
Introduction

The global impetus to care for cultural heritage has never been as important as it is today. Cultural heritage as an area of concern – vital as it is for global peace,¹ sustainable development² and respecting the identities of peoples³ – has been recognised by international organisations such as UNESCO since the 1950s. In recent years cultural heritage has had an augmented role on the international political and legal stages; it has been the subject of UN Security Council Resolutions,⁴ the first G7 Meeting on Culture took place in 2017,⁵ UNESCO's #Unite4Heritage initiative⁶ and 2018 saw the EU's European Year of Cultural Heritage.⁷

The need to respond to the modern-day destruction of cultural heritage objects and places during times of conflict and to stop the circulation of decontextualised objects has been a leitmotiv of the twenty-first century. Museums in possession of cultural heritage objects, of which the original owners lost possession during dark historical events, face difficult questions about justice across the generations. In times of austerity, some publicly owned cultural heritage may be at risk of sale to the highest bidder – with an attendant loss to communities for whom it is important. The continued

¹ Constitution of the United Nations Educational, Scientific and Cultural Organization (16 November 1945), Preamble and art. 1(1).

² United Nations, *Transforming Our World: The 2030 Agenda for Sustainable Development* (A/RES/70/1), Goal 11.4 – 'Strengthen efforts to protect and safeguard the world's cultural and natural heritage'. In the context of Wales, sustainable development includes improving the cultural well-being of Wales: Well-being of Future Generations (Wales) Act 2015, s. 2. Cultural heritage was included in the Final Declaration of the UNESCO World Conference on Cultural Policies and Sustainable Development – MONDIACULT 2022.

³ E.g. Universal Declaration on Cultural Diversity UNESCO 2001, art. 8, which describes cultural goods and services as 'vectors of identity, values and meaning'.

⁴ Both in response to specific problems caused in wartime (UN Security Council Resolution 1483 (2003) and UN Security Council Resolution 2139 (2014) relating to Iraq and Syria respectively) but also more generally (UN Security Council Resolution 2347 (2017)).

⁵ *Joint Declaration of the Ministers of Culture of G7 on the Occasion of the Meeting: Culture as an Instrument of Dialogue Among Peoples* (Florence, 30 March 2017): www.g7.utoronto.ca/culture/culture-2017-en.html (last accessed 15 May 2023).

⁶ UNESCO, #Unite4heritage.

⁷ Decision (EU) 2017/864 of the European Parliament and of the Council of 17 May 2017 on a European Year of Cultural Heritage (2018) OJ 2017 No. L131 20 May 2017, p. 1.

public display of statues commemorating historical figures may harm modern-day communities. These different areas of concern and contestation illustrate just some of the problems with which national and international legal systems must grapple.

As individuals, groups, as a nation or as humanity, there are strong feelings towards cultural heritage due to the links with these communities' history, religion or culture, often because it forms part of their identity. Harm to these objects, places and practices can cause harm to the community for whom they are important. However, harm can also be felt across borders, impacting communities or individuals further afield. International norms provide support for each individual's right to take part in cultural life. However, decisions about the appropriate course of action, particularly where conflicting views exist about why cultural heritage is important to different communities, pose challenges for domestic legal and non-law regulatory initiatives.

This book is not simply about the monumental or the prized possessions of the internationally renowned museum, but rather it is about all types of cultural heritage within the UK, which may be important to communities for often very different reasons.⁸ In some circumstances the law seeks to protect cultural heritage from harm, facilitates it being passed down the generations or provides access to it, but on other occasions the law passes by without affecting how it is cared for. Instead, policy guidance from government or non-governmental organisations, ethical obligations agreed by professional bodies and imposed on their members, or other civil society initiatives may ensure that objects, places or practices are cared for, and memories are not forgotten. It is for this reason that this book adopts an integrated approach. It examines the variety of initiatives, nested within each other as practices of care, which deal with cultural heritage. The book thus provides a window on the way in which the UK, as a community, a network of communities and as part of the international community, cares for cultural heritage.

1.1 Scope of Enquiry

Often the very different and difficult questions about cultural heritage are dealt with in disparate ways and form the focus of different enquiries.⁹ The way in which the UK cares for cultural heritage through formalised mechanisms has, on occasions, been separated along artificial lines.¹⁰ Yet, at the

⁸ Cultural heritage is 'based on the diversity of the individual contributions of all human beings': Jukka Jokilehto, 'Human Rights and Cultural Heritage: Observations on the Recognition of Human Rights in the International Doctrine' (2012) 18 *International Journal of Heritage Studies* 226.

⁹ In the context of international cultural heritage law, Lixinski has described these as 'sub-niches': Lucas Lixinski, *International Heritage Law for Communities: Exclusion and Re-Imagination* (Oxford: Oxford University Press, 2019), p. 3.

¹⁰ As to which, see Section 1.7.

heart of all of these difficult questions is a desire to care *for* cultural heritage because we care *about* it.¹¹ By approaching all cultural heritage through the lens of assessing how it is *cared for*, one can see how communities (local, national or international) recognise its importance, how they enjoy it and how they fulfil any responsibilities to current and future generations.

This book will show how, by focusing on the multivocality of decision-making¹² about how cultural heritage is cared for – through the multiple layers of law, formal guidance, ethical principles and civil society solutions representing nested practices of care – it is possible to navigate dissonance, in particular between conflicting viewpoints. By translating cultural heritage and its importance to different people into and out of legal language and engaging with how the instruments and decision-makers create communities of care, one can better understand the extent to which a community cares about cultural heritage and, in turn, cares for it. A central argument of the book is that the most appropriate way to analyse the extent to which cultural heritage is cared for is to focus on how legal and non-law (ethical) initiatives¹³ provide the space to hear the different voices of the communities who care about cultural heritage – not only in decision-making in heritage management (following consultation), but also when resolving disputes about cultural heritage (when balancing different viewpoints) and seeking to resolve dissonance. These different activities of care, undertaken by varied communities of care, are analysed to determine whether the care provided by these nested practices of care is appropriate. Here, appropriate care is recognised as empathetic, respectful and dialogic. The book therefore seeks out the translations of the notion of cultural heritage and how its importance is imagined through embedding the human dimension¹⁴ of cultural heritage into decision-making by creating communities of care. This book therefore takes an

¹¹ See Ian Russell, 'Heritage, Identities, and Roots: A Critique of Arborescent Models of Heritage and Identity' in George S. Smith, Phyllis Mauch Messenger and Hilary A. Soderland (eds.), *Heritage Values in Contemporary Society* (Walnut Creek: Left Coast Press, 2010), p. 30 who suggests these as the two aspects of heritage.

¹² As to multivocality, see James Boyd White, 'Law and Literature: "No Manifesto"' (1987–8) 39 *Mercer Law Review* 739, 746.

¹³ Use of the phrase 'ethical initiatives' in the title of the book was chosen to indicate the approaches found outside law which do not have a legally binding effect, but which detail how communities *ought* to act. These ethical initiatives can take a variety of different forms, beyond what might traditionally be considered as 'soft law'. Therefore, in addition to guidance and instruments with an obvious ethical basis, such as codes of ethics, the term 'ethical initiatives' also includes civil society initiatives and public participation initiatives (discussed in Section 1.5.3). To distinguish between these different elements, the rather ineloquent terminology of 'non-law instruments' will be used to encompass such guidance, ethical codes and other non-legally binding documents, whereas the terminology of civil society initiatives and public participation initiatives will be used for those more practical measures, as defined in Section 1.5.3.

¹⁴ As to the human dimension of cultural heritage, see Section 1.2.

interdisciplinary approach in the manner entreated by the Council of Europe's Faro Convention on the Value of Cultural Heritage for Society of 2005.¹⁵

1.1.1 The Centrality of Care

The justifications for approaching cultural heritage through the framework of care are set out in the next chapter, along with the particular definition of care and its central elements. However, here is an opportune place to explain why the concept of care, specifically within the context of the ethics of care, is an appropriate lens through which to examine cultural heritage.

Unlike Continental systems of law, some of which have heritage codes,¹⁶ the UK's system is multi-layered. It comprises commitments made in international law, national law (in the form of legislation, case law and local by-laws), and statutory and non-statutory codes of conduct and guidance, which all form nested practices of care. However, rather than adopting a regulatory approach investigating how the state and other institutions mandate appropriate treatment of cultural heritage, taking an approach based on care recognises the assumption of responsibility to look after something, particularly when it is at risk of harm. It therefore can take account of how people use the law and non-law processes as instruments to prevent harm to cultural heritage or to continue its use. Care, as an active process, which focuses on relationships and communities assuming responsibilities, provides an invaluable way of drawing together these varied systems.

The terminology of care is frequently used to refer to institutions having cultural heritage in their care.¹⁷ However, the approach to care adopted in this book uses the term more widely to include how different viewpoints and needs are taken into account and how contested areas involving cultural heritage are navigated. These include grappling with issues of justice, memory and historical record, specifically responses to requests for restitution and the way in which cultural heritage is displayed and presented to the public.¹⁸

¹⁵ Council of Europe Framework Convention on the Value of Cultural Heritage for Society (adopted 27 October 2005, Faro, entered into 1 June 2011) CETS 199.

¹⁶ E.g. the French *Code du patrimoine* and the Italian Decreto Legislativo 22 gennaio 2004, m. 42 'Codice dei beni culturali e del paesaggio, ai sensi dell'articolo 10 della legge 6 luglio 2002, n. 137'.

¹⁷ E.g. ICOM, *Code of Ethics for Museums* (revised 2004), in which 'Care of collections' is a sub-heading of principle II: 'Museums that maintain collections hold them in trust for the benefit of society and its development'. The National Trust for Scotland has 'Caring' as the first of its five values: www.nts.org.uk/our-work/our-manifesto-and-values (last accessed 20 December 2022). An early use of 'care' was the *Report of the Trustees and Director of the National Gallery on Requirements as regards the care and exhibition of the pictures and the additional space to be provided in the proposed enlargement of the gallery* (Presented pursuant to an Address of the House of Lords, dated 21 June 1869).

¹⁸ This includes statues of those involved in the slave trade. See Section 9.8.

Care therefore extends beyond preservation, truth and access¹⁹ and provides a dynamic framework which draws on law and other instruments to provide an holistic overview. Rather than pitting one person against another, the framework of communities of care set out here envisages respectful decision-making with participation and empathy, seeking to resolve dissonance.²⁰

1.1.2 Cultural Heritage Rather than Cultural Property

‘Cultural heritage’ is the subject matter of this book, in preference to ‘cultural property’. Adopting the terminology of ‘cultural heritage’ rather than ‘cultural property’ has several advantages. First, ‘cultural property’ frequently suggests the monumental²¹ – what might be described as ‘high culture’²² – or those objects or places that a nation considers of vital importance.²³ It is infrequently used to refer to practices.²⁴ By contrast, ‘cultural heritage’ more fully reflects the varied ways in which cultural heritage is experienced and used. It therefore encompasses a greater variety of categories of objects, places and practices which a community might identify as cultural heritage²⁵ and which might not naturally fall within the categories of property.²⁶

A second advantage of using the language of cultural heritage is that ‘heritage’ incorporates the notion of inheritance or passing cultural heritage

¹⁹ Which is what Merryman identified as the three elements of a cultural property policy: John Henry Merryman, ‘The Public Interest in Cultural Property’ (1989) 77 *California Law Review* 339, 355.

²⁰ See Chapter 2.

²¹ Certainly in the context of museums, it tends to be ‘reserved for things whose loss would be felt most profoundly’: Peter H. Welsh, ‘The Power of Possessions: The Case Against Property’ (1997) 21 *Museum Anthropology* 12, 15.

²² Katya S. Ziegler, ‘Cultural Heritage and Human Rights’ in Giuffrè Milano (ed.), *Alberico Gentili: La Salvaguardia Dei Beni Culturali Nel Diritto Internazionale*, Working Paper No. 26/2007 (Oxford Legal Studies Research Paper Series, Faculty of Law, University of Oxford, 2007), p. 2: <http://ssrn.com/abstract=1002620> (last accessed 20 December 2022).

²³ Lostal suggests that cultural property is used in international conventions to refer to objects important to one state, whereas cultural heritage is used to refer to those things of universal importance (nevertheless usually the importance of cultural property is linked to the ‘cultural heritage’ of the particular state party (e.g. UNESCO 1970): Marina Lostal, *International Cultural Heritage Law in Armed Conflict* (Cambridge: Cambridge University Press, 2017), p. 60; Sarah Harding, ‘Value, Obligation and Cultural Heritage’ (1999) 31 *Arizona State Law Journal* 292, 345.

²⁴ Usually traditional knowledge, traditional practices and genetic knowledge are categorised as intangible cultural heritage: see Noriko Aikawa-Faure, ‘From the Proclamation of Masterpieces to the Convention for the Safeguarding of Intangible Cultural Heritage’ in Laurajane Smith and Natsuko Akagawa (eds.), *Intangible Cultural Heritage* (Key Issues in Cultural Heritage, London: Routledge, 2009), p. 15.

²⁵ See Abdulqawi Yusef, ‘Cult of Cultural Heritage’ in Francesco Francioni and Federico Lenzerini (eds.), *The 1972 World Heritage Convention: A Commentary* (Oxford: Oxford University Press, 2008), p. 31.

²⁶ E.g. folklore: Lyndel V. Pratt and Patrick J. O’Keefe, “‘Cultural Heritage’ or ‘Cultural Property’?” (1992) 1 *International Journal of Cultural Property* 307, 319.

on to future generations.²⁷ This is ‘central to the force of the term cultural heritage’²⁸ and is reflected in UNESCO’s Declaration on the Responsibilities of the Present Generations Towards Future Generations under which present generations have the responsibility of transmitting our common heritage to future generations²⁹ and avoiding ‘compromising it irreversibly’.³⁰

Thirdly, to some people the term ‘cultural property’ has political connotations³¹ which can side-track the debate by focusing on a nation’s appropriation of objects, places or practices for its own ends. It also has a strong legal meaning³² and its incorporation of ‘property’ demonstrates disciplinary imperialism,³³ often revealing the author to be a lawyer; it is thus a ‘synthetic construction’.³⁴ Cultural heritage objects or places will often have the legal characteristic of being property, but that particular legal characteristic should not define the subject matter. It is putting the cart before the horse to call it cultural *property*. It may be that recourse is had to property rights and often it is difficult to avoid the property characteristic of cultural heritage (particularly when individual property rights are at odds with the public interest or communities’ views). Indeed, Lixinski argues that a shift away from property to heritage ‘has also had the (unintended) consequence of disassociating communities from heritage they live with or around, and for whose survival they are necessary’.³⁵ Whilst ‘heritage’ has a legal etymology in

²⁷ See Section 3.2.

²⁸ Janet Blake, ‘On Defining the Cultural Heritage’ (2000) 49 *International and Comparative Law Quarterly* 61, 69.

²⁹ Declaration on the Responsibilities of the Present Generations Towards Future Generations, UNESCO, Paris, 12 November 1997, art. 7 (Volume 1, Records of the General Conference, 29th session, Paris, 21 October to 12 November 1997). Note Lixinski’s observation that whilst the 1997 Declaration focuses on the present and the future generations, it is silent about the past: Lixinski, *International Heritage Law for Communities*, p. 110. As Besterman observes, ‘Museums are the custodians of an intergenerational equity which may extend well beyond local or even national boundaries’: Tristram Besterman, ‘Museum Ethics’ in Sharon Macdonald (ed.), *A Companion to Museum Studies* (Oxford: Blackwell, 2006), p. 435; ‘heritage should be cared for in order to hand on things that are valued to future generations’: Deborah Mattinson, ‘The Value of Heritage: What Does the Public Think?’ in Kate Clark (ed.), *Capturing the Public Value of Heritage: The Proceedings of the London Conference* (London: English Heritage, 2006), p. 89.

³⁰ Declaration on the Responsibilities of the Present Generations, art. 8; ‘The fundamental policy behind cultural heritage law is protection of the heritage for the enjoyment of present and later generations’. Prott and O’Keefe, ‘“Cultural Heritage” or “Cultural Property”?’ 309.

³¹ James Cuno, *Who Owns Antiquity? Museums and the Battle over Our Ancient Heritage* (Oxford: Princeton University Press, 2008), p. 9.

³² Charlotte Woodhead, ‘A Critical Analysis of the Legal and Quasi-Legal Recognition of the Underlying Principles and Norms of Cultural Heritage’ (thesis submitted for the degree of Doctor of Philosophy at the University of Leicester, April 2014).

³³ See Section 3.4.2.

³⁴ Francesco Francioni, ‘The Human Dimension of International Cultural Heritage Law: An Introduction’ (2011) 22 *European Journal of International Law* 9, 10.

³⁵ Lixinski, *International Heritage Law for Communities*, p. 27.

terms of inheritance,³⁶ and is indeed a term used to refer to land in Scots law,³⁷ the link with inheritance and passing down the generations is more closely aligned to the very characteristic which makes it cultural heritage – its inter-generational nature. It therefore avoids demonstrating a disciplinary imperialism to the same extent that referring to property does.³⁸ Certainly by using the word ‘property’ the focus of discussion frequently shifts to ownership, possession and allocation of resources, which can be unhelpful, leading to a dichotomy between, on the one hand, possessing or owning something, and on the other hand, not being able to do so. Cultural heritage, as a term, therefore ‘has less ideological baggage in tow’.³⁹ Labelling something as cultural property can unhelpfully give the impression of possessive individualism,⁴⁰ which again has implications where long-term decisions are made where custodians other than the originating communities have possession. Much ill feeling has been caused by institutions relying on their strict legal rights as property owners or lawful possessors to avoid addressing challenges to their continued retention of objects.⁴¹ For that reason it is helpful to refocus attention on the subject matter itself rather than its legal status. It is clear that the notion of property within the concept of ‘cultural property’ has on occasions been interpreted in a restrictive, and sometimes unhelpful way, without acknowledging the varied types of property relationships that can exist.⁴² It should be acknowledged that some works have attempted to focus on the more varied types of property including stewardship and property for personhood⁴³ (as well as peoplehood⁴⁴ and grouphood⁴⁵). Despite these valiant attempts to reframe the subject matter within more creative forms of property rights, the term ‘cultural heritage’ still provides far more advantages for the reasons given here. The fourth reason for preferring the terminology of

³⁶ Tim Murphy, ‘Legal Fabrications and the Case of “Cultural Property”’ in Alain Pottage, Martha Mundy and Chris Arup (eds.), *Law, Anthropology, and the Constitution of the Social: Making Persons and Things* (Cambridge: Cambridge University Press, 2004), p. 132; Derek Gillman, *The Idea of Cultural Heritage* (Revised ed., Cambridge: Cambridge University Press, 2010), pp. 82–3; Ryan Trimm, ‘Heritage as Trope: Conceptual Etymologies and Alternative Trajectories’ (2018) 24 *International Journal of Heritage Studies* 465, 467.

³⁷ The Law Society of Scotland, *Laws of Scotland: Stair Memorial Encyclopaedia* (Edinburgh: Butterworths, 1993). col. 18, Pt I, para. 56.

³⁸ As to disciplinary imperialism, see Section 3.4.2.

³⁹ Prott and O’Keefe, ‘“Cultural Heritage” or “Cultural Property”?’ 309.

⁴⁰ See Michael F Brown, ‘Can Culture Be Copyrighted?’ (1998) 39 *Current Anthropology* 193, 203.

⁴¹ This is explored in the discussion of areas of contestation in Sections 1.3 and 3.4 in the context of the uneasy relationship between law and heritage and challenges to the *status quo* by claimants.

⁴² For a refreshing approach see Kristen A. Carpenter, Sonia K. Katyal and Angela R. Riley, ‘In Defense of Property’ (2009) 118 *Yale Law Journal* 1022.

⁴³ Jeffrey Douglas Jones, ‘Property and Personhood Revisited’ (2011) 1 *Wake Forest Journal of Law & Policy* 93, 120, 135.

⁴⁴ John Lie, *Modern Peoplehood* (Cambridge, MA: Harvard University Press, 2004) p. 13; Carpenter et al., ‘In Defense of Property’, 1028.

⁴⁵ See John Moustakas, ‘Group Rights in Cultural Property: Justifying Strict Inalienability’ (1989) 74 *Cornell Law Review* 1179.

cultural heritage is that it also avoids what has been described as the ‘paradox’ of cultural property.⁴⁶ This refers to the paradox of combining the static nature of property – which assumes that something ‘belongs’ to a particular group – with the more dynamic nature of culture.⁴⁷ This, in turn, results in real difficulties in recognising the diverse nature of those forms of cultural heritage which evolve over time, on occasions with contributions from people from different cultures.⁴⁸

1.1.3 Cultural Heritage Rather than Heritage

At times reference is made to heritage in this book where the particular instrument or academic article uses the term, but the broad scope is concerned with cultural heritage, as distinguished from natural heritage.⁴⁹ At times there may be an artificial or indistinguishable difference between natural and cultural heritage, for example in the context of cultural landscapes,⁵⁰ but the primary discussion of this book will be cultural heritage and for that reason this terminology will be adopted.

1.2 The Importance of Cultural Heritage

Heritage, in its broader sense, has been described as ‘an influential force in society’⁵¹ which is ‘deeply entwined with other aspects of our lives whether at an individual or a group level’.⁵² It is ‘not something to dispose of as a commodity but integral to our lives’.⁵³ Cultural heritage is something beyond the ordinary. It is acknowledged that at its simplest it may be property – a place,

⁴⁶ Naomi Mezey, ‘Paradoxes of Cultural Property’ (2007) 107 *Columbia Law Review* 2004, 2005.

⁴⁷ *ibid.*, p. 2005.

⁴⁸ *ibid.*, p. 2005; Kwame Anthony Appiah, *Cosmopolitanism: Ethics in a World of Strangers* (London: Penguin, 2006), p. 129. For the problems relating to hybrid works see Fiona Macmillan, ‘Copyright, Creativity and Cultural Property Rights: The Case of Arts Festivals’, Cultivate Working Paper No. 1 (2010) (HERA Joint Research Programme on Copyrighting Creativity: Creative Values, Cultural Heritage Institutions and Systems of Intellectual Property) 17.

⁴⁹ See generally David Lowenthal, ‘Natural and Cultural Heritage’ (2005) 11 *International Journal of Heritage Studies* 81. Cf. Lixinski, who adopts the terminology of heritage in preference to cultural heritage: Lixinski, *International Heritage Law for Communities*, p. 22.

⁵⁰ In the UK St Kilda in the Hebrides, the Blaenavon Industrial Landscape in Wales as well as the English Lake District, the Cornwall and West Devon Mining Landscape and the Royal Botanic Gardens, Kew are examples of cultural landscapes recognised through designation as such on the World Heritage List: <https://whc.unesco.org/en/culturallandscape/> (last accessed 22 May 2023).

⁵¹ Marie Louise Stig Sørensen and John Carman, ‘Introduction’ in Marie Louise Stig Sørensen and John Carman (eds.), *Heritage Studies: Methods and Approaches* (London: Routledge, 2009), p. 3.

⁵² *ibid.*, p. 23.

⁵³ David Lowenthal, ‘Stewarding the Past in a Perplexing Present’ in Erica Avrami, Randall Mason and Marta de la Torre (eds.), *Values and Heritage Conservation: Research Report* (Los Angeles: The Getty Conservation Institute, 2000), p. 23.

an object – or it may be a practice. Yet, it has characteristics which make it much more difficult to treat it simply as property.⁵⁴ It has been described as ‘the contents of humanity’s social portfolio’.⁵⁵ Cultural heritage has a further role, specifically the importance that it represents to certain people.⁵⁶ This may be because of its importance for the individual, community, nation or humanity’s identity,⁵⁷ or there may be a significant link between cultural heritage and a place.⁵⁸ Cultural heritage is often said to have a significance which comprises different types of value.⁵⁹ It is therefore clear that cultural heritage has a significant human dimension⁶⁰ which ‘brings to life community aspirations’.⁶¹ The relevant community may be local, national, or international; cultural heritage can have a universal value which is recognised as a common heritage.⁶² Even if communities have no first-hand experience of the cultural heritage, there may be a feeling of common concern for the heritage and a feeling of shared loss if that heritage is at risk of harm or is

⁵⁴ ‘In all, viewing cultural property and cultural heritage as a distinct, more worthy form of property, whose transmission must be assured, is the particular feature that, along with its specific discrete principles, defines the set of international laws concerning cultural heritage as international cultural heritage law and distinguishes it from other branches of international law’: Lostal, *Armed Conflict*, p. 63.

⁵⁵ Susan B. Bruning, ‘Articulating Culture in the Legal Sphere: Heritage Values, Native Americans and the Law’ in George S. Smith, Phyllis Mauch Messenger and Hilary A. Soderland (eds.), *Heritage Values in Contemporary Society* (London: Routledge, 2016), p. 223.

⁵⁶ See James Leach, ‘Owning Creativity: Cultural Property and the Efficacy of Custom on the Rai Coast of Papua New Guinea’ (2003) 8 *Journal of Material Culture* 123, 136.

⁵⁷ David Lowenthal, *The Past is a Foreign Country* (Cambridge: Cambridge University Press, 1985), p. 41; Bruning, ‘Articulating Culture in the Legal Sphere’, p. 221; James O. Young, ‘The Values of the Past’ in Geoffrey Scarre and Robin Coningham (eds.), *Appropriating the Past: Philosophical Perspectives on the Practice of Archaeology* (Cambridge: Cambridge University Press, 2013), p. 34; Fiona Macmillan, ‘The Protection of Cultural Heritage: Common Heritage of Mankind, National Cultural “Patrimony” or Private Property?’ (2013) 64 *Northern Ireland Legal Quarterly* 351, 363; Blake, ‘On Defining the Cultural Heritage’, 77; Lisanne Gibson and John Pendlebury, ‘Introduction: Valuing Historic Environments’ in Lisanne Gibson and John Pendlebury (eds.), *Valuing Historic Environments* (Farnham: Ashgate, 2009), p. 2.

⁵⁸ There is also a close link between identity, community and place – see Rosemary Coombe, ‘Possessing Culture: Political Economies of Community Subjects and their Properties’ in Veronica Strang and Mark Busse (eds.), *Ownership and Appropriation* (Oxford: ASA Monographs, Berg, 2011), p. 111. The relationship between Indigenous Peoples and place is recognised in the United Nations Declaration on the Rights of Indigenous Peoples (adopted 13 September 2007) 61/295 2008, art. 12.

⁵⁹ These are explored at Section 4.3.1.

⁶⁰ See generally Francioni, ‘The Human Dimension of International Cultural Heritage Law’, 9; Francesco Francioni and Lucas Lixinski, ‘Opening the Toolbox of International Human Rights Law in the Safeguarding of Cultural Heritage’ in Andrea Durbach and Lucas Lixinski (eds.), *Heritage, Culture and Rights: Challenging Legal Discourses* (Oxford: Hart, 2017), p. 17.

⁶¹ Francioni and Lixinski, ‘Opening the Toolbox’, p. 34.

⁶² Christopher C. Joyner, ‘Legal Implications of the Concept of the Common Heritage of Mankind’ (1986) 35 *International & Comparative Law Quarterly* 190, 199. Note Macmillan’s caution that ‘History shows us that it is not possible to decouple cultural heritage from particular identities, national, communal or otherwise’: Macmillan, ‘The Protection of Cultural Heritage’, 363.

destroyed.⁶³ The Nubian campaign of 1959–1980 shows this. The active response from around the world, in an age without rolling news or social media to rally support to save cultural heritage from physical destruction,⁶⁴ showed the importance of the cultural heritage to others, even though these places and monuments may never have been viewed first-hand by those stepping forward to help. Due to the strong human dimension, it is therefore essential that the people(s) for whom cultural heritage is important are central to decision-making about cultural heritage.⁶⁵ The concern of those who care about and care for cultural heritage (and, in turn, cultural heritage law) is therefore not only the physical *thing* itself (most usually the object or place) but also the practice and the intangible element of cultural heritage.

1.2.1 As an Intangible Concept

Increasingly cultural heritage is treated as an intangible concept⁶⁶ in the form of a ‘cultural practice, involved in the construction and regulation of a range of values and understandings’ rather than something promoting ‘a certain set of Western elite cultural values’.⁶⁷ It is ‘less of an objective, physical existence than the range of associations which accompany an object or monument and which provide the sense of being part of a group’.⁶⁸ ‘Cultural heritage is value’ rather than the object, place or practice. It is thus ‘... the importance itself’⁶⁹ and legal regimes aim to protect this importance. In essence ‘it is the significance of the expression in the social life of a community that is, or should be, the policy focus of heritage protection, according to contemporary wisdom’.⁷⁰ For it is the human response to objects, places or practices which justifies our particular treatment of them and thus the intangible dimension of them⁷¹ and in particular the desire to protect them from harm, which can be understood as

⁶³ Darvill refers to this as the existence value: Timothy Darvill, ‘Value Systems in Archaeology’ in Malcolm A. Cooper, Anthony Firth, John Carman and David Wheatley (eds.), *Managing Archaeology* (London: Routledge, 1995), p. 43.

⁶⁴ This co-ordinated effort to salvage and to save from physical destruction key elements of the Nubia culture has been hailed as ‘a defining example of international solidarity when countries understood the universal nature of heritage and the universal importance of its conservation’: UNESCO Press release, *50th Anniversary of Nubia Campaign* (31 March 2009): <https://whc.unesco.org/en/news/497/> (last accessed 20 December 2022).

⁶⁵ See Section 5.3. ⁶⁶ Laurajane Smith, *Uses of Heritage* (London: Routledge, 2008), p. 11.

⁶⁷ *ibid.*, p. 11. ⁶⁸ Blake, ‘On Defining the Cultural Heritage’, 84.

⁶⁹ Craig Forrest, *International Law and the Protection of Cultural Heritage* (London: Routledge, 2010), p. 3.

⁷⁰ Rosemary J. Coombe and Joseph F. Turcotte, ‘Indigenous Cultural Heritage in Development and Trade: Perspectives from the Dynamics of Cultural Heritage Law and Policy’ in Christopher B. Graber, Karolina Kuprecht and Jessica C. Lai (eds.), *International Trade in Indigenous Cultural Heritage: Legal and Policy Issues* (Cheltenham: Edward Elgar, 2012), p. 275.

⁷¹ Artefacts can ‘often provoke memories’ and are ‘sensed through our bodies’: John Urry, ‘How Societies Remember the Past’ in Sharon Macdonald and Gordon Fyfe (eds.), *Theorizing Museums* (Sociological Review Monograph Series, Blackwell, 1996), p. 50 and ‘seeing certain ... artefacts functions to reawaken repressed desires and thereby to connect past and present’: *ibid.*, p. 55.

the adoption of a functionalist approach.⁷² Contrastingly, Lixinski suggests that both the tangible and intangible elements of cultural heritage are relevant and advocates an holistic approach, taking account of both the tangible and intangible elements and their interplay.⁷³

1.2.1.1 The Centrality of Participation and Communities

Given the recognition of the human dimension to cultural heritage, participation of communities is central to the way in which cultural heritage is cared for. This reflects another shift away from focusing on traditional Western notions of preserving the tangible⁷⁴ towards cultural practices. This is recognised in professional codes of ethics in their focus on the participation of stakeholders.⁷⁵

The prevalence of experts in the care of cultural heritage was emphasised by work identifying the authorized heritage discourse.⁷⁶ Broader communities are, however, central to the care of cultural heritage. This extends beyond well-meaning amateurs who might assume responsibility for its care, for 'Heritage can play a key role in communities, for example, by encouraging civic pride and in shaping identity. In order to interpret and preserve local history effectively it must be contributed to, contested and explored by the wider community and not kept within an enclave of heritage enthusiasts.'⁷⁷

It is important to have mechanisms which facilitate the communities of discourse surrounding cultural heritage and which permit, through multi-voice, the resolution of dissonance relating to cultural heritage, thereby creating effective communities of care.⁷⁸ Central to appropriate care for cultural heritage is providing the space for dialogue and for balancing the various viewpoints of the different stakeholders for whom the particular cultural heritage is relevant. Consultation and dialogue are necessary for 'incorporating the multiplicity of interpretations of . . . heritage' and should include marginalised communities.⁷⁹

⁷² Tolina Loulanski, 'Revising the Concept for Cultural Heritage: The Argument for a Functional Approach' (2006) 13 *International Journal of Cultural Property* 207, 216. With this approach the focus is shifted away from the subject matter towards an appreciation of cultural heritage as a construction, with the care of cultural heritage being for the sake of people.

⁷³ Lucas Lixinski, *Intangible Cultural Heritage in International Law* (Oxford: Oxford University Press, 2013), p. 2.

⁷⁴ Smith, *Uses of Heritage*, pp. 3, 11.

⁷⁵ The Museums Association (MA), *Code of Ethics for Museums* (2015), p. 20.

⁷⁶ Smith, *Uses of Heritage*, p. 11.

⁷⁷ Corinne Perkin, 'Beyond the Rhetoric: Negotiating the Politics and Realising the Potential of Community-Driven Heritage Engagement' (2010) 16 *International Journal of Heritage Studies* 107, 117.

⁷⁸ What constitutes appropriate care is explored at Section 2.5.3. Effective communities of care are therefore those communities which provide such appropriate care.

⁷⁹ See Karima Bennoune, *Cultural Rights: Report of the Special Rapporteur in the Field of Cultural Rights: Intentional Destruction of Cultural Heritage* (A/71/317 UN), p. 16.

1.2.2 Caring about Cultural Heritage Because of Its Importance

Since cultural heritage is important, communities care *about* it. The concepts of care, more generally, and specifically caring *about* will be explored in Chapter 2. Suffice it to say, for present purposes, because cultural heritage is recognised as important due to its human dimension, communities care *about* it for a variety of reasons, particularly where there is risk of harm to it. This can result in a desire to take direct or indirect action by caring *for* it. However, risk of physical harm is only one of several areas of contestation which are explored in the next section.

Caring about cultural heritage is different from valuing it. Valuing can be undertaken quite objectively, in a non-emotional manner. Caring about something is having a feeling towards it – a disposition – which may result in a need to do something or to care for something, either directly or indirectly. Decision-makers or lawmakers may care about something but their reason for caring about it is different from communities for whom the cultural heritage is part of their identity.

Caring for cultural heritage is a process, in response to caring about it. It differs from merely preserving it, providing access or seeking the truth. Care, in the context of cultural heritage, may involve either action or inaction such as curated decay.⁸⁰ It may also require keeping it away from the public rather than giving access where its importance is sacred or secret. Care includes the use of cultural heritage and sustaining people's relationships with it, encouraging and facilitating its use as part of a culture. It may also involve explaining an object's history or dealing with the way in which it is displayed. Care is thus an all-round activity concerning cultural heritage. As part of the process of caring it is necessary to navigate the various areas of contestation in which cultural heritage finds itself.

1.3 Areas of Contestation

Cultural heritage is not neutral, and for some it is inherently dissonant.⁸¹ The previous section has shown the importance of cultural heritage to communities in varied ways which, at times, conflict with each. Rather than talking about 'contested cultural heritage',⁸² which implies that the cultural heritage itself is contested, the terminology of areas of contestation is adopted to refer to

⁸⁰ See generally Caitlin DeSilvey, *Curated Decay: Heritage Beyond Saving* (London: University of Minnesota Press, 2017).

⁸¹ Smith, *Uses of Heritage*, p. 4; Emma Waterton, *Politics, Policy and the Discourses of Heritage in Britain* (Basingstoke: Palgrave Macmillan, 2010), p. 7.

⁸² Helaine Silverman, 'Contested Cultural Heritage: A Selective Historiography' in Helaine Silverman (ed.), *Contested Cultural Heritage: Religion, Nationalism, Erasure, and Exclusion in a Global World* (London: Springer, 2011), p. 1.

those instances where different people object to the ways in which cultural heritage is envisaged, used or at risk of harm.⁸³ Contestation is taken to mean a social activity that ‘entails objection to specific issues that matter to people’⁸⁴ and this more fully represents the broader way in which cultural heritage exists in communities.

The areas of contestation in the UK identified here fall into three broad categories. The first is how cultural heritage is imagined, translated into and out of law, and designated (including through the medium of listing). The second area is how to navigate the risk of harm or loss to cultural heritage (both to its tangible manifestations and also the intangible element of cultural heritage). The third area relates to the role played by cultural heritage and its communities of care in seeking and providing justice and memory. These areas of contestation contrast with other approaches to what has been described as the ‘cultural heritage predicament’.⁸⁵ For example, Nafziger and Paterson have identified ‘three dimensions’ to this – ‘conquest, colonialization, and commerce’.⁸⁶ These are helpful categories when considering the international framework relating to the care of cultural heritage (and were in fact raised in the context of the UNESCO Conventions).⁸⁷ Many of the areas of contestation identified here can be filed under Nafziger and Paterson’s three headings, but several elements of contestation at the national level cannot be. The interests of the varied communities, the reasons for which they care about cultural heritage and their desire to actively care for cultural heritage are overlooked in their categorisation. Local communities may be faced with a risk of harm to cultural heritage from a proposed redevelopment without commerce at its heart. The community’s concern may also be grounded in community values rather than commercial ones and be focused on seeking a role in the decision-making process relating to the care of cultural heritage. The care of finds of archaeological interest cannot be said to have conquest, colonialisation or commerce at their heart, but a community’s concern may be based on the quest for knowledge or on a desire to connect with the past.⁸⁸ Cases involving private owners’ use of their cultural heritage will not necessarily involve questions of commerce, but rather a balance between public access and private enjoyment of property.

Each area of contestation will be considered in turn.

⁸³ The terminology of contested heritage will be adopted briefly in the specific sense, when discussing symbols of injustice and the cause of pain, Section 9.8.

⁸⁴ Antje Wiener, *A Theory of Contestation* (Heidelberg: Springer, 2014), p. 1.

⁸⁵ James A. R. Nafziger and Robert Kirkwood Paterson, ‘Cultural Heritage Law’ in James A. R. Nafziger and Robert Kirkwood Paterson (eds.), *Handbook on the Law of Cultural Heritage and International Trade* (Cheltenham: Edward Elgar, 2014), p. 13.

⁸⁶ *ibid.* ⁸⁷ *ibid.*

⁸⁸ E.g. the search for the remains of Richard III which took place in Leicester.

1.3.1 Imagining 'Cultural Heritage': Translation, Designation and Dissonance

It is difficult to provide a concise yet comprehensive definition of cultural heritage. Often one knows heritage when one sees it⁸⁹ – for few people would disagree that the ruins at Palmyra represent cultural heritage. Even those who seek to destroy it understand it to be someone's cultural heritage, if not theirs. A certain level of international consensus can be reached about the sorts of objects, places and practices that are our own cultural heritage, or that of other communities. Often it may not be necessary to grapple with definitions or to classify something as cultural heritage until it is at risk. Only then will it be important whether something *ought* to be treated as cultural heritage and receive enhanced levels of care because of its legal status.⁹⁰

Contestation can arise where laws or other devices with a degree of moral enforceability⁹¹ seek to designate cultural heritage as being set apart from other property and worthy of particular care. The first issue is – what is designated? Who makes the decision about what is designated and for whom is that decision made? What are the implications of designation? An essential element of this is the role that communities play in the process. This includes being consulted not only about designation but also about the effect of their views on final designation. Here the themes of consultation and participation play key roles. Certain things may only need a legal designation as cultural heritage or one of its synonyms temporarily – for the purposes of a particular process such as export or being assumed into public ownership.⁹²

The act of designation may affect both the communities for whom it is important and the cultural heritage itself. There are both dark and bright sides to formal designation of cultural heritage;⁹³ designation as a World Heritage

⁸⁹ '[I]n most circumstances, the cultural significance of a certain object is self-evident':

Andrea Biondi, 'The Merchant, the Thief and the Citizen: The Circulation of Works of Art within the EU' (1997) 34 *Common Market Law Review* 1173, 1180; a problem is that many charters assume heritage is significant: Kate Clark, 'From Significance to Sustainability', in Kate Clark (ed.), *Capturing the Public Value of Heritage: The Proceedings of the London Conference* (London: English Heritage, 2006), p. 59. However, note the criticism of Waterton et al., whose article is a response to what they describe as an often 'uncritical, common-sense understanding of what heritage entails': Emma Waterton, Laurajane Smith and Gary Campbell, 'The Utility of Discourse Analysis to Heritage Studies: The Burra Charter and Social Inclusion' (2006) 12 *International Journal of Heritage Studies* 339, 340.

⁹⁰ Value may only be articulated by the public and heritage professionals 'when the existence of places or practices are threatened or celebrated'. Tracey Avery, 'Values Not Shared: The Street Art of Melbourne's City Laneways' in Gibson and Pendlebury, *Valuing Historic Environments*, p. 140; Rodney Harrison, 'What is Heritage?' in Rodney Harrison (ed.), *Understanding the Politics of Heritage* (Manchester: Open University and Manchester University Press, 2010), p. 13; Lowenthal suggests that 'Nothing arouses affection for a legacy as much as the threat of its loss': David Lowenthal, 'Patrons, Populists, Apologists: Crises in Museum Stewardship' in Gibson and Pendlebury, *Valuing Historic Environments*, p. 19. As to care, see Chapter 2.

⁹¹ Such as codes of ethics produced by professional bodies including the International Council of Museums (ICOM) and the UK's MA.

⁹² See, for example national treasures at Section 8.1.2.

⁹³ Lixinski, *International Heritage Law for Communities*, pp. 3, 7.

Site can increase tourism, but at the same time negatively affect the resident communities.⁹⁴ For that reason communities need a central role within the selection and designation process.⁹⁵

Cultural heritage is not solely imagined in legal terms through formal legal designation in what has been described as ‘official heritage’.⁹⁶ How the courts approach cultural heritage and imagine it in case law, particularly when dealing with non-heritage law principles, provides a window on to how the UK cares for cultural heritage. Frequently, cultural heritage disputes involve difficult questions – so-called ‘hard cases’.⁹⁷ Clear, unproblematic answers to the legal questions may be difficult to find, particularly when applying principles such as private property. Therefore, the observation that in case law it is likely that ‘a range of culturally possible results’⁹⁸ will arise ‘among which choices will have to be made by lawyers and by judges’⁹⁹ is particularly relevant. Yet, one should not see such a ‘multiplicity of readings’ as a weakness, but recognise that it is ‘its strength, for it is this that makes room for different voices, and gives a purchase by which culture may be modified in response to the demands of circumstance’.¹⁰⁰ This appreciation of the, at times, messiness of law means that cultural heritage can be translated in many different situations and in many different ways in case law; dualisms such as ‘official’ and ‘unofficial’ heritage are therefore difficult to reconcile with this.¹⁰¹ Furthermore, it is not simply law that acts in an ‘official’ way; a plethora of guidance and codes is published by government departments, NGOs and other heritage organisations which all contribute to translating and designating cultural heritage with a view to caring for it. These various ‘nested practices of care’¹⁰² and the way they use the label of cultural heritage or one of its synonyms are explored in Chapter 4.

1.3.1.1 Difficulties with Cultural Heritage and the Risk of Including Too Much

Cultural heritage, whilst important to communities for a variety of reasons, should not be assumed to be intrinsically good.¹⁰³ Objects, places or practices

⁹⁴ In some circumstances, designation can have a deleterious effect not only on the communities involved but also on the heritage place itself, for example the impact of Machu Picchu by having large numbers of tourists climbing over the historic place.

⁹⁵ See Lixinski, *International Heritage Law for Communities*, p. 125.

⁹⁶ Harrison distinguishes between official heritage, which is seen as something that has been classified as heritage by inclusion on a heritage list such as the World Heritage List, and unofficial heritage, which is created by “the bottom-up” relationship between people, objects, places and memories’: Harrison, ‘What is Heritage?’, p. 8.

⁹⁷ See generally Ronald Dworkin, *Law’s Empire* (Cambridge, MA: Belknap Press, 1986); Matthias Weller, ‘Key Elements of Just and Fair Solutions: The Case for a Restatement of Restitution Principles’ in Evelien Campfens (ed.), *Fair and Just Solutions?* (The Hague: Eleven International, 2015), p. 201.

⁹⁸ James Boyd White, ‘Law as Language: Reading Law and Reading Literature’ (1981–2) 60 *Texas Law Review* 415, 436.

⁹⁹ *ibid.*, 436. ¹⁰⁰ *ibid.*, 444. ¹⁰¹ See discussion above in this section. ¹⁰² See Section 3.1.

¹⁰³ See UN Report of the Special Rapporteur in the field of cultural rights, A/72/155 on fundamentalism and extremism as threats to cultural heritage.

which might qualify as cultural heritage, but for some problematic characteristics, will need to be considered critically, particularly if their initial labelling as cultural heritage or their continued treatment leads to enhanced levels of care which may be offensive or problematic for some communities. Such problematic characteristics might originate from the very nature of objects, places or practices – for example, if they are made of human remains, although this will depend on context. Equally, the prior use of a place as a concentration camp or other places of mass atrocities may be difficult to navigate as cultural heritage places. Where recognising something as cultural heritage gives it an enhanced status in law which may ensure its protection from harm, it is important that objects, places or practices that are, either by their nature or in practice, patriarchal or which infringe human rights¹⁰⁴ are critically analysed before being admitted into the category of cultural heritage.¹⁰⁵ This is irrespective of whether this is by means of hard or soft laws or through other non-law initiatives.¹⁰⁶

One consequence of taking a broad approach to the designation of cultural heritage, rather than adopting a narrower category of cultural property,¹⁰⁷ is the risk of admitting a great deal into the scope of protection.¹⁰⁸ This potentially leaves too much to care for, which risks an abundance of heritage.¹⁰⁹ Careful collections management is therefore necessary,¹¹⁰ as is revisiting formal designation of heritage places over time to consider whether the listing is still appropriate, or whether a place should be delisted.¹¹¹ A central element of care is revisiting its appropriateness, as well as revisiting the question of who has responsibility for that care.¹¹² As part of this re-evaluation, the scope of what is cared for and the necessity for the extent of its continued care will be relevant. Ethical issues may also arise where cultural heritage may become associated with a particular organisation or person

¹⁰⁴ Article 2(1) of the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage which states that ‘consideration will be given solely to such intangible cultural heritage as is compatible with existing human rights instruments’. See UN Report of the Special Rapporteur in the field of cultural rights, A/67/287 on rights of women to enjoy cultural heritage on an equal basis to men. See Lixinski, *Intangible Cultural Heritage*, pp. 172–3. This may also extend to animal rights as well – for example, practices such as bear baiting or bull fighting.

¹⁰⁵ See Gillman, *The Idea of Cultural Heritage*, pp. 94–5. ¹⁰⁶ As to which, see Chapter 2.

¹⁰⁷ Which might only include the superlative examples.

¹⁰⁸ Holtorf suggests that there is a potential to include car wrecks as heritage, giving the example of the car cemetery in Sweden which has been protected since the 1990s ‘in a state of continuing deterioration’: Cornelius Holtorf, ‘Perceiving the Past: From Age Value to Pastness’ (2017) 24 *International Journal of Cultural Property* 497, 499.

¹⁰⁹ Rodney Harrison, *Heritage: Critical Approaches* (Abingdon: Routledge, 2013), p. 166 and see National Museum Directors Conference, *Too Much Stuff? Disposal from Museums* (2003) which argues for ‘careful review and rationalisation of collections’, p. 3.

¹¹⁰ The MA, *Code of Ethics* distinguishes between responsible disposal based on curatorial decisions and financially motivated disposal (principles 2.8 and 2.9 respectively).

¹¹¹ See Section 7.4.2.

¹¹² The nature of ‘appropriate care’ and the elements of it are considered at Section 2.5.3.

through sponsorship of the particular collection of cultural heritage or the institution in which it is held.¹¹³

1.3.2 Recognising the Communities for Whom Cultural Heritage Is Important

As part of the designation process, it is necessary to focus on the importance of cultural heritage for a range of different communities. At times certain communities may be marginalised and not considered as part of the decision-making about cultural heritage. This can occur where local communities living within a proposed World Heritage Site are not consulted about the decision to designate it as being of universal value. In other cases, if objects were taken during conflict and times of colonisation and have subsequently passed across borders, the communities from which they originated may be located many miles away from a museum where an important cultural heritage object is now housed. Where those communities have changed over time there may be difficulties in not only recognising the place or community from which cultural heritage originated and for whom it is important but also recognising the voices of those communities.

1.3.3 Assuming Responsibility for Care

In addition to the need to involve communities for whom cultural heritage is important, determining who should assume responsibility for the care of cultural heritage in the future is also an area of contestation. This is particularly challenging where cultural heritage objects were acquired by force or through subjugation of communities who now wish to challenge the rights of the current possessors. A significant area of contestation is where care is paternalistic,¹¹⁴ where the presumption is that experts or the current possessors are the most appropriately placed to provide direct and continued care.

1.3.4 Reacting to Threats of Harm and Loss

A further area of contestation is the need to navigate actual or potential harm and loss of cultural heritage. This includes not only physical harm but also

¹¹³ E.g. the debate over the sponsorship by oil companies of museums in the UK or the connection with the Sackler family: see Gareth Harris, “‘End BP Sponsorship of British Museum’: 90 Heritage Professionals Sign Open Letter Against Oil Giant”, *The Art Newspaper*, 11 November 2021 and José da Silva and Christina Ruiz, ‘Serpentine Drops Sackler Name Following “Rebranding”’, *The Art Newspaper*, 25 March 2021. See MA, *Code of Ethics*, which defines due diligence as ensuring that a museum has taken all reasonable measures to understand ‘the full background of a sponsor, lender or funder’: p. 23 and states that museums should ‘Ensure editorial integrity in programming and interpretation’ and should resist any attempts to influence this by donors or funders: principle 1.2.

¹¹⁴ A concept derived from Uma Narayan, ‘Colonialism and Its Others: Considerations on Rights and Care Discourses’ (1995) 10 *Hypatia* 133 and discussed at Sections 2.6 and 9.5.1. Such care is where the community with current responsibility for care refuses to engage with dialogue and emphasises their role as the most appropriate provider of care.

intangible harm as experienced by communities, including loss of information or association. When dealing with harm, questions arise about how to navigate the public/private divide. Often assumptions are made that public rather than private ownership of cultural heritage is the most appropriate means of providing care. However, an element of appropriate care, as identified in Chapter 2, is that it is dialogic. Communities are therefore central to decision-making processes to ensure that any shift from the private to the public domain is appropriate in the circumstances.

1.3.4.1 Desire to Pass Cultural Heritage On to Future Generations and Averting Physical Loss or Damage

Irreparable physical harm can occur because of direct damage or destruction, during peacetime or wars. Destruction of cultural heritage during wartime has a long history. Although often entailing outright destruction or physical harm, harm can also involve removal to other places, with attendant loss to the dispossessed community. Suppression of cultural practices is also a significant tool of oppression against communities, often taking place as part of colonialism.¹¹⁵

In times of peace, destruction or harm can be intentionally caused to both cultural heritage places and objects. This can include vandalism, theft, unlawful excavations or unlawful work to a building (whether or not by its owner).¹¹⁶ Destruction can also be accidental, resulting from damage from fires or natural disasters¹¹⁷ or through deterioration. Damage may also result from poor restoration,¹¹⁸ including over-cleaning or over-painting, which may even change the work itself. Harm may also be caused by neglect caused by a failure to undertake quotidian care.

Development projects such as major infrastructure programmes also pose a risk of destruction or harm to cultural heritage places and their settings.¹¹⁹ Harm may therefore be sanctioned in the name of sustainable development; in such circumstances efforts will often be made to mitigate this harm.¹²⁰

¹¹⁵ For example the potlatch ceremony was prohibited in Canada by federal law which came into effect in 1885 (and only repealed in 1951): Catherine E. Bell and Robert K. Paterson, 'Aboriginal Rights to Cultural Property in Canada' (1999) 8 *International Journal of Cultural Property* 167, 200.

¹¹⁶ See generally Historic England, *Heritage Crime*: <https://historicengland.org.uk/advice/caring-for-heritage/heritage-crime/> (last accessed 20 December 2022).

¹¹⁷ See Section 7.8.3 for examples of this.

¹¹⁸ There has been criticism of the cleaning methods used on the collection of marbles from the Parthenon in the care of the British Museum. A colloquium was convened on this subject: Ian Jenkins, *Cleaning and Controversy: The Parthenon Sculptures 1811–1939* (British Museum Occasional Paper, 2001). See Elizabeth Pye, *Caring for the Past: Issues in Conservation for Archaeology and Museums* (London: James & James, 2001), p. 65. See Mark Brown, 'Botched Restorations Put England's Church Wall Paintings at Risk', *The Guardian*, 24 September 2019.

¹¹⁹ For example during the Crossrail works in London a significant number of listed buildings were either altered or demolished: Cross Rail Act 2008, sch. 9.

¹²⁰ See Section 7.8.

1.3.4.2 Maintaining Associations between Objects, Places and Practices

Losses also include intangible loss such as loss of context where archaeological objects are unearthed and removed without proper cataloguing of the find site.¹²¹ The illicit trade in cultural heritage objects is of worldwide concern and can fuel looting of cultural heritage places, further harming them. Not only does the loss of information harm the historical record, but there can also be disfigurement of statues and monuments with irreparable physical harm to places.

Intangible loss is also occasioned where an object is removed from its original location, or where objects forming a collection are dispersed. ‘Collections’ as a concept require caring for on the basis that individual objects have been brought together and now form a coherent whole or a ‘new creation’.¹²² The collection might represent a unique example of a particular style or period, an encyclopaedic collection, or if they were created by a particular person, demonstrate their collecting habits or a particular period of history. The sale of, or irreparable harm to, an object which is an element of a collection can cause harm to the entire collection. As well as the loss of association and the harm to the communities for whom the cultural heritage collection is important, aesthetic or scholarly consequences may also result from separating a collection, described as ‘the aesthetic equivalent of physical dismemberment’.¹²³ Yet, this needs to be balanced with claims for the return of cultural heritage objects which, whilst being elements of that ‘entity’, may have been taken from their original owners, or from the community from which they originated and for whom return is important.

1.3.4.3 Avoiding ‘Loss’ to a Community or Nation: The Threat of Physical Relocation and ‘Saving for the Nation’

A further risk of loss at the national level is where a cultural heritage object, considered of importance to a nation or locally, is at risk of export abroad and the public would no longer be able to access it in the UK. The rhetoric surrounding this is usually that of seeking to ‘save the object for the nation’¹²⁴ even though the object may have previously been privately owned and the public have never before gazed upon it. This area of contestation is not concerned with the potential physical destruction of the object or indeed with the destruction directly of the intangible element of cultural heritage. Rather, the loss of access by the national community to the physical thing is central.

¹²¹ See, for example, Simon MacKenzie, Neil Brodie, Donna Yates and Christos Tsirogiannis, *Trafficking Culture: New Directions in Researching the Global Market in Illicit Antiquities* (London: Routledge, 2019).

¹²² Patrick J. O’Keefe, ‘The Heritage Value of a Private Collection’ in Marc-André Rénold and Quentin Byrne-Sutton (eds.), *La libre circulation des collections d’objets d’art* (Zurich: Schulthess Polygraphischer Verlag, 1993), p. 182. This represents the difficulties found at the public-private divide which are analysed in Section 6.6.2.

¹²³ Paul M. Bator, *International Trade in Art* (London: University of Chicago Press, 1983), p. 22.

¹²⁴ See Section 8.1.

The system thus focuses on possession. Similar concerns about the risk of loss may be felt where plans are made to sell a cultural heritage place or to cease using somewhere for a cultural heritage practice or particular industry. In response, efforts may be made to ‘save’ it from private sale and development and instead to keep it for a community’s use.

1.3.5 Justice and Memory

Cultural heritage can be a symbol of injustice if claims to it are unresolved and wrongs unacknowledged. Return of an object, compensation or acknowledgement of past wrongs can be a significant symbol of justice.

Over the years, cultural heritage objects may have been removed from their places of origin. Occasionally there is a clear history setting out the object’s journey from creation to its current location. An artwork with a clear provenance (ownership history) recording all transactions from the artist’s studio to the current owner represents the ideal situation. However, in some situations the legal history of an object is far less clear. Acquisitions may not have been clearly legal or indeed ethical – either at the time or according to modern mores. Private collectors and museum collections may have been the beneficiaries of wrongdoing, even if not directly responsible for that wrongdoing. When it comes to privately owned objects, particularly where the current possessors have acquired legal title under statutes of limitation, claims will need to be resolved privately between the parties, as the claimants would have no legal claim.¹²⁵ Yet, there are views that museums, tasked with ensuring the public trust in their activities,¹²⁶ have obligations (regardless of the legal position) to act and to respond ethically to claims made by those previously wronged.

Key areas of contestation involve cultural heritage that was either taken forcibly from persecuted groups during the Nazi era, or where the owners had no choice but to transfer the cultural objects. Where these objects come to light, in sales, private collections or museums, claims may be made against the current possessors. In other claims lineal descent is less obvious, where broader communities rather than families claim objects. During the long and troubling history of British colonialism, objects were seized without permission;¹²⁷ such objects are still in the UK both in private and public ownership.¹²⁸ Some of

¹²⁵ These might be brokered by auctions houses or organisations such as the Art Loss Register or Art Recovery International, perhaps with the involvement of the Commission for Looted Art in Europe or other claimant groups.

¹²⁶ MA, *Code of Ethics*, principle 3.

¹²⁷ They were taken in a variety of different situations. For example, Hicks’ ‘preliminary series of seven types of takings’ which he sets out in the colonial context: Dan Hicks, *The Brutish Museums: The Benin Bronzes, Colonial Violence and Cultural Restitution* (London: Pluto Press, 2020), p. 238.

¹²⁸ These include royal collections, Church collections, government collections and both national and non-national museums.

these were acquired during punitive expeditions (for example at Maqdala and the Kingdom of Benin) or during colonial rule and subsequently appeared on the art market¹²⁹ or are housed within museums. Other objects of sacred significance to particular communities, including human remains, were bought, stolen or traded, often in the context of unequal power relations. Modern-day claims are important for the identity of communities.¹³⁰ Many arguments for return can be made on the grounds of interference with cultural rights.¹³¹ Counter arguments are made about the need to retain universal collections which represent a common heritage. Allegations are also made that repatriation requests may be political in nature and not represent the best long-term response.¹³²

Controversy surrounds instances of cultural appropriation,¹³³ which can take a variety of forms. This may be the misappropriation of a cultural practice which is then appropriated by another community, or used for tourism without the permission of the community from which it originates. Cultural appropriation can include the commercialisation of symbols used by communities for sacred reasons or the incorporation of these into other artworks.

As discussed above, in the context of designation, certain things associated with troubled histories are difficult to navigate in the context of the care of cultural heritage. Contestation surrounds not only designation but also how these objects, places or practices are cared for, including how they are displayed. Particular problems derive from statues of those involved in slavery or other colonial activities¹³⁴ whose continued display also involves commemoration or memorialisation and can cause difficulties for present generations.

1.3.5.1 Inherently Dissonant Disputes: Tangible Difficulties

These – often multifarious – claims bring with them the difficulty of balancing competing interests. Seeking to resolve these is no easy task and navigating these often involves taking account of moral as well as legal

¹²⁹ As well as international sales, objects can also be found at local auction houses: Alex Capon, 'Benin Plaque Withdrawn from Auction after Curator Raises Provenance Questions', *Antiques Trade Gazette*, 8 May 2021, edition 2491.

¹³⁰ Johanna Gibson 'dignity, wisdom and continuity of culture and identity' as elements that must be 'developed and encouraged through the protection of traditional and Indigenous knowledge' (Johanna Gibson, *Community Resources: Intellectual Property, International Trade and Protection of Traditional Knowledge* (London: Routledge, 2005), p. 193, 2005); Kalliopi Fouseki, 'Claiming the Parthenon Marbles Back: Whose Claim and on Behalf of Whom?' in Louise Tythacott and Kostas Arvanitis (eds.), *Museums and Restitution: New Practices, New Approaches* (Farnham: Ashgate, 2014), p. 173.

¹³¹ See generally Janet Blake, *Exploring Cultural Rights and Cultural Diversity: An Introduction with Selected Legal Materials* (Builth Wells: Institute of Art and Law, 2014).

¹³² E.g. the Declaration on the Importance and Value of Universal Museums [2004] *ICOM News* 4; see generally Tiffany Jenkins, *Keeping Their Marbles: How the Treasures of the Past Ended Up in Museums . . . and Why They Should Stay There* (Oxford: Oxford University Press, 2016).

¹³³ See Geoffrey Scarre and Robin Coningham, 'Introduction' in *Appropriating the Past*, p. 3, who distinguish between appropriation and expropriation.

¹³⁴ This might be the name of a benefactor of a collection or the donor of an object who may have connections with slavery, colonisation or misappropriation.

considerations.¹³⁵ Past injustices and differences of opinion can be entrenched and make the task of resolving seemingly incompatible disputes difficult.¹³⁶ As Scarre and Coningham observe, it would be naïve to assume that disagreements about cultural heritage can be resolved ‘with a modicum of mutual understanding and good-will’.¹³⁷ As they rightly point out, it is possible to reach differing conclusions whilst remaining reasonable simply because the parties’ starting points are different.¹³⁸

It is important, though, to acknowledge the dissonance involved with cultural heritage and to engage with the various communities of discourse involved to help navigate this.¹³⁹ Doing so is essential to the way in which to appropriately care for cultural heritage and those for whom it is important by assuming responsibility for the care of cultural heritage through communities of care. The framework of care is set out in Chapter 2.

1.4 A Word on Methodology

Inspired by James Boyd White’s treatment of law as language,¹⁴⁰ which invites us to read law with humility,¹⁴¹ this book seeks to avoid abstracting single principles from decided cases.¹⁴² Instead, it analyses how legal instruments and decision-makers translate¹⁴³ notions of cultural heritage and the need to care for it. By so doing one can assess how a community cares *about* and cares *for* cultural heritage.¹⁴⁴ Where difficult decisions are made about the long-term approach to caring for cultural heritage (essentially its fate) the analysis will consider how decision-makers take into account the range of voices from communities in the decision-making process.

Various authors have analysed heritage through critical discourse analysis (CDA).¹⁴⁵ There are overlaps between the current, rhetorical approach which

¹³⁵ ‘Cultural-property policies are also controversial because they focus on moral duties, and sometimes on religious, cultural and political belief systems that are not universally held’: ACCP Editorial Board, ‘Conclusion: Museums at the Center of Public Policy’ in Kate Fitz Gibbon (ed.), *Who Owns the Past? Cultural Policy, Cultural Property and the Law* (Piscataway: Rutgers University Press, 2005), p. 310.

¹³⁶ David Lowenthal, *The Heritage Crusade and the Spoils of History* (Cambridge: Cambridge University Press, 1998), pp. 2–3. ‘[Heritage’s] potential for both good and evil is huge. On the one hand, it offers a rationale for self-respecting stewardship of all we hold dear; on the other, it signals an eclipse of reason and regression to embattled tribalism.’

¹³⁷ Scarre and Coningham, ‘Introduction’, p. 8. ¹³⁸ *ibid.*

¹³⁹ Trimm suggests heritage can ‘paper over’ dissonance: Trimm, ‘Heritage as Trope’, 467.

¹⁴⁰ Derived from, *inter alia* White, ‘Law as Language’, 415. ¹⁴¹ *ibid.*, 443.

¹⁴² *ibid.*, 420, 433.

¹⁴³ Boyd White sees translation as offering ‘a way of thinking about the relations we can establish among different discourse systems, and among the different communities they embody’: James Boyd White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (London: University of Chicago Press, 1990), p. 225.

¹⁴⁴ The theme of simultaneously caring *about*, and *for*, heritage stems from Russell, ‘Heritages, Identities, and Roots’, p. 30.

¹⁴⁵ Smith, *Uses of Heritage*; Waterton et al., ‘The Utility of Discourse Analysis’, 339.

deals with legal instruments and the way in which CDA treats those same instruments. The latter frequently focuses on the power relations involved. As Harrington et al. observe, CDA focuses on how ‘cultural forms represent, conceal and reinforce power qualities’ and has contributed to a rhetorical analysis.¹⁴⁶ They also point out that CDA has a certain structuralism which looks at the large scale over long periods of time.¹⁴⁷ Contrastingly, adopting an approach which focuses on the way in which language and rhetoric are used on a smaller scale allows a more specific analysis of how cultural heritage is imagined in specific contexts within UK legal and non-law instruments.¹⁴⁸

Rather than focusing on the link between power relations and discourse¹⁴⁹ and how this serves to perpetuate the authorized heritage discourse,¹⁵⁰ suppressing other voices, the aim of this book is to consider the way in which attempts have been made to construct notions of heritage and to provide rhetorical communities of discourse.¹⁵¹ This allows one to see how the human dimension of cultural heritage is placed within the legal and non-law devices. This approach helps to untangle when communities of care are created and how they assume responsibility for the care of cultural heritage. As part of this one can appreciate the multivocality¹⁵² involved in the process.

Typically a legal text is a coercive one – compelling or commanding its reader either directly or indirectly.¹⁵³ However, by treating law as a language¹⁵⁴ and as a culture of argument and interpretation one can interpret the legal (and non-law) texts in an ethical and relational manner with an appreciation of the cultural context in which they are interpreted,¹⁵⁵ thus linking closely with the act of caring for cultural heritage, which is relational in nature.¹⁵⁶

1.4.1 Law, Language and Interpretation

Law and literature are closely intertwined¹⁵⁷ and both ‘rely on symbols and myths, use rhetoric in a constitutive fashion and shape reality through language’.¹⁵⁸ This closeness is particularly relevant to the law dealing with cultural heritage. Language and linguistic devices play a significant role when

¹⁴⁶ John Harrington, Lucy Series and Alexander Ruck-Keene, ‘Law and Rhetoric: Critical Possibilities’ (2019) 46 *Journal of Law and Society* 302, 305.

¹⁴⁷ *ibid.* ¹⁴⁸ E.g. looking at words and meanings: *ibid.*

¹⁴⁹ Waterton et al., ‘The Utility of Discourse Analysis’, who focus on the Burra Charter: The Australia ICOMOS Charter for Places of Cultural Significance.

¹⁵⁰ A phrase coined in Smith, *Uses of Heritage*, p. 11. ¹⁵¹ White, ‘Law as Language’, 441.

¹⁵² White, ‘Law and Literature’, 746.

¹⁵³ Peter Goodrich, *Reading the Law: A Critical Introduction to Legal Method and Techniques* (Oxford: Basil Blackwell, 1986), p. 91. Boyd White invites us to avoid treating law as a set of commands or rules: White, ‘Law as Language’, 436.

¹⁵⁴ White, ‘Law as Language’, 415.

¹⁵⁵ *ibid.*, 427. See also White, ‘Law and Literature’, 739, 751. ¹⁵⁶ See Section 2.4.

¹⁵⁷ With both being a language and both inherently communal: White, ‘Law as Language’, 415.

¹⁵⁸ Andrea Bianchi, ‘International Adjudication, Rhetoric and Storytelling’ (2017) 9 *Journal of International Dispute Settlement* 28, 31.

discussing cultural heritage, on occasions stifling meaningful debate and development of the law, specifically surrounding restitution and repatriation claims. These ultimately hamper the appropriate care of cultural heritage. It will be seen in Chapter 9 how the Myth of the Marbles looms over debates about restitution, and rhetoric such as ‘rightful owners’ and ‘saving for the nation’ play central roles in the UK’s care of cultural heritage.¹⁵⁹ Narratives and analogies, as linguistic devices, also affect how the UK cares for cultural heritage.¹⁶⁰

Interpretation of any text is no straightforward endeavour, for frequently there will be sufficient ‘real ambiguities and uncertainties’ to suggest that there is an observable meaning which could be ‘demonstrated in some quasi-scientific way’.¹⁶¹ There is therefore real scope for interpreting instruments in a variety of different ways. One way is to be overly formalistic and literal. An alternative approach – and that adopted here – is to interpret legal (and non-law) materials by focusing on the human element.¹⁶² By this means it will be possible to appreciate the way in which the notion of caring for cultural heritage is expressed and effectuated in the various instruments that form the corpus of discussion, referred to as nested practices of care.¹⁶³

Law can be used as a ‘powerful instrument of empire, denying humanity and trivializing human experience’.¹⁶⁴ In a field such as cultural heritage, so affected by empire, it is important to be alert to the way in which law, specifically retentive museum governing statutes, has been used to stifle debates or challenges to the *status quo*. It is also necessary to recognise how the rhetoric of the ‘universal museum’ is used to justify continued retention of contentious objects.¹⁶⁵ Yet, Boyd White acknowledges that ‘on the other [hand], it can be an important way – perhaps our best way – of seeing, recording, resisting empire’.¹⁶⁶ Where claims are made within frameworks of ethical norms, these can act as mechanisms which can resist empire.

1.5 Matters of Terminology

1.5.1 Communities, the UK as a Community and as a Network of Communities

Although there are some disadvantages to adopting the terminology of ‘communities’ which will be explored further in Chapter 5, it is nevertheless helpful to use this terminology to describe the extremely varied groups of people who care about and care for cultural heritage. Such communities exist at very different levels, from the international communities down to the very small communities of families who care about cultural heritage for quite personal

¹⁵⁹ See Sections 9.5.2.5 and 8.1 respectively. ¹⁶⁰ See Sections 9.7.2.1 and 9.3.6, respectively.

¹⁶¹ White, ‘Law as Language’, 417. ¹⁶² As Boyd White invites us to do. ¹⁶³ See Section 2.2.

¹⁶⁴ James Boyd White, ‘Interview with James Boyd White’ (2007) 105 *Michigan Law Review* 1403, 1405.

¹⁶⁵ As to which, see Section 9.5.2.3. ¹⁶⁶ White, ‘Interview’, 1405.

reasons. The focus of this book is on the UK as a community, as a group of four national communities, as a member of the European and international communities.¹⁶⁷ However, the UK comprises smaller communities within the four nations, many of whom care about and care for cultural heritage directly. This book treats communities as a sufficiently wide enough concept to incorporate these varied communities, as well as the communities of Parliament, as lawmakers and developers of policy, but also the courts and other institutions which care about cultural heritage and care for it which act in a similar capacity acting as communities of care.

The approach taken here then is wider than the Faro Convention's definition of heritage communities and wider than approaches which focus on Indigenous or local communities.¹⁶⁸ It takes heed of reservations regarding the adoption of the word community.¹⁶⁹ It does not prioritise any single individual community over another. Instead, it recognises that they exist in all manner of shapes and forms with a certain 'messiness'.¹⁷⁰ By adopting such an approach it is hoped that this makes visible all the different ways in which care is provided for cultural heritage. It shows how these varied groups – forming communities of care – make use of legal and non-law instruments (representing nested practices of care) and assume responsibility for the cultural heritage that they care about.

1.5.2 'Care' in Preference to 'Safeguarding'

Blake has expressed a preference for the terminology of safeguarding rather than protection and points out that rather than focusing on the 'more negative sense of "protection against" . . . safeguarding implies taking positive actions to foster the heritage, its holders, and the context in which it is developed'.¹⁷¹ However, the concept of care moves beyond the activity and action that need to be taken which are reflected in the term 'safeguarding' – which may well be positive ones – to encompass as well why people have strong feelings about cultural heritage, the use that they make of the cultural heritage as well as the response to this that might need to be taken to ensure that that use is maintained.¹⁷² It also focuses on the element of sustaining relationships

¹⁶⁷ The ability to consider the UK as such a network of communities is perhaps helped by what has been described as Britain arguably having 'a weak statist conception of the nation that partly explains the flowering of notions of sub-state "communities": Stefan Berger, Bella Dicks and Marion Fontaine, "Community": A Useful Concept in Heritage Studies? (2019) 26 *International Journal of Heritage Studies* 325, 344.

¹⁶⁸ As to which see Section 5.1. ¹⁶⁹ *ibid.*

¹⁷⁰ Emma Waterton and Laurajane Smith, 'The Recognition and Misrecognition of Community Heritage' (2010) 16 *International Journal of Heritage Studies* 4, 5 and see Section 5.1.

¹⁷¹ Janet Blake, *International Cultural Heritage Law* (Oxford: Oxford University Press, 2015), p. 12.

¹⁷² It is acknowledged that 'In this way, the safeguarding of ICH is a more context-dependent approach that takes account of the wider human, social, and cultural contexts in which the enactment of ICH occurs': *ibid.*, p. 12.

about it. Care thus focuses on the entire process rather than the activity that needs to be done (which could be described as the normative response).

Although ‘care’ of cultural heritage is only occasionally found in legal instruments,¹⁷³ nevertheless it permeates many aspects of cultural heritage (as will be discussed in the context of the frequent reference, often without further analysis, to care).¹⁷⁴ By contrast, safeguarding, as a concept, has been found predominantly in the context of intangible cultural heritage.¹⁷⁵

1.5.3 Civil Society Initiatives and Public Participation Initiatives

‘Civil society’ has been described as ‘the area between citizen and parliament politics’¹⁷⁶ which, by its nature, presumes ‘a background of some degree of caring relations rather than of merely competing interests’.¹⁷⁷ Drawing on the UK government’s definition of ‘civil society’, the general term is understood here to mean those organisations, individuals or initiatives which are outside state control but which create social value.¹⁷⁸ The particular social value of interest here relates directly to the care of cultural heritage.¹⁷⁹ Civil society initiatives play an important role in the care of cultural heritage, facilitating communities coming together and actively assuming responsibility for the care of cultural heritage places, objects and practices through making use of legal devices to structure their organisation. This includes the use of charity law. Potentially this is an enormous, unwieldy category of materials to consider even solely within the UK, and so specific focus will be placed on the narrower category of initiatives which link directly (or interweave) with the legal framework of dealing with cultural heritage and which contribute to the way in which cultural heritage is cared for.

It becomes apparent, though, that certain initiatives have a measure of state control through funding and are thus not entirely independent. They would

¹⁷³ Although it is found in certain governing statutes of national museums (although not defined): see Section 6.4.1.

¹⁷⁴ See Section 2.2.

¹⁷⁵ The similarities between the elements of care identified in Chapter 2 and safeguarding, as recognised in the ethical elements of safeguarding (set out in the UNESCO, *Ethical Principles for Safeguarding Intangible Cultural Heritage*, Decision of the Intergovernmental Committee, 10.COM 15.A), are explored in Section 2.3.

¹⁷⁶ Selma Sevenhuijsen, ‘The Place of Care: The Relevance of the Feminist Ethic of Care for Social Policy’ (2003) 4 *Feminist Theory* 179, 183.

¹⁷⁷ Virginia Held, *The Ethics of Care: Personal, Political and Global* (Oxford: Oxford University Press, 2006), p. 17.

¹⁷⁸ Civil society as ‘individuals and organisations when they act with the primary purpose of creating social value, independent of state control’ (HM Government, *Civil Society Strategy: Building a Future that Works for Everyone* (London: Cabinet Office, 2018), p. 12). Social value here means ‘enriched lives and a fairer society for all’ (*Civil Society Strategy*, p. 12). See generally Jonathan Garton, *The Regulation of Organised Civil Society* (Oxford: Hart, 2009) and Michael Edwards, *Civil Society* (4th ed., Cambridge: Polity, 2020).

¹⁷⁹ Selma Sevenhuijsen, *Citizenship and the Ethics of Care* (tr. Liz Savage) (London: Routledge, 1998), p. 44.

therefore not strictly be considered civil society initiatives,¹⁸⁰ but operate in such a way as to engage communities in participation with cultural heritage. Examples include the Portable Antiquities Scheme, the Enriching the List initiative and the Register of War Memorials, all of which are funded, in part, by central government agencies. Therefore, in the context of this book the alternative term ‘public participation initiatives’ will be used to refer to initiatives which seek to engage communities in participation in heritage practices, whether this is through active participation and engagement or participation in the decision-making processes and regardless of whether these initiatives are organised by government departments or NGOs.

1.5.4 National and Non-national Museums

Unlike some European countries, UK national museums are not formed of state-owned collections.¹⁸¹ National museums are those in receipt of direct government funding and usually governed by legislation and a board of trustees.¹⁸² They have a stronger sense of inalienability than non-national collections because the governing statutes of national museums usually include provisions curtailing their powers of deaccessioning objects.¹⁸³ On the other hand, the structure of non-national museums are varied, established using a range of legal devices.¹⁸⁴ These include charities, which are subject to charity regulation and need to have a public benefit. Others are established as private trusts. The 821 local authority museums¹⁸⁵ have

¹⁸⁰ Under the approach of Salamon and Anheier, who identify non-profit, civil society organisations as being organized, private (in the sense of being separate from government), non-profit distributing, self-governing and voluntary: Lester M. Salamon and Helmut K. Anheier (eds.), *Defining the Nonprofit Sector: A Cross-National Analysis* (Manchester: Manchester University Press, 1997), pp. 33–4.

¹⁸¹ Although some museums were initially controlled by government departments, the ownership of the collections and the care of them were transferred to boards of trustees: see e.g. National Heritage Act 1983, s. 4(1), which transferred the Victoria and Albert Museum from the Minister of the Crown to the newly formed board of trustees and made it clear that the property ‘shall not be regarded as property of, or held on behalf of, the Crown’: sch. 1, para. 2(2).

¹⁸² See DCMS, *Strategic Review of DCMS-Sponsored Museums* (2017). Examples include: the British Museum (British Museum Act 1963), the National Gallery, National Portrait Gallery and the Tate Gallery (Museums and Galleries Act 1992). National museums also include the Wallace Collection, which was gifted to the nation (Museums and Galleries Act 1992). The national museums of Scotland, Wales and Northern Ireland are not directly sponsored by the DCMS in this way. They are also governed by either legislation or Royal Charter: National Museum of Scotland (National Heritage (Scotland) Act 1985) National Museums and Galleries of Northern Ireland (Museums and Galleries (Northern Ireland) Order 1998). The National Museum of Wales was established by Royal Charter in 1907.

¹⁸³ See Section 7.3.2.2.

¹⁸⁴ Jeremy Warren (ed.), *The Legal Status of Museum Collections in the United Kingdom* (London: Museums and Galleries Commission, 1996); Janet Ulph, *The Legal and Ethical Status of Museum Collections: Curatorially Motivated Disposals* (London: Museums Association, 2015).

¹⁸⁵ Bethany Rex and Peter Campbell, Report on *Local Authority Investment in Museums after a Decade of Austerity* (London: Museums Association, 2021), p. 7.

differing legal structures, with some collections forming part of the assets of the local authority, which can lead to tensions in times of austerity. University collections may have been established separately as trusts, although others may form part of the assets of the University and are thereby governed by the institutional legal structure.

1.5.5 The Jurisdictions

Some cultural heritage legislation applies across the UK, whilst some applies only to an individual nation. In addition, separate case law will be applicable to Scotland and to Northern Ireland as compared with England and Wales.

Ecclesiastical law applies solely to the Church of England and forms a particularly rich body of jurisprudence caring for cultural heritage. Although few disputes about cultural heritage reach the secular courts, all sales of 'church treasures' and alterations to listed churches are considered by the Church of England's consistory court.¹⁸⁶ Other churches across the nations make decisions about cultural heritage through the ecclesiastical exemption found in the listed building legislation or sales of church treasures, and aspects of these jurisdictions will be analysed. However, many of these decisions are made at the local level and do not form a body of principles as developed as the Church of England ecclesiastical law.

1.6 Adopting a Doubly Integrated Approach to Law

This book does not presume that law is the answer in the search for the most appropriate means of caring for cultural heritage. Regulation in this area of law can be problematic and litigation has been described as a flawed mechanism in the context of cultural heritage disputes.¹⁸⁷ For that reason, this book adopts a doubly integrated approach. First, it treats all cultural heritage on the same basis – regardless of whether it is tangible, intangible or involves places, objects or practices. Preventing harm to cultural heritage places, objects or practices, stolen art, heritage crime, illicit trade in looting, Nazi-looted art, deaccessions and repatriation are dealt with holistically. A community's compunction to care for cultural heritage means that something *ought* to be done – and what may be appropriate to be done (and who has responsibility for doing it) may differ between those contexts. Yet the fact that communities care about cultural heritage and wish to care for it, either directly or indirectly is a common thread throughout these disparate areas. The subsequent chapters analyse how processes that are in place meet the need for such normative responses and provide such care. Thus, the aim is to break down conceptual barriers to look at how decisions about these important objects, places and practices are addressed across the spectrum of cultural heritage.

¹⁸⁶ Under the ecclesiastical exemption. Discussed in Section 3.7.3. ¹⁸⁷ See Section 3.4.1.

The second aspect of the integrated approach is that of blurring the line between the legal and non-law initiatives which support communities who care about cultural heritage and provide care for it. This includes how notions of cultural heritage are transformed into the legal sphere and also into those instruments without the force of law, but which serve to care for cultural heritage.¹⁸⁸

1.6.1 Providing a Complete Window on a Community

The way in which the law treats something can go a long way to demonstrating how a community views it.¹⁸⁹ But that is not the full picture. Whilst the law goes some way to caring for cultural heritage and ensuring that it is not wilfully destroyed, dispersed or diminished, the UK also relies on other non-law instruments which mandate how either a limited category of people (in the case of professional organisations) or a wider group (in the case of formal government guidance) treat cultural heritage.¹⁹⁰ Furthermore, civil society initiatives facilitating public participation in cultural heritage and decision-making about cultural heritage also contribute to the creation of a fuller picture of how the UK cares for cultural heritage.¹⁹¹ Public participation initiatives organised by government or NGOs with government backing also add to this.

These decision-makers may be at the community or local level or in particular institutions. Museums will be faced with curatorial decisions relating to acquisition, lending and disposal, the placement of cultural heritage (including who possesses it), who has access to it, who decides what happens to it and who participates in the decision-making process. How disputes are dealt with, and how dissonance is navigated (specifically how cultural heritage is translated in these circumstances), is central to a comprehensive understanding of how cultural heritage is cared for by any community – here, the UK. How decision-makers approach the decision (e.g. how they respond to claims for restitution or how they engage with communities and the public more broadly) as well as how they reach their ultimate decisions demonstrate their care for cultural heritage and how the UK, in turn, cares for cultural heritage. Furthermore, an

¹⁸⁸ E.g. codes of ethics, recommendations of experts panels and guidance. See Sections 3.7.5 and 3.7.6.

¹⁸⁹ Soderland argues that ‘The law provides a lens through which archaeology can be historicized by exploring the voices through which heritage has come to be defined, redefined in law over time as well as how legal classification engages our contemporary understanding of archaeological heritage’: Hilary A. Soderland, ‘Values and the Evolving Concept of Heritage: The First Century of Archaeology and Law in the United States’ in George S. Smith, Phyllis Mauch Messinger and Hilary A. Soderland (eds.), *Heritage Values in Contemporary Society* (Walnut Creek: Left Coast Press, 2010).

¹⁹⁰ ‘Policy texts and legal texts are, after all “stories in themselves”: they include patterns of dealing with things which are often the result of political compromises and discursive traditions’: Sevenhuijsen, *Citizenship and the Ethics of Care*, p. 30.

¹⁹¹ E.g. the Portable Antiquities Scheme: www.finds.org.uk (last accessed 20 December 2022) or the Enriching the List scheme run by Historic England: <https://historicengland.org.uk/listing/enrich-the-list/> (last accessed 20 December 2022).

assessment of the way in which a community cares for cultural heritage also involves analysing how that final decision is justified or audited whether through judicial review or some other mechanism through which to challenge or appeal the decision. Whilst these different non-law instruments and decision-making communities of care do not represent or make use of binding legal principles, these mechanisms do provide an important way to care for cultural heritage, but the authority of these communities and the enforceability of these instruments and decisions will be considered carefully when analysed.

1.7 Conclusion

The integrated approach to caring for cultural heritage adopted in this book avoids taking a myopic view of heritage¹⁹² by focusing on individual areas of contestation. It looks beyond particular groups of interests (such as international, national or community),¹⁹³ but instead takes a holistic approach. It considers how communities of care are created and developed, enabling us to understand the way in which a community (here the UK) cares for cultural heritage through law, policy, ethics and practice. Using the framework of caring for cultural heritage, it focuses on developing and sustaining relationships, acknowledging and accepting responsibilities, ensuring mutual respect, trust and empathy, providing the space and willingness to navigate (and resolve) dissonance, providing the space and willingness to respond to actual or threatened harm and facilitating the flourishing of cultural heritage.¹⁹⁴

As a methodological approach it draws on the work of James Boyd White to analyse the acts of translation of cultural heritage and care into legal language to consider how the UK provides the space to recognise the importance of cultural heritage through meaningful consultation to facilitate consensus. It thus seeks to avoid the authorized heritage discourse and legal disciplinary imperialism, but instead focuses on the communities of care which develop to care for cultural heritage.

¹⁹² Fincham has suggested that a 'myopic view' of heritage can result from concentrating on indigenous claims and repatriation at the expense of adopting a more holistic method: Derek Fincham, 'The Distinctiveness of Property and Heritage' (2011) 115 *Penn State Law Review* 641, 643. This should not be interpreted as showing disrespect towards claims that may be made by indigenous groups, but instead the focus here is on cultural heritage, regardless of origin and broadly conceptualised. This can be seen not only in law, but more generally, for as Bienkowski points out, cosmopolitanism discourse in archaeology has unintentionally 'tended to focus on empowering and involving indigenous communities' rather than more broadly on minority communities: Piotr Bienkowski, 'Whose Past? Archaeological Knowledge, Community Knowledge, and the Embracing of Conflict' in Scarre and Coningham, *Appropriating the Past*, p. 57.

¹⁹³ It looks beyond the nationalism/internationalism debate to address the human dimension to cultural heritage, including communities, which has been described as a third way of thinking of cultural property: Lucas Lixinski, 'A Third Way of Thinking about Cultural Property' (2019) 44 *Brooklyn Journal of International Law* 563.

¹⁹⁴ This framework of caring for cultural heritage is fully explored in the next chapter.

The book is separated into three parts, each of which represents one of the broad areas of contestation involving cultural heritage identified in this chapter. The individual chapters within each part look at specific areas of contestation relevant to the UK and for each of these areas the key elements of care are considered and the extent to which these are reflected in the legal or non-law initiatives in the UK are analysed.

Part I examines how cultural heritage is imagined and translated in the UK. It starts in Chapter 2 by setting out the framework of care adopted in this book and identifying the key elements of appropriate care, being respectful, empathetic and dialogic. In the next chapter, the various legal and non-law instruments and civil society initiatives in the UK, recognised as nested practices of care, are identified and analysed. Chapter 4 considers the various ways in which cultural heritage is directly translated in law and explores how the human dimension to cultural heritage is recognised and helps to establish the UK's overall approach to caring for cultural heritage.

Part II focuses on how the UK cares for cultural heritage through encouraging flourishing of cultural heritage and averting irreparable harm and loss. Chapter 5 explores the way in which communities of care develop and assume responsibilities to care for cultural heritage. Chapter 6 sets out the quotidian care that is provided in respect of cultural heritage, which includes the provisions in law and non-law instruments for looking after cultural heritage on a daily basis, and providing opportunities for communities to use, enjoy and have access to cultural heritage. Chapter 7 analyses the way in which the UK seeks to navigate harm to cultural heritage – both actual or threatened tangible and intangible harm to cultural heritage, focusing on precautionary, preventative and reactive care as well as efforts to mitigate the effect of harm when it cannot be averted. Chapter 8 explores the rhetoric of saving cultural heritage for the nation and averting loss of access on a national level; it seeks to determine whether the export licensing system is focused on caring for cultural heritage or rather the response to a concern that another nation might acquire cultural heritage which the UK is desirous of keeping.

Part III explores the provision of space to resolve dissonance. Chapter 9 considers the space to provide justice and challenge the *status quo*. It analyses whether cultural heritage has an instrumental role, or whether restitution, repatriation, reunification, return or some other remedy are central to caring for others. A central part of the care here is to ensure mutual respect, trust and empathy. To this end, the approaches taken to dealing with challenges to the *status quo* in the form of paternalistic care are compared with dialogic responses which are infused with the ethics of care.