of claims based on moral grounds that may be made to museums and the similarities between them which may justify a moral response to them. The third part will then focus on the recognition of these claims in ethical norms and then set out the concept of moral title to claims and how this may be evident both in ethical norms found in museum codes of ethics and also specifically in the context of Nazi Era dispossessions and the work of the Panel.

#### *A preliminary comment about title*

Legal entitlement to objects will necessarily frame the discussions where the current possessor's entitlement to the object would otherwise be upheld by a court of law. However, in many claims involving cultural objects legal title will no longer be enjoyed by the claimant. Whilst the argument is not being put forward that moral title has any legal force, nevertheless, it has been recognised that much utility can be derived from analogies with legal principles,<sup>12</sup> albeit with a caveat of not adopting an overly legalistic approach. The concept of moral title as set out in this paper is a theoretical framework within which to view claims, the approach to the concept of title does derive support from the approach taken in English common law.

Whilst there is some academic debate about the precise meaning of 'title' in English law, particularly in the context of the sale of goods,<sup>13</sup> there is strong support for treating the term as measuring 'the strength of the interest [a person] enjoys [over an asset] in relation to others'.<sup>14</sup> This term can also be used as shorthand for 'the claimant's right, or entitlement, to possess the thing.'<sup>15</sup> For the purposes of this paper the term 'title' shall be used to refer to the strength of someone's interest in an object which gives them an entitlement to that property. 'Legal title' shall be used to refer to the strength of the interest and a claimant's entitlement that would be recognised by a court of law. 'Moral title' shall be used to refer to the strength of the interest that would be recognised by a government-backed independent panel of experts such as the Spoliation Advisory Panel. In the case of moral title, this entitlement will not necessarily be to possession of the object,

facilitated through a transfer of legal title, but may amount to a lesser entitlement. This feature will be explored below.

### **The legal position of claims and museums' title to cultural objects**

Over the years a museum will have acquired a vast number of different objects, from a wide range of sources and in a variety of different circumstances. Where it can be established that the object was recently removed from the original owner's possession without their consent then it is likely that a claimant could establish the existence of a cause of action in the tort of conversion (wrongful interference with goods). Since possession is the cornerstone of one's rights to personal property a previous owner would bring a claim in conversion based on his immediate right to possess the goods,<sup>16</sup> rather than because he may be described as being the owner *per se*. This reflects the principle that there is no absolute right of ownership that can by itself be vindicated in court and that the English common law of personal property relies heavily on the concept of relativity of title.<sup>17</sup> Because title is relative, it can be resolved by a court in favour of one party, even though someone else, who is not a party to court action, may have a superior claim.<sup>18</sup>

Where there has been a conversion the claimant would be entitled to receive compensation, although under section 3(3)(b) of the Torts (Interference with Goods) Act 1977 the court has a discretion whether or not to order the delivery of an object under section 3(2)(a). Case law shows that return of the object tends to be limited to circumstances where damages are an inadequate remedy.<sup>19</sup> Cultural objects that might be considered as being unique or having an intrinsic value, thus rendering damages an inadequate remedy, would usually justify return.<sup>20</sup> If we consider three examples of claims made for recently acquired objects it will be possible to see that in some situations as well as civil liability towards the claimants, there may be additional criminal liability for the acquiring museum. First, consider a cuneiform tablet originating from Iraq that was purchased by a London-based museum in 2011. It has now become apparent that this tablet was illegally removed from an Iraqi museum during the Gulf War and that the seller was in full knowledge of the facts of its wrongful removal. Here, the Iraqi museum would have an extant claim in the tort of conversion since the 6-year limitation period would only start to run from the first purchase unrelated to the theft (here the purchase by the London

museum, assuming it was made in good faith).<sup>21</sup> However, the museum may be guilty of an offence under the Iraq (United Nations Sanctions) Order 2003 of dealing or failing to transfer the object to a constable, unless it can show it “did not know and had no reason to suppose that the item in question was illegally removed Iraqi cultural property.”<sup>22</sup> Similar co-existing civil and criminal liability can also be seen in the context of a fixture taken from a listed building. The second example, involves a sculpture which formed an integral part of the architectural design of a listed building and which was sufficiently annexed to the land and was illegally removed<sup>23</sup> in 2014 and later sold to a museum. If the removal was made by someone other than the owner of the listed building then the owner would have a claim in the tort of conversion. Whether or not it was the owner of the listed building, or an unauthorised individual who sold the sculpture to the museum, there is a risk that both seller and buyer would be guilty of an offence under the Dealing in Cultural Objects (Offences) Act 2003 unless it could be established that they were not dishonest and that they did not know or believe that the object was tainted.<sup>24</sup> Similarly, if an object from illegal metal detecting activity on a scheduled monument were sold to a museum there is again a risk of criminal sanction under the 2003 Act.

These two pieces of legislation, which form part of criminal law regime, demonstrate the recognition that there is a need to respect cultural heritage of particular states that might be at risk during times of war, but also the associative value of heritage that a heritage object may have with its archaeological or historical context.

However, where an object was taken from its place of origin years earlier and has been in the UK for many years there may be no direct legal impediment to acquiring this object because the current possessor would have the best title to the object and this could be passed on to the acquiring museum. This is because the statute of limitation would not only have barred the claimant’s claim, but would also have extinguished the original owner’s title. Where an object had been stolen before May 1981, under the Limitation Act 1939, the six year limitation period started to run from the original conversion, not from the first good faith purchase (which is now the position under the Limitation Act 1980).<sup>25</sup> It is clear that both Limitation Acts have an effect beyond a purely procedural one which would only bar a claim, but instead they alter who the holder of title to the object is.<sup>26</sup> Therefore, unlike the general position with regards to limitation periods, in the context of the tort of conversion

the effect of the Limitation Acts 1939 and 1980, is to bar the right as well as the remedy.<sup>27</sup> So far, there has been no successful claim that the extinction of title to cultural objects in this way is contrary to human rights legislation. In the case of land even though the extinction of title after a period of time necessarily affects the property rights of an individual, and may take effect without the payment of compensation, the Grand Chamber of the European Court of Human Rights (reversing the decision of the European Court of Human Rights) held that limitation periods pursue a legitimate aim in the general interest<sup>28</sup> and that the application of limitation periods in the context of adverse possession to land did not upset the “fair balance” under Article 1 of the First Protocol of the European Convention on Human Rights.<sup>29</sup> There is ECtHR jurisprudence which acknowledges the importance of protecting cultural heritage as a legitimate aim which may justify interfering with the peaceful enjoyment of possessions<sup>30</sup> as well as an emerging recognition of cultural identity.<sup>31</sup> However, this has not been applied directly, either in the ECtHR or in English courts, to claims for cultural objects from museums.<sup>32</sup> Therefore, by itself, it seems that at present there is little on which to base such a legal claim.

A more frequent situation will arise where museums, many years earlier, acquired objects for their collections and by now the Limitation Act 1939 will have extinguished the original owner’s title 6 years from the date of the conversion. This can be seen in several categories of claims. First, those claims involving dispossessions during the Nazi Era as a result of Nazi persecution. Despite the original act of dispossession being wrongful and most likely amounting to an act of conversion, title would, in legal terms, still have been extinguished six years after entering into the UK. Secondly, the 1970 UNESCO Convention was only ratified by the UK in 2002 and has no retrospective effect. Consequently, illicitly exported or stolen cultural heritage post-1970 but before 2002 may be found in museums, but no claim could be made for its recovery due to the extinction of the original owner’s title. Such objects might include elements of historical monuments, antiquities which are more than 100 years old or archaeological objects from excavations.<sup>33</sup> Thirdly, claims for human remains may be made, but there is no legal obligation to return these, not least because it is questionable whether any legal title in them existed in the first place.<sup>34</sup> Fourthly, indigenous communities may have been dispossessed of objects which were taken to be housed in museum collections, but for which they did not give permission for removal. In these

situations the claimant communities will often have a continuing relationship with the objects which may well form part of a cultural practice. Finally, an object in a museum may have been acquired by wrongful taking during times of war, but many years earlier than 1970. Examples might include the Benin Bronzes and the Maqdala treasure now housed in the British Museum.

The first four of these categories are what Campfens has called the grey areas where moral claims are necessitated because of the lack of a legal claim.<sup>35</sup> It is to the question of how moral claims arise and to the common issues relating to the different categories of these moral claims that the discussion now turns.

### **How moral claims emerge**

“Disputes about who has good title – who is the legal owner – must be distinguished from disputes about who has the best moral right to the item in question. Claims are often made against museums and galleries, in this country and elsewhere, for the return of objects, where the claim is not (or not mainly) based on legal ownership, but on moral considerations.”<sup>36</sup>

Any claim for an object where legal title has been lost would necessarily need to rest on an extra-legal claim since the current possessor museum would otherwise be entitled to the object based on its better title. It is argued that claims will necessarily be based on moral reasons as to why it is more appropriate that the claimant either have possession of the object, or have some entitlement to be consulted or involved in the decision-making process about the curation of the object. It is argued that this claim to an entitlement would then have a strength which would be recognised as moral title to the object. Gillman suggests that where a possessor has good title (i.e. legal title) then any claim made for the return of a cultural object would necessarily take a moral rather than legal form such that the claimant would frame it in terms that he ‘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>37</sup> It is acknowledged in legal scholarship that there are moral rights which “exist independently of any legal system”, but which are shown to exist “by moral argument”.<sup>38</sup> They are “capable of being deduced from the nature and experience of



ourselves, and the world and society in which we live. Rational people can recognize such rights independently of their being given force of law.”<sup>39</sup> It is argued that in the context of cultural objects such moral rights have been reasoned by the arguments made in favour of facilitating the resolution of claims. These have arisen in the contexts discussed in the previous sections and will be more fully analysed below. It is argued that where a moral right exists, there is also “a moral right against the wrongdoer that he will correct the wrong he has done.”<sup>40</sup> In the context of cultural objects now in museums one problem is that the wrongdoer may not now be the person against whom any moral claim can be made, but instead it will be the museum which now possesses the object against whom a claim (more usually for transfer) will be made. In such circumstances, whilst the museum may have benefited from the original wrong, it did not cause it and the claimant will usually not be original owner, but may be an heir or a descendant of the originating community, but who can show a continuity of belief, customs or religion. In these circumstances, though, it may be more accurate to talk of claims, rather than rights.<sup>41</sup> Frequently the term ‘rights’ is used to denote a claim that a person may make against another but ‘claim’ is appropriate phraseology for the situations that arise in the context of cultural objects since statements of entitlement will be couched in terms of claims which may be given effect to, rather than absolute rights.

There are two ways in which one could analyse these moral claims. The first is that these are historical claims which have survived the years based on the original owner’s loss of property. The basis on which these claims are made is arguably a type of historical entitlement<sup>42</sup> which has at its basis the moral circumstances. This could be based on the circumstances of the dispossession, which may have taken place as part of the commission of a crime against humanity.<sup>43</sup> Alternatively, these could be analysed as situations where the remedy is focused on the claimants who require acknowledgment of the wrong that befell their forefathers and that this acts as part of the reconciliatory justice.<sup>44</sup> Thompson treats claims for family heirlooms as a situation where the later generations have the claim to the object and the importance of the object to the family means that the claim preserves down the generations.<sup>45</sup> This would cover the situation where claims are made for the return of cultural objects that were owned by Jewish families but which were taken during the Nazi Era. The importance of recovering these objects may pass down the generations such that

their recovery now takes on a symbolic value.<sup>46</sup> However, where the circumstances of loss took place in the context of breaches of human rights or crimes against humanity then there may be an ongoing obligation which is not based on a historical claim, but which has continued to the present day. In this regard, Vrdoljak suggests that indigenous claims are not just about historic injustices, but are about continuing violations of human rights or 'violation of their right to self-determination'.<sup>47</sup>

Gillman identifies three bases on which moral claims to cultural objects outside the legal system may be grounded: 'remedying historical inequity'; 'the overall utility [being] greater in one place than another'; or 'a collective right to the property'.<sup>48</sup> Nazi Era dispossessions would fall into the first of these categories as would objects or human remains that were taken during colonial times from indigenous originating communities. Claims from such communities would also fall into Gillman's third category. Wrongful taking of cultural objects may well fall into all three categories (whether before or after the 1970 UNESCO convention came into force).

Whilst these claims arise in a variety of different situations, there are commonalities in the way in which they arise and in the way in which they can be resolved. One common feature of certain types of moral claims that has found widespread public support and which have been justified on the basis of moral reasoning is where the circumstances of loss involved genocide, crimes against humanity or some other breach of human rights and therefore acceding to claims is a means of remedying the historical inequity as Gillman would describe it. This can be seen in the context of Nazi Era dispossessions which have been treated as *sui generis*, because of the scale<sup>49</sup> but were recognised because of 'methodical and systematic manner' of dispossession as it was directed at specific people,<sup>50</sup> which was not just for the Nazis' self-enrichment but also 'formed an integral part of their attack on other races'.<sup>51</sup> Cotler has described these widespread dispossessions as thefticide.<sup>52</sup> This close link with genocide and crimes against humanity has therefore been a justification for the differential approach<sup>53</sup> and the keenness to facilitate return of Nazi Era dispossessions. The similarities with genocide and the past infringement of human rights has also been seen as justification for the restitution of Aboriginal human remains.<sup>54</sup> However, as Scovazzi points out,

‘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>55</sup>

These fundamental moral entitlements might arise from the circumstances of dispossession which may fall short of genocide, but would nevertheless be considered morally questionable.<sup>56</sup> They include claims made by states to cultural objects that they treat as emblems of their cultural heritage. Some objects of cultural importance may have been lost by communities or nations during times of unequal power relations or as a result of war or colonial dispossessions; prime examples of this are found in the British Museum in the cases of the Benin Bronzes and the Maqdala Treasure (the latter having been described by a Parliamentary Select Committee as being one of the clearest examples of when a museum should give effect to a moral claim.<sup>57</sup> Where the circumstances of dispossession are morally questionable then this may lend strength to a moral claim, so too might the actions of the museum when they initially acquired the object; the provenance research undertaken by the museum may have fallen short of the standard that would have been expected at the time. UNESCO, through its Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation and the ICOM-WIPO Art and Cultural Heritage Mediation initiative, shows a strong international commitment to such claims and the need for return.

Strong parallels have been highlighted between Nazi Era claims and those for indigenous cultural objects in terms of the contexts of removal, the discourse about the objects, return being a form of redress as well as the importance of the assertion of control.<sup>58</sup> However, similarities can also be drawn with other acts of dispossession. For example the removal of objects from the City of Benin in 1897. There is a similarity of the context of removal, although in a shorter period of time than in the case of Nazi Era and colonial dispossessions. The discourse concerning the objects and return as a form of redress and the importance of control hold similarities across these different objects. This can be seen by the importance attributed to the recent return of certain Bronzes to the Oba of Benin by a private individual whose grandfather acquired them during the post-conflict looting.<sup>59</sup> It is therefore argued that similar moral claims could be justified on these bases.

### *Facilitating moral claims through legal mechanisms*

National museum collections<sup>60</sup> are protected in legal terms by governing statutes such that the museums are only permitted to transfer objects from their collections in the most limited of circumstances.<sup>61</sup> This is predicated on the basis that these collections are retained for the public benefit and should remain intact for future generations. The limited circumstances in which transfer can take place tend to be where objects are duplicates, consist of printed material that can easily be reproduced or where the objects are decaying.<sup>62</sup> It has been confirmed by the High Court that this prohibition could not even be side-stepped where there was a strong moral argument for transferring an object to a claimant based on the morally questionable circumstances in which the original owner lost possession of the object.<sup>63</sup> However, Parliament has enacted two significant exceptions to this general rule which now permit transfers in circumstances where there is no legal right to have an object transferred to a claimant, but where there is arguably a moral argument in favour of this. The first, relates to human remains and permits the transfer of human remains of people who died less than 1,000 years before the Act came into force out of their collections 'if it appears to them to be appropriate to do so for any reason'.<sup>64</sup> This change to the law came about because of the recommendations of the Working Group on Human Remains<sup>65</sup> and the strong political support from the UK and Australian Prime Ministers.<sup>66</sup> The second exception concerns the transfer of cultural objects of which the original owner were dispossessed during the Nazi Era. Here, under the Holocaust (Return of Cultural Objects) Act 2009, national museums have the power to transfer objects to claimants where this course of action has been recommended by the Panel and then approved by the Secretary of State.<sup>67</sup>

Both of these relaxations of the general legal presumption against transfers from national museum collections were brought about by a realisation that there were legitimate non-legal claims based on moral grounds which might be made by original owners or originating communities. Neither statute prescribes automatically acceding to claims, but instead provide facilitatory mechanisms for responding to claims in appropriate circumstances.

Museums established as charities are also under restrictions about when they can transfer objects from the collections, but this would include circumstances where they felt under a

moral obligation to give an object to a claimant, such as a situation where the object had been taken during the Nazi Era.<sup>68</sup> An example of this is the Courtauld Institute which, following the recommendation of the Panel in the *Feldmann* claim, transferred objects from its collections to the claimants with permission of the Charity Commission.<sup>69</sup>

Contrastingly, local authority museums which are not set up as charities will tend to be under no legal prohibition on transferring objects from their collections. Nevertheless, they would be under the general ethical obligation against disposal from museums found in museum codes of ethics and which applies to all types of museum, regardless of legal structure. These are discussed below in the context of ethical norms.

### **Recognition of moral claims in ethical instruments**

Through a variety of ethical norms found in museum codes of ethics and associated guidance there is an increasing recognition of a pre-existing and persistent entitlement on moral grounds. Museums shift themselves away from reliance on traditional legal concepts of title to a more ethical notion of title to cultural objects. Not only can this be seen in the way in which museums act as ethical guardians,<sup>70</sup> but also through their focus on ensuring, when they acquire objects, that they obtain valid title to them.<sup>71</sup> Furthermore, in the context of existing collections, we can see that museums recognise that their strict legal entitlement might need to give way to a moral one, for museums are entreated to be cognisant of potential claims for restitution or repatriation of objects from within their existing collections.<sup>72</sup>

This section analyses the way in which both the framework of ethical norms derived from professional codes of ethics and other guidance recognise the validity of third party claims to cultural objects that are held by museums. Where museums seek to acquire objects there will be incumbent on them Each of these is analysed below. First, when acquiring objects for their collection, museums should ensure that the objects are not tainted by any potential legal or moral claims. Secondly, in the context of their existing collections (i.e. historically acquired objects) museums need to be alert to potential third-party claims which may again be made on either legal or moral grounds.

### ***Acquisition of objects***

Above it was seen that in many situations there may be no legal bar to a museum acquiring an object that was converted many years earlier, because of the expiration of the original owner's title under the statute of limitation. However, the ethical norms by which museums conduct themselves (and which often tend to exceed the legal obligations) would encourage against such an acquisition if the original owner or originating community or state might be thought to have a claim based on moral grounds. This can be seen in both the international and national museum codes of ethics and it is clear that they apply to the grey areas identified by Campfens.<sup>73</sup> First, this can be seen through ICOM's concept of valid title<sup>74</sup> which aims at ensuring that objects are free from taint.<sup>75</sup> Such taint may result from the fact that the original owner of the object was dispossessed of it without permission, for example by theft or a sale that was forced because of duress, or in general circumstances of persecution.<sup>76</sup> Valid title is described as the 'Indisputable right to ownership of property, supported by full provenance of the item since discovery or production'.<sup>77</sup> This means that even if a museum could show that it had a defensible legal title to the object, acquired by virtue of statute of limitation, it would nevertheless need to show that it had made every effort to undertake the appropriate due diligence to establish a full ownership history.<sup>78</sup> Museums have effectively imposed on themselves obligations of good faith which in many situations will require them to undertake obligations in excess of their strict legal duties. The UK's Museums Association Code of Ethics categorically states that there are certain circumstances where objects should be rejected. First, where there is a suspicion that the object has been stolen<sup>79</sup> and secondly where there is any suspicion that it has been 'wrongfully taken during a time of conflict'.<sup>80</sup> In the situation where there is a suspicion that it has been stolen there is a proviso that the museum might be able to acquire it, if it had consulted the 'rightful owner' and the acquisition was aimed at bringing the object into the public domain.<sup>81</sup> This provision therefore treats the original owner as being having a continued moral entitlement to be consulted about the appropriate treatment of the object.

Museums are required to reject objects that have been illicitly traded where it is clear that this happened after 1970. Thus, although the UNESCO Convention 1970<sup>82</sup> did not enter into force until 1972, it appears to be treated as a date after which museums have an enhanced standard of due diligence; in effect, museums have been put on notice about the illicit trade by virtue of the international commitment to fighting against which was expressed in the

convention itself.<sup>83</sup> The use of the date of 1970 reflects the way in which international legal instruments which show a commitment to ethical behaviour, but which may not have been adopted by a country, can influence the ethical treatment of cultural objects. Therefore, this date now acts as an ethical marker, after which point museums should be aware of the inappropriateness of acquiring objects which have been illicitly traded after this date.

It seems that the museum profession recognises that there is a continued relationship between the object and the original owner (or the community from which the object originates), for in the MA's Acquisition Guidance it 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>84</sup> It recognises, therefore, that others may have a claim to objects based on moral grounds, which should be taken into account before acquiring the legal title to objects.

### *Existing collections*

The UK Museums Association (MA), in its Code of Ethics, entreats museums to act as ethical guardians,<sup>85</sup> holding their collections 'in explicit or moral terms...in trust for the benefit of the public';<sup>86</sup> therefore the relationship between the museum and its collections is one of a guardian or steward caring for the collections, yet acting on behalf of the public.<sup>87</sup>

Within the framework of ethical norms, there is a clear presumption in favour of the retention of museum collections and there are strong sentiments against disposals outside the public domain, particularly where these are financially motivated.<sup>88</sup> The MA has even gone as far as engaging disciplinary procedures where museums have disposed of objects for purely financial motives and without fulfilling the justifications for such disposals.<sup>89</sup> Nevertheless, it is clear that within this context it is recognised that third party claims may be made for the transfer of cultural objects and that these should be dealt with in a sensitive manner.<sup>90</sup>

It is clear that by virtue of their ethical codes, museums in possession of objects to which others may claim an entitlement on moral grounds are expected to initiate dialogues relating to these holdings.<sup>91</sup> Restitution should happen where it is clear that an object was

exported or transferred in violation of laws such that museums should (if permitted by law) take 'prompt and responsible steps to co-operate in its return'.<sup>92</sup>

### *A risk of subjectivity?*

Concern has been expressed about the subjectivity of moral rights.<sup>93</sup> However, in addition to the ethical norms found in museum codes of ethics, there are various other international commitments to such moral claims. Statements of international commitment as far back as 1943 with the Inter-Allied Declaration and the more recent declarations such as the Washington Conference Principles and the subsequent statements of principles demonstrate a clear and widespread commitment to the existence of these rights in the context of Nazi Era possessions in a concrete form and which are not simply subjective but have developed as a consistent policy. Indeed, the Allies' commitment to restitution was clear from the post-war restitution laws that were set up in Germany in the different military zones.<sup>94</sup> International conventions such as the 1970 Convention have shown a deep-rooted international commitment to the fight against the illicit trade in cultural objects and the recognition that some objects form an integral part of a nation's heritage and the museum profession, in its professional codes of ethics, have followed the spirit of this and other international conventions in providing a higher moral obligation than the strict legal one. Claims made by one state against another on moral bases are clearly envisaged in the context of both UNESCO and WIPO, as discussed above.<sup>95</sup> In the context of indigenous claims for human remains international commitments such as the Vermillion Accord,<sup>96</sup> together with domestic guidance such as the DCMS Guidance on Human Remains<sup>97</sup> demonstrates a firm commitment to the appropriateness of return of human remains. Furthermore, indigenous claims for other cultural objects are directly supported by the UN Declaration on the Rights of Indigenous Peoples.<sup>98</sup>

The existence of these varied types of claims have common elements which link the moral bases on which claims may be brought which do not have resort to subjective considerations, but can be identified objectively. Whether a claim is upheld in principle will depend on the balancing up various considerations and the focus will now turn to such a claims process and the way in which a moral claim may result in the identification of moral title.



## **The emerging concept of moral title**

The notion of the importance of moral as well as legal title to cultural objects was first raised in the context of auctions<sup>99</sup> and has since developed in the field of museums.<sup>100</sup> It is argued that one can interpret the work of the Panel as recognising the existence of an entitlement by claimant which is based on moral grounds, which might be called a moral title to the original object. This arises because the Panel has determined (based on its assessment of the overall legal, factual and moral situation, specifically (a) the moral strength of the claim, or (b) the moral obligation on the museum),<sup>101</sup> that the claimant is entitled, based on moral grounds, to some remedy. This may be by recommending the return of the object, the payment of either an *ex gratia* payment or compensation, or the display of the account of the object's history next to the object in the museum.<sup>102</sup> It is argued that this moral title is now vested in the claimant, as heir to the original owner's estate. This moral title may either have been inherited by the claimant from the original owner, or may have vested first of all in the claimant by virtue of the Panel's recommendation. Moral title could therefore arise at various stages. Each of these is analysed below.

### *Legal and moral title existing conterminously in the case of all personal property*

It is argued that there is a moral element to property entitlement such that in the event of any theft it could therefore be considered that the original owner is the 'rightful owner' in moral terms such that theft elicits 'widespread disappropriation'.<sup>103</sup>

Arguably a moral title to property exists regardless of whether the object is cultural heritage or something more fungible in nature in terms of one tends to think of the legal owner as morally entitled to his property.<sup>104</sup> However, statutes of limitation clearly recognise that later possessors should, after a specified period of time be free from a claim by an earlier owner.<sup>105</sup> It would seem therefore, that any moral title would be extinguished by the statute of limitation at the same time as the legal title. However, it might be argued that the position of cultural objects is different. This could be by virtue of their special status as having a value beyond their financial one.<sup>106</sup> Yet, such an abstract value of the objects may not be sufficient by itself to provide justification a moral entitlement that would survive limitation periods, rather the value that might justify a continuing moral entitlement would

need to be the value *to someone* in particular. This might be shown if the object in question is a central part to a practice which may have a sacred significance to a community, or where the object is inextricably linked to the identity of the community or nation. Repatriation and restitution of cultural heritage objects has a powerful role to play and return can, through a process of re-socializing of objects, provide a means of ‘preserving and renewing the intangible aspects of heritage’<sup>107</sup> and can lead to renewal of cultural values.<sup>108</sup>

Moral title only arises where the original legal title holder was dispossessed of a cultural object in morally repugnant circumstances.

Alternatively moral title could be theorised as persisting and surviving any statutory extinction of the legal title as a direct result of the particular circumstances in which the original owner lost possession of the cultural heritage object. Here it would be the moral repugnancy of the loss that justifies the persistence of a moral title that survives the original owner’s legal title. In the case of Nazi Era cultural objects the loss in the context of the genocide of particular groups has frequently been used as justification for the special treatment.<sup>109</sup> Therefore, in the context of the Panel’s work involving dispossessions at the hands of the Nazis in the context of persecution of the Jews, we can see that such circumstances could act as the necessary factor that allows the moral title to survive the limitation periods. However, even within the work of the Panel, there is clear support for the extension of the necessary level of moral repugnancy to losses which have no link with genocide and yet the moral title was still established and justified return of the object. The Benevento Missal which became part of the British Library collection was, on the balance of probabilities removed (probably stolen) during the confusion of war in Italy, most likely when the Allies had requisitioned the building in which the manuscript was housed. In the Panel’s Report, more emphasis was placed on the circumstances in which the museum<sup>110</sup> acquired the manuscript; the museum’s provenance checks, even measured against the standards of the day, were found wanting. The curator should have enquired further when it became apparent that the manuscript was written in Beneventan script and was likely to have originated from Benevento. The Panel did not assess the cultural value of the object. No analysis was contained in the report about the moral strength *per se* of the claimant’s claim; instead, more focus was placed on the moral obligation on the museum resulting from the circumstances in which it acquired the manuscript. However, it is argued that the

Chapter House's original ownership of the manuscript, together with the circumstances of loss were still sufficient to give the Chapter House a continuing moral entitlement to the manuscript, justifying its return.

Such a title therefore arises, not when the original owner acquires the object, but on the occasion of his being dispossessed of it. This might be either when there was a direct seizure or within general context in which dispossession took place (the overall persecution of the Jews). The Panel expressed in strongly emphatic terms the fact that in the case of a seizure by the Gestapo of a collection of artworks, the claimant's had a strong moral claim.<sup>111</sup>

#### *Moral title only arises on the recommendation of the Panel*

An obvious point at which moral title could arise is when the Panel actually makes a recommendation that there is sufficient strength to the claimant's moral claim or where it recognises that a moral obligation rests on the museum which justifies a remedy. On this analysis the Panel would either be creating a moral title at this point, or it could be said to crystallise on the recommendation by the Panel that a claim is sufficiently strong or the museum is a moral obligation such that a remedy is justified.

#### *Overview analysis of the proposals*

Whether or not the claimant's entitlement derives from their forefathers (i.e. the original owner) and would therefore be based on an historical entitlement<sup>112</sup> or their own entitlement in terms of historical injustices and reconciliatory justice<sup>113</sup> nevertheless, by giving effect to moral claims or recognising that museums have a moral obligation to return the object to the claimant, the Panel is recognising a moral title that is enjoyed by the claimants in that the moral strength to their claim is sufficiently strong to justify a remedial response.

In the first two propositions above, moral title would have needed to devolve to the original owner's heirs. This therefore relies on it being capable of being inherited and sufficient to allow the claimant to frame a claim against the possessor-institution derived from his ancestor's original legal title and concurrent moral title. A clear difficulty arises with this fiction in that the moral claim arguably only arose in 2000 upon the establishment of the Spoliation Advisory Panel. Alternatively moral title could be treated as being implied as early

as 1943 by the Inter-Allied Declaration<sup>114</sup> when the state-parties reserved their positions to declare invalid transfers of property. However, doubts have been expressed about its current customary law status because of states' overall non-compliance with its provisions.<sup>115</sup>

A particular problem arises if one analyses the moral claim coming into existence on the formation of the Panel. This approach might be framed within the context of Thompson's approach to treating the current claimants as having claims in their own right which are based on reconciliation rather than historical entitlement.<sup>116</sup> 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. This would mean that 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 might arguably be weaker than that of his ancestor since it is based on his own loss rather than the original owner's. Under this analysis, if the Panel were to award an *ex gratia* payment it could be said that the award should be made on the basis of the loss of the chance of inheriting the object, rather than the loss of the actual object.<sup>117</sup> However, treating the claimant's loss as his own is inconsistent with the approach taken by the Panel so far in its recommendations where it tends to treat the claimant as stepping into the shoes of the original owner. This can be seen in the *Tate Gallery/Griffier* claim<sup>118</sup> where the Panel assessed the strength of the original owner's claim<sup>119</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>120</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>121</sup> the fact that that did not reduce the strength suggests that the claimant is treated in a manner which assumes that it is his ancestor actually making the claim. Claimants show their entitlement by a series of bequests made down the generations. The approach therefore seems to be that: had the original owner been alive then morality would dictate that the painting ought to be returned and therefore it ought to be returned to the heir. This moral entitlement does appear to be treated as being of a proprietary nature since it is something that is inherited.

It seems more likely in practice though, that the moral entitlement crystallises, at the time that the Panel makes a recommendation based on its assessment of the strength of the

claim and whether any obligation rests on the possessor institution. Until then no entitlement has crystallised, but rather merely a claim exists.

When the Panel makes a recommendation to return an object then that creates a moral entitlement that has been recognised by an independent body. It still remains for the institution to agree to that recommendation and to give effect to it through the transfer of the legal title to the claimants. It is therefore fragile in nature because it is not something that would be upheld by the courts. Nevertheless, it is clear that were a museum to refuse to follow a recommendation of the Panel then professional embarrassment is likely to ensure compliance with its terms.

### **Ways in which to give effect to moral title**

If the person who enjoys good title therefore has a right to possession and we treat moral title in a similar vein to the person who has the best title to the cultural object, then it seems appropriate to suggest that a successful claimant, would be entitled to have the object transferred to him. In most cases, where the claimant has been successful the Panel has recommended that the museum should transfer the object to the claimant. Moral title could be said to merge with the legal title when the legal title is transferred and that would be the only title on which the claimant would need to rely in the future. This is similar to a situation where property is owned by an individual and there is a merging of both the legal and equitable title (where it is unnecessary to talk about the two as separately occurring), rather than where property is co-owned where it is necessary to separate the legal and equitable interests.

Where the Panel recommends the payment of an *ex gratia* sum and that the object remains in the museum, were this to be accepted by the claimants in full and final settlement of the claim<sup>122</sup> then the claimant's moral title would surely cease to exist.<sup>123</sup>

The remedy of the display of an account of the object's history, as well as being recommended in conjunction with the payment of an *ex gratia* sum can also be recommended as a freestanding remedy. This approach has also been adopted by the Dutch and German panels. This has occurred even where the Panel made no accompanying recommendation of the payment of an *ex gratia* sum and consequently this

commemorative action has been the only remedial response despite there being a moral strength to the claim, albeit one that does not justify return. Appropriate situations include where the claimant's had already been compensated or where the forced sale was not at a significant undervalue.<sup>124</sup>

Alternatively, the Panel may have recommended that the museum retains the object but that it should display an account of the object's history next to it. Here moral title would not entitle the holder to possession of the object, but rather to an entitlement regarding the manner in which the object is, in future, displayed. To this end, the use of the word 'title' may differ somewhat from the traditional legal concept of title which equates to the entitlement to possession. However, it could nevertheless still be described as the quantum of interests<sup>125</sup> that the holder has, (albeit not an interest to possess, but something altogether different) and correspond with the approach that suggests that it is possible to have title to a lesser interest in property.<sup>126</sup> Potentially a museum may well overlook the need to display the account of the object's history in the future and display it without the explanatory text. In such a case it would need to be considered if a claimant has accepted the Panel's recommendation as full and final settlement of a claim and the museum failed to display the account then this failure could have the effect of allowing the claimant to revive his claim. Whilst in theory, a moral title could give the claimant the right of some form of redress, it would be difficult to quantify what this would be, for he would not have suffered any financial loss. A recommendation of the payment of a nominal sum would seem inappropriate here as the very nature of the original remedy was commemorative in nature and necessarily not loss-based. It might seem more appropriate then to require performance of the obligation itself since damages would be inadequate.<sup>127</sup> Having said that one could envisage that in many situations, if the account were omitted then the museum would be willing to reinstate it without any further recourse to the Panel being necessary.

### **Applications beyond Nazi Era claims**

Dispossessions at the hands of the Nazis have been treated in the UK as *sui generis* as discussed above. Yet, 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>128</sup>)

and so the Panel 'not without some hesitation' accepted jurisdiction of a claim for the return of the Beneventan Missal<sup>129</sup> even though it had no direct connection with the actions of the Nazis. As discussed above, it was most likely to have been removed during or after the Allied bombardment in 1943.<sup>130</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 actions that fall short of genocide perpetrated on a particular group.<sup>131</sup> The author has argued elsewhere that this claim provides support for the possibility of establishing moral title in claims brought by other groups since the determinations by the Panel are not based solely around the genocide or persecution suffered by the claimant group.<sup>132</sup>

Furthermore, the Benevento Missal recommendation, is the only claim where the claimant was a legal rather than natural person and where the claimant was actually also the original owner (usually claims are made by heirs of the original owner). This feature of the claim lends further gives support to any argument which seeks to justify the extension of these principles of moral title to other claimants, such as communities or nations, rather than to specific, identified heirs. As a concept then, moral title has the potential to extend beyond purely Holocaust-related dispossessions and to apply more widely to 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>133</sup>

Campfens suggests that 'The question of whether any specific procedure can serve as an example for future models will, in the end, depend on the use, acceptance and authority of the solutions to deal with disputes as they emerge.'<sup>134</sup> It is argued that the bases on which the Panel determines the moral strength of the claim and any moral obligation on the museum are starting to develop into objective principles that can be applied in subsequent moral claims.<sup>135</sup> By focusing on moral title, rather than taking either restitution or identifying the 'rightful owner' as the starting the process permits the balancing of different factors to reach a solution that will respond with nuance to the moral circumstances. If the moral strength of the claim lends itself to return as a remedy then this is an available option. However, in a situation where the claimant or his descendant received financial recompense, either by receiving the market value of the object, or post-war compensation then alternative remedies can be considered instead.

To further develop the concept of moral title, it may be relevant to take into account the public benefit that is derived from a cultural object so that that can be weighed in the balance when considering how to give effect to moral title. It may be, that where there is little connection between the claimants and the original object, the public benefit derived from the object far outweighs the benefit of receiving the object, rather than money or some remedy. This approach can be seen in the Dutch case involving the *Semmel claim* where some objects were returned to the heirs, whereas others were retained by the museum since the interest of the museum in making those objects available to the public outweighed the emotional and moral interests of the claimants in having the objects returned to them.<sup>136</sup> In this way, in circumstances where the value of the cultural heritage object may be more fully realised in the public domain, this is a factor that could be taken into account when determining the appropriate course of action to take. Further, the remedies which could be used to respond to the recognition of the claimant's moral title could include collaborative ventures or other civil society solutions<sup>137</sup> to cultural heritage disputes.

Although in a Scottish, rather than English context (but where the differing legal systems does not affect the analogy), the approach taken to hearing moral claims can be seen in the procedure adopted by several institutions with a resultant moral title. The 'influential model'<sup>138</sup> of Glasgow City Council,<sup>139</sup> commended by the Select Committee,<sup>140</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>141</sup>



Rather than focusing on the circumstances of the loss of possession in establishing the strength of the claimant's claim in Panel recommendations, here the moral strength of the claim is derived from the cultural and religious importance of the object to the claimant community. It also looks at the moral obligation on the museum derived from the circumstances in which the object was acquired by the museum. These factors, again take into account the moral aspects of the claim, and their application can be seen in the context of the successful claim for the Lakota Ghost Dance Shirt which was returned to the Lakota people in 1999. The return of shirt was described as "an exception to the general presumption against return because of its unique position in the history of the Lakota, because of the way the object found its way into Glasgow's collection, and because the delegation were able to meet the Council's concerns for the long term preservation of the object."<sup>142</sup>

## **Conclusion**

It has been argued that the concept of moral title to cultural objects has developed as a concept and can be derived from the decisions of the UK's Spoliation Advisory Panel. Moral title provides a mechanism by which to recognise the particular strength of the moral claim and also the situations where there is a moral obligation on the institution regarding the object. Despite the difficulties in establishing exactly when the claimant's moral title comes into existence there is a strong argument for saying that when the Panel 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. This recognises that the claimant has an entitlement to have the physical object transferred to him, to receive some monetary recompense or to have the history surrounding the original owner's dispossession of the object commemorated publicly.

The concept of moral title provides a framework in which to classify those with an entitlement to cultural objects that may, in certain circumstances, take precedence over the legal title of the possessor institution. It also provides a means by which to frame the wider debate since it provides a more objective means by which to approach claims for cultural objects rather than using more subjective approaches such as talking of the 'rightful' or 'true owners' or by focusing solely on claims for restitution. The Panel demonstrates a situation

where an independent body which has government backing recognises an entitlement to cultural objects that is based on one of the grey areas identified by Campfens' and where the strength of that interest (the title) on moral grounds may be recognised. In some instances the strength of this interest means that the moral title will trump that of the legal owner and justify the return of the object to the original owner. However, this will not always be the case. A moral entitlement may well be recognised, but its strength, whilst strong enough to be categorised as such is insufficient to justify trumping the legal title.

Moral title avoids the focus being on 'rightful owners' or restitution. By starting from these points, the debate can become polarised if one starts with the view that one person is the 'rightful owner', particularly in situations where the museum came into possession of the object innocently. Instead, a balancing exercise can be taken and a determination made about the relativity of the parties' entitlement, both legal and moral. The concept of moral title permits the recognition by decision-makers that other factors are involved and that it is not a simple question of an object being returned to an original owner.

Moral title fits in neatly within the English law principle of relativity of title to property (even in the absence of any argument that it should have legal effect). Here a moral title comes about (without any automatic legal force and therefore without any automatic priority over existing legal title). Nevertheless, it is still something that is pitted against, or is enjoyed by one party at the same time as the legal title is enjoyed by another. For example, the claimant's moral title may require the legal title holder to display an account of the object's history next to the object whilst it is on display.

There has clearly been strong support for the return of Nazi Era cultural objects to their pre-war owners. The Panel has acceded to claims for return in circumstances where the objects were seized, or where the original owners did not receive the true market price at the forced sale or where they have been uncompensated. In cases where there was clearly a strength to the moral claim but the claimant had received compensation or adequate consideration at the sale the Panel has recommended that the object remain in the museum and that an account of the object's history be displayed. However, other claimant groups have not received as much support. If the Nazi Era claims process and the entitlement enjoyed by the claimants can be framed as a tangible concept that can be transposed to the

context of resolving other claims for cultural heritage this will facilitate the development of principles that can be applied to claims elsewhere but also demonstrate that where the moral title is based on objective principles these can justify action in other areas. The concepts developed by the Panel and which are given effect to in the concept of moral title are more objective than concepts such as 'rightful owner' which is found in the media.

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<sup>1</sup> E.g. Oltermann, "German collector accused of owning Nazi-looted art dies". On the first page of their introductory chapter to *Art, Cultural Heritage and the Market: Legal and Ethical Issues* Vadi and Schneider talk of 'the return of cultural artefacts to their *legitimate* owners' (emphasis added). In evidence in legal proceedings, the Director of the British Museum, Neil Macgregor, described the original owners from whom drawings, then in the British Museum, had been seized by the Nazis as the 'rightful owners': *Attorney General v Trustees of the British Museum* [2005] EWHC 1089 (Ch), para. 13.

<sup>2</sup> Palmer, "Responding to Conscience", 90 argues that the effect of the Limitation Act 1939 is unlikely to have conferred on the museum the legal title that was enjoyed by the original owner, i.e. ownership. He raises this point in the context of whether the object could vest in the trustees of the museum for the purposes of the British Museum Act 1963, s 3(4). Nevertheless, as English common law works on the basis of relativity of title the museum would still be able to claim a title in law greater than anyone else; it would thus have a title that a court would uphold.

<sup>3</sup> In English law the Limitation Act 1939, s 3(2) extinguished title 6 years after the conversion (wrongful interference with goods). Now the Limitation Act 1980 extinguishes the title of the original owner 6 years after the conversion (s 3(2)). In the case of theft, time will not run against a thief, but will run from the first conversion that it is unrelated to the theft (e.g. good faith purchase): s 4(2).

<sup>4</sup> Campfens, "Alternative Dispute Resolution," 77.

<sup>5</sup> Whether English common law could ultimately accommodate a legal concept of moral title within the framework of relativity title is a debate for another day.

<sup>6</sup> Smith, *Contract Theory*, 5.

<sup>7</sup> Spoliation Advisory Panel Terms of Reference ("SAP ToR").

<sup>8</sup> Namely the Museums Association, Code of Ethics for Museums (UK Museums Association, London 2008) ("MA CoE") and ICOM Code of Ethics for Museums (International Council of Museums, Paris 2006) ("ICOM CoE").

<sup>9</sup> Campfens, "Alternative Dispute Resolution," 77.

<sup>10</sup> Characteristics which a system of alternative dispute resolution in this field should strive for: see Campfens, "Alternative Dispute Resolution," 88 and Woodhead, "Nazi Era spoliation".

<sup>11</sup> Where reference is made to the UK, this refers to statutes, conventions or procedures that apply across the United Kingdom, rather than just to those museums governed by English law.

<sup>12</sup> Palmer, "Spoliation and Holocaust-Related Cultural Objects," 10 and Campfens, "Alternative Dispute Resolution," 82.

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- <sup>13</sup> C.f. Battersby and Preston, "The concepts of "property," "title" and "owner"" and Ho, "Some reflections on "property" and "title"".
- <sup>14</sup> Goode, *Commercial Law*, 34 and Sheehan, *The Principles of Personal Property Law*, 14.
- <sup>15</sup> Sheehan, *The Principles of Personal Property Law*, 13 and McFarlane, *The Structure of Property Law*, 146. Fox, "Relativity of title at law", 333 & 364 approaches title as essentially representing a claim.
- <sup>16</sup> See *Clerk & Lindsell on Torts*, para. 17-61.
- <sup>17</sup> Auld LJ in *Waverley Borough Council v Fletcher* [1995] QB 334, 345.
- <sup>18</sup> *Armory v Delamirie* (1722 1 Str. 505) NB that the Torts (Interference with Goods) Act 1977, s 8(1) does now allow a defendant to plead *jus tertii* (i.e. that a third party has a better claim) and that third party can then be added to the claim.
- <sup>19</sup> Where the defendant is given the option by the court whether to return the goods or pay compensation, questions have arisen as to the compatibility of this provision with the Human Rights Act 1998: Curwen, "The remedy in conversion", 580.
- <sup>20</sup> *Garcia v De Aldama* [2002] EWHC 2087 (Ch) (manuscript by Spanish poet Lorca was "intrinsically valuable"); *Duke of Somerset v Cookson* (1735) 3 Peere Williams 390 (Ch) (an object of antiquity, unique in nature) and *Pusey v Pusey* (1684) 1 Vern 273 (Ch) (an heirloom that had association with its owner).
- <sup>21</sup> Limitation Act 1980, s 4.
- <sup>22</sup> ss 8(2) and 8(3). Similar criminal sanctions are now also found in the The Export Control (Syria Sanctions) (Amendment) Order 2014.
- <sup>23</sup> i.e. without the necessary consent from the Secretary of State.
- <sup>24</sup> s 1(1).
- <sup>25</sup> Limitation Act 1980, s 4.
- <sup>26</sup> Limitation Act 1939, s 3(2) and Limitation Act 1980, s 3(2).
- <sup>27</sup> McGee, *Limitation Periods* para 2.020.
- <sup>28</sup> *J.A. Pye (Oxford) Ltd and J.A. Pye (Oxford) Land Ltd v UK* 44302/02 30 August 2007 (Grand Chamber), para. 69.
- <sup>29</sup> *J.A. Pye v UK* para. 85
- <sup>30</sup> See *Beyeler v Italy* (2001) 33 EHRR 52, *Kozacioğlu v Turkey* 2334/03 19 February 2009 (Grand Chamber) and *Albert Fürst von Thurn und Taxis v Germany* (Application No 26367/10).
- <sup>31</sup> *Chapman v UK* 27238/95 (Grand Chamber) and *Muñoz Diaz v Spain* 49151/07 8 December 2009.
- <sup>32</sup> Note, however, that there have been reports of a claim being submitted by Turkey to the European Court of Human Rights in connection with sculptures currently held by the British Museum: Dalya Alberge, "Turkey turns to human rights law"
- <sup>33</sup> The full list of types of property is found in Article 1. However, the definition of cultural property for the purposes of the UK's ratification of the convention is based on the EU list originally set out in 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.
- <sup>34</sup> Although note the situation where the remains have undergone some process of work or skill: see generally Woodhead, "Ownership, Possession, Title and Transfer"
- <sup>35</sup> Campfens, "Alternative Dispute Resolution." 78.
- <sup>36</sup> Scottish Law Commission, Discussion Paper No. 144, para. 1.7.
- <sup>37</sup> Gillman, *The Idea of Cultural Heritage*, 28.
- <sup>38</sup> Kamm, 'Rights', 476-477.
- <sup>39</sup> Stevens, *Torts and Rights*, 330.
- <sup>40</sup> Stevens, *Torts and Rights*, 336. Stevens envisages in this context that an apology might be an appropriate form of reparation.
- <sup>41</sup> Hohfeld, "Fundamental Legal Concepts", 32 and Kamm, 'Rights', 476.
- <sup>42</sup> See Nozick *Anarchy, State, and Utopia*, 152.
- <sup>43</sup> See Paterson, "Resolving Material Culture Disputes," 174.
- <sup>44</sup> Thompson, *Taking Responsibility for the Past*, 66.
- <sup>45</sup> Thompson, *Taking Responsibility for the Past*, 129. See also Sher in the context compensation for black and Native American communities: Sher, "Ancient Wrongs and Modern Rights", 16.
- <sup>46</sup> Cotler, "The Holocaust, 'Thefticide' and Restitution," 623.
- <sup>47</sup> Vrdoljak, "Reparations for Cultural Loss," 197 and 225. See also Paterson, "Resolving Material Culture Disputes" 174.
- <sup>48</sup> Gillman, *The Idea of Cultural Heritage*, 28.



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- <sup>49</sup> *Restitution of Objects Spoliated in the Nazi-Era*, para 1.2 and Seventh Report, para 193.
- <sup>50</sup> Feliciano, “The Great Cultural Robbery: the Plunder of Jewish-Owned Art”, 165.
- <sup>51</sup> *Restitution of Objects Spoliated in the Nazi-Era*, 8.
- <sup>52</sup> Cotler, “The Holocaust, ‘Thefticide’ and Restitution”, 602.
- <sup>53</sup> Paterson, “Resolving Material Culture Disputes,” 160.
- <sup>54</sup> Vrdoljak, “Reparations for Cultural Loss,” 197 and 225 and Paterson, “Resolving Material Culture Disputes” 174.
- <sup>55</sup> Scovazzi, “The Return of the Benev. VI29 Missal,” 294.
- <sup>56</sup> See MacDonald, “Daring to Compare”, 399-400 and who suggests that Maori as a whole may not have been subjected to cultural genocide, but that by seeking to invoke the Holocaust analogy this can “obscure the injustices perpetrated against Maori by successive New Zealand governments, and promotes neither healing nor understanding.”
- <sup>57</sup> Select Committee, “Cultural Objects,” para. 58.
- <sup>58</sup> Glass, “Return to Sender”, 123-128.
- <sup>59</sup> Otzen, “The man who returned his grandfather’s looted art”.
- <sup>60</sup> “National museums” are treated here as those governed by statutes and in receipt of direct government funding in accordance with the approach of the National Museum Directors Conference, Loans Between National and Non-national Museums.
- <sup>61</sup> See the Museums and Galleries Act 1992, s 4 and schedule 5 and the British Museums Act 1963, ss 3(4) and 5(1).
- <sup>62</sup> British Museum Act 1963, s 5.
- <sup>63</sup> *AG v British Museum*, para. 15.
- <sup>64</sup> Human Tissue Act 2003, s 47(2).
- <sup>65</sup> Palmer, *Report of the Working Group on Human Remains*.
- <sup>66</sup> Made in 2000 by John Howard and Tony Blair – quoted in Palmer, *Report of the Working Group on Human Remains*.
- <sup>67</sup> ss 2(1)-(2).
- <sup>68</sup> CA 2011, s 106(1).
- <sup>69</sup> Courtauld Gallery Collections, *Architectural capriccio – design for a stage(?)*.
- <sup>70</sup> MA CoE, principle 1.0.
- <sup>71</sup> ICOM CoE, principle 6.2.
- <sup>72</sup> See discussion under heading “Existing collections”.
- <sup>73</sup> Discussed above.
- <sup>74</sup> ICOM CoE, 14.
- <sup>75</sup> ICOM CoE, principle 2.2.
- <sup>76</sup> See the Inter-Allied Declaration and *Tate Gallery claim*, para. 42 and *Report of the Spoliation Advisory Panel in respect of a Painting Now in the Possession of Glasgow City Council* (2004 HC 10), para. 9.
- <sup>77</sup> ICOM CoE, Glossary, 16.
- <sup>78</sup> ICOM CoE, principle 2.3.
- <sup>79</sup> MA CoE, principle 5.9.
- <sup>80</sup> MA CoE, principle 5.8.
- <sup>81</sup> MA CoE, principle 5.9.
- <sup>82</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.
- <sup>83</sup> Prott, “The History and Development of Return of Cultural Objects”, 10.
- <sup>84</sup> Museums Association, *Ethical guidelines 1*, principle 3.9.
- <sup>85</sup> MA CoE, principle 1.0.
- <sup>86</sup> MA CoE, principle 1.5.
- <sup>87</sup> For the purposes of this paper, the terms ‘guardianship’ and ‘stewardship’ will be treated as synonymous. Marstine appears to support the interchangeable nature of these concepts (Marstine, “The contingent nature of the new museum ethics”, 18) whereas Geismar suggests that the term guardianship is used in the museum context and stewardship in the archaeology context (Geismar, “Cultural Property, Museums, and the Pacific”, 116).
- <sup>88</sup> See ICOM CoE, principles 2.13 and 2.15 and MA CoE, principle 6.0 and 6.14.

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- <sup>89</sup> E.g. Northampton Council's membership was barred for 5 years following the sale of the statute of Sekhemka: MA, "MA bars Northampton Museums".
- <sup>90</sup> MA CoE, principle 6.18.
- <sup>91</sup> ICOM CoE, principle 6.2.
- <sup>92</sup> ICOM CoE, principle 6.3.
- <sup>93</sup> E.g. Arvind, "Beyond 'Right' and 'Duty'", 157.
- <sup>94</sup> E.g. the separate US and British Military Government Law No 59 and see Palmer, *Museums and the Holocaust*, 122-123 and Robinson, "War Damage Compensation and Restitution", 374.
- <sup>95</sup> Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation and the ICOM-WIPO Art and Cultural Heritage Mediation initiative
- <sup>96</sup> *The Vermillion Accord on Human Remains*. World Archaeological Congress, 20 February 2009.
- <sup>97</sup> DCMS *Guidance for the Care of Human Remains in Museums* PP 847 (DCMS 2005).
- <sup>98</sup> United Nations Declaration on the Rights of Indigenous Peoples (adopted 13 September 2007) ) 61/295 2008.
- <sup>99</sup> Palmer, "Itinerant Art in the European Community," 284.
- <sup>100</sup> See Woodhead, "Moral Claims Against Museums," 1.
- <sup>101</sup> SAP ToR, paras 12(e) and 12(g).
- <sup>102</sup> SAP ToR, para. 13.
- <sup>103</sup> Merrill and Smith, "The Morality of Property," 1853.
- <sup>104</sup> See generally the distinction that Radin makes between property that is fungible, or for personhood: Radin, "Property and Personhood", 959-960.
- <sup>105</sup> Of course in the case of the 1980 Limitation Act if a thief or someone connected to the theft still possesses the object then time will not have started to run.
- <sup>106</sup> E.g. arguments have been put forward for a different limitation period in the context of art and antiquities: See generally Carey Miller and Redmond-Cooper. In the context of Nazi Era spoliation see Cuba, "Stop the Clock".
- <sup>107</sup> Simpson, "Museums and restorative justice," 122.
- <sup>108</sup> Simpson, "Museums and restorative justice," 125.
- <sup>109</sup> See for example O'Donnell who talks of the establishment of such panels 'privileging...Holocaust claims over those of other art-theft victims' such that future victim groups will need to 'surpass Holocaust-paradigmatic standards of suffering': O'Donnell, "The Restitution of Holocaust Looted Art and Transitional Justice," 70 and 71 respectively.
- <sup>110</sup> For it was the British Museum, as predecessor in title to the British Library, who originally acquired the object and whose standard of provenance checks was under scrutiny on this occasion.
- <sup>111</sup> 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 (2008 HC 602) [hereinafter *British Museum/Rothberger claim and Fitzwilliam/Rothberger claim*], para. 13.
- <sup>112</sup> See, for example, Nozick *Anarchy, State, and Utopia*, 152.
- <sup>113</sup> See Thompson, *Taking Responsibility for the Past*, 66.
- <sup>114</sup> Inter-Allied Declaration 1943.
- <sup>115</sup> O'Donnell, "The Restitution of Holocaust Looted Art and Transitional Justice," 60.
- <sup>116</sup> Thompson, *Taking Responsibility for the Past*, 66.
- <sup>117</sup> See the discussion of the 'standing' of claimants in Woodhead, "Redressing historic wrongs," 131-132.
- <sup>118</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)* [hereinafter *Tate/Griffier claim*].
- <sup>119</sup> *Tate/Griffier claim*, para 43.
- <sup>120</sup> *Tate/Griffier claim*, para 44.
- <sup>121</sup> *Tate/Griffier claim*, para 44.
- <sup>122</sup> Where a recommendation has been implemented the claimants are taken to have accepted this in full and final settlement of the claim: SAP ToR, para 11.
- <sup>123</sup> Unless other conditions were included in the recommendation which the claimant may need to enforce, such as the display of an account of the object's history.
- <sup>124</sup> *Report of the Spoliation Advisory Panel in Respect of Eight Drawings Now in the Possession of the Samuel Courtauld Trust (2009 HC 757) and Report of the Spoliation Advisory Panel in Respect of 14 Clocks and Watches Now in the Possession of the British Museum (2012 HC 1839)*.
- <sup>125</sup> As per Goode, *Commercial Law*, 34.

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<sup>126</sup> Ho, "Some reflections on "property" and "title"," 577.

<sup>127</sup> This corresponds to the approach in English contract law where judges only use their discretion to award specific performance where damages would be inadequate: *Co-Operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1.

<sup>128</sup> SAP ToR, para 1 and Holocaust (Return of Cultural Objects) Act 2009, s 3(3).

<sup>129</sup> *Report of the Spoliation Advisory Panel in respect of a 12th century manuscript now in the possession of the British Library* (2005 HC 406) [hereinafter *British Library/Benevento claim*], para 2.

<sup>130</sup> *British Library/Benevento claim*, para 52.

<sup>131</sup> See O'Donnell, "The Restitution of Holocaust Looted Art and Transitional Justice," 70 and 71

<sup>132</sup> Woodhead, "Redressing historic wrongs".

<sup>133</sup> See generally Woodhead, "Redressing historic wrongs".

<sup>134</sup> Campfens, "Alternative Dispute Resolution", 88.

<sup>135</sup> See generally Woodhead, "Nazi Era spoliation".

<sup>136</sup> C.f. Advisory Committee on the Assessment of Restitution Applications, "Binding Opinion in the Dispute on Restitution of the Painting *Landing Stage* ," para. 7.6 (return to claimants); Advisory Committee on the Assessment of Restitution Applications, "Binding Opinion Regarding the Dispute about the Return of the Painting *Madonna and Child with Wild Roses*," para. 7.6 (retention by museum) and 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* ," para. 7.7 (retention by museum).

<sup>137</sup> Brown, *Who Owns Native Culture?* 242.

<sup>138</sup> Curtis, "Repatriation from Scottish Museums", 237.

<sup>139</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>140</sup> Seventh Report, vol I (ibid) [199(x)].

<sup>141</sup> Glasgow City Council Memorandum, Seventh Report, vol II, Minutes of Evidence 18 May 2000. A similar approach can be found in Aberdeen University's Policy which looks at the following elements: 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.' Aberdeen University Museums, *Repatriation Procedure*.

<sup>142</sup> Glasgow City Council Memorandum, Seventh Report, vol II, Minutes of Evidence 18 May 2000.