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Tarnished Treasures: Provenance and the UK's Waverley Criteria**

Abstract: The United Kingdom (UK), like other countries, has made strong commitments to tackling the illicit trade in objects and those that were taken during the Nazi Era. Yet, admitting objects with such questionable provenance into the category of UK national treasures and attempting to keep them in the UK by seeking institutional support to make them available to the public would be at odds with these worthy policies. The main analysis in this paper is focused on the issues raised by the 2017 decision in the UK to designate as a national treasure a Meissen figure that was formerly owned by Emma Budge, whose heirs lost possession of her collection during the Nazi Era in a forced sale. Using the trope of "tarnished treasures" this paper argues that admitting objects with tainted provenance into the category of national treasures tarnishes the entire category of national treasures. Recognizing the need to retain the integrity of this special

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category, this paper sets out ways in which the UK export licensing process can more fully take into account provenance before admitting tainted cultural objects into the canon of national treasures, and thus avoiding tarnishing the entire category.

Keywords: UK, national treasures, Nazi Era spoliation, tainted cultural objects

Introduction

In May 2017 the UK Secretary of State for Culture, Media and Sport announced that he would defer granting an export licence for a Meissen figure of “Pulcinell” in order to provide an opportunity for a UK purchaser to acquire it, thus ensuring public access.¹ Its owner wished to sell it to an overseas purchaser and that sale was dependent on the grant of an export licence. The Secretary of State’s decision was not only based on the object’s outstanding aesthetic importance but on its significance as the very first example of the recognized genre of Commedia dell’Arte and as one of only very few stoneware sculptural works from the Meissen factory.² In deciding to delay the granting of an export licence, the Secretary of State was following the recommendation of the Reviewing Committee on the Export of Works of Art and Objects of Cultural Interest (“the Committee”), which had concluded that “Pulcinell” satisfied two of the three criteria for designating objects as national treasures (the “Waverley Criteria”).³ Adopted in 1952 following the report of the Waverley Committee, these three criteria are used to determine whether an object is of such national importance to be designated a national treasure and that the granting of an export licence should be deferred to allow time for purchasers who will provide appropriate public access to purchase the object, thereby “saving it for the nation”.⁴ These objects may never before have been seen by the public, are often privately owned, and their owners now wish to sell them, or send them, abroad.

¹ Department for Digital, Culture, Media & Sport (DCMS), *Rare Meissen Figure at Risk of Leaving the UK*, 2 May 2017, <https://www.gov.uk/government/news/rare-meissen-figure-at-risk-of-leaving-the-uk> [accessed: 14.10.2018].

² Reviewing Committee on the Export of Works of Art and Objects of Cultural Interest, *Note of Case Hearing on Meissen Figure of ‘Pulcinell’* (“Case 19, 2016-17”).

³ Established by the *Report of the Committee on the Export of Works of Art*, HMSO, London 1952 (chaired by Viscount Waverley; “Waverley Report”). Where export licences are sought for export within, or outside the European Union, the Secretary of State can defer the granting of a licence to allow time for a purchaser to come forward so that the object can remain within the UK.

⁴ The phrase “saving for the nation” is found not only in media reports, but in the reports of the Export Reviewing Committee and Press Releases when the Secretary of State announces the deferral of export licences.

The Meissen decision would not have been controversial in itself, representing as it did a clear application of the Waverley Criteria, were it not for the fact that the object had been owned by Emma Budge, a Jewish lady whose collection was the subject of a forced sale during the Nazi Era. "Pulcinell" had appeared as Lot 779 at an auction at Paul Graupe, Berlin in September 1937, when other objects had also been sold in circumstances which the UK's Spoliation Advisory Panel ("the Spoliation Panel") recently classified as a forced sale.⁵ "Pulcinell" appears never to have been returned to the heirs of Emma Budge. Apparently after the 1937 sale it was transferred to a dealer whose descendants sold it in London in 2016.⁶ After that sale, a further sale to an overseas purchaser was agreed upon subject to the granting of an export licence.⁷ The provenance information identifying Emma Budge as the previous owner was merely noted in the Committee's published note of the case hearing.⁸ In noting this, the Chairman then stated that "it was reasonable for the Committee to consider the export licence application and reach a conclusion on the Waverley Criteria which could form the basis of a recommendation to the Secretary of State".⁹ The export licence was deferred to allow a UK buyer to come forward and purchase it and attempts were made to engage the owner in dialogue with the Budge heirs, but ultimately because no purchaser came forward, the export licence was granted and "Pulcinell" was exported.

If the figure was sold in circumstances that amounted to a forced sale, it is most likely that the legal position would be that, because the Meissen figure had been in the UK for over 50 years¹⁰ and treated by someone as their own, section 3(2) of the Limitation Act 1939 would have extinguished the legal title of the original owner

⁵ *Report of the Spoliation Advisory Panel in Respect of Three Meissen Figures in the Victoria and Albert Museum*, 10 June 2014 (2014 HC 208). Other claims heard by the Spoliation Panel treated sales at the same auction as forced sales: *Report of the Spoliation Advisory Panel in Respect of Four Nymphenburg Porcelain Figures in the Possession of the Cecil Higgins Art Gallery, Bedford*, 20 November 2014 (2014 HC 775) and *Report of the Spoliation Advisory Panel in Respect of a Tapestry Fragment in the Possession of Glasgow City Council*, 27 November 2014 (2014 HC 776). The same conclusion was reached by the Dutch and Austrian committees when dealing with claims from the Budge heirs for the return of other objects. It should be acknowledged that sometimes objects in an auction originating from the same collector can arrive there by different means. For example, in some situations an owner may have sold the object on to someone else but not as a forced sale and it turned up later in the same auction. Therefore, without full provenance research being undertaken it is not possible to say categorically that the Meissen figure was one that had been sold as a result of a forced sale, but the presence of it in the same sale as other objects whose sale was forced certainly raises questions worthy of consideration.

⁶ M. Bailey, *UK Permits Nazi-Looted Meissen Figure to Leave for Japan Despite Spoliation Claim*, "The Art Newspaper", 5 June 2018.

⁷ *Ibidem*.

⁸ Case 19, 2016-17.

⁹ *Ibidem*.

¹⁰ This can be assumed because the Committee only considers objects that have been in the UK for at least 50 years: DCMS, *Statutory Guidance on Export Controls on Objects of Cultural Interest*, March 2015, para. 10.

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six years from the date of any conversion (the tort of wrongful interference with goods).¹¹ Therefore any legal claim for its recovery would likely be unsuccessful, and the matter would be an ethical one.

Why was it then that in 2014 the Secretary of State, in response to an application of the Budge heirs for resolution of a dispute, had approved the Spoliation Panel's recommendation to transfer other Meissen figures from the Victoria and Albert Museum, London, treating the 1937 sale as a forced one, yet only three years later designated Pulcinell, another object from the same sale, as a national treasure by deferring the grant of an export licence to allow time to find a UK purchaser?

This case raises interesting questions which go to the heart of designating objects as national treasures and the factors that are, or should be, relevant when deciding whether or not to admit an object into this exceptional category of objects considered worthy of "saving for the nation".

There are various situations in addition to Nazi Era dispossessions where cultural objects can be tainted by past histories, such as having been taken during colonial times, or having been acquired after 1970 when certainly museums acquiring these objects would seek greater assurances about provenance (even if not strictly required to do so by law).

This article introduces the notion of tarnishing national treasures. The principal argument put forward here is that the failure to take into account provenance, but instead to appropriate as a national treasure an object to which another person¹² has a moral claim, has the potential to impact the way in which the public may perceive not only the individual object, but also the entire category of national treasures. By designating an object with a tainted provenance, the UK government is pronouncing that such an object, despite its taint, should be appropriated for the nation in clear contradiction of existing national (and international) commitments to tackling Nazi Era dispossessions and the illicit trade in cultural objects, as well as the increased interest in addressing colonial collections. Additionally, in so designating the object, the government is also actively encouraging museums which are bound by codes of ethics to purchase an object in contravention of their ethical obligations. Thus, it is argued herein that the inclusion of individual tainted objects within the narrow category of national treasures has the potential to tarnish the entire category of national treasures. There is a clear difficulty however in tackling this dilemma, for the Secretary of State can only defer the granting of a licence for the purpose of finding a buyer for a national treasure; in the Meissen case if he had not delayed granting the licence then the fact that the object had originated from the Budge collection might not have come to the public attention. However, where an object with a tainted provenance is ultimately exported then it enters the international art market and

¹¹ Unless there was fraudulent concealment.

¹² Or community or nation.

the UK, by giving permission to export that object, has contributed to the unethical trade in cultural objects.

This paper begins by setting out the context of the UK's approach to designating objects as "national treasures" through the export licensing system, and considers the extent to which factors outside the Waverley Criteria may be relevant in adjudging whether an object should be designated as a national treasure. The paper then outlines the strong commitment that the UK has to addressing the ongoing problem of unresolved claims to Nazi Era dispossessions of cultural objects, and identifies other situations in which objects may be tainted and where provenance should thus be an important factor before something is designated as a national treasure. The paper then introduces the trope of tarnished national treasures and analyses the implications surrounding the case study of the 2017 decision relating to the Meissen figure. In the final section various proposals are advanced to address the important issue of avoiding admitting tainted cultural objects to the category of national treasures.

Background: Designating "National Treasures" in the UK

The underlying principle of the UK's export licensing system for cultural objects is to provide "an opportunity for the UK to retain cultural goods judged to be of outstanding national importance".¹³ This category of objects is referred to as "national treasures";¹⁴ they are a special category deemed worthy of attempting to retain within national borders, which interferes with individual private property rights through the system set out below.¹⁵ In the UK objects designated as national treasures have included Titian's *Venus and Adonis*, a copy of the warrant for the execution of Mary Queen of Scots, and Benjamin Britten's complete draft score of the *Young Person's Guide to the Orchestra*.¹⁶ Control of such objects is an exception to the principle of free movement of goods.¹⁷ For that reason it is important to ensure that the category retains its integrity. By designating something as a national treasure, a nation is effectively "appropriating" the object for itself; it should there-

¹³ Arts Council England, *UK Export Licensing for Cultural Goods: Procedures and Guidance for Exporters of Works of Art and Other Cultural Goods*, 2019.

¹⁴ DCMS, *Statutory Guidance...*, para. 10. Such a system is likely to be justified on the basis of European Court of Human Rights, *Beyeler v. Italy*, Application No. 33202/96, Judgment of 5 January 2000.

¹⁵ Deferral is for a specific period of time and a fair market price at which offers are made is determined by the Secretary of State: DCMS, *Statutory Guidance...*, para. 18.

¹⁶ Arts Council England, *UK Export Licensing...*, para. 41.

¹⁷ Treaty on the Functioning of the European Union (TFEU) (consolidated version), OJ C 202, 7.06.2016, p. 47, art. 36. An EU export licence can be refused where cultural goods are national treasures – Council Regulation (EC) No. 116/2009 of 18 December 2008 on the export of cultural goods (codified version), OJ L 39, 10.02.2009, p. 1, art. 2(1).

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fore be a superlative category and interpreted narrowly.¹⁸ To give a sense of scale – in 2016/2017, 27,398 objects were exported after referral to the Expert Advisers on the question of national importance, but only 22 objects were considered by the Committee and of those, 15 were designated as national treasures.¹⁹

The phrase “national treasures” has a long history in the UK. An early reference is found in the Calendar of Manuscripts of Hatfield House;²⁰ although the manuscripts were part of a private collection they “may indeed be justly regarded in the light of a national treasure”.²¹ In the 1915 Curzon Report, which was commissioned to enquire into the retention of important artworks in the UK, a concern was expressed about owners of private collections selling off masterpieces and the “cry of lamentation” at “each diminution in the national treasure”.²² Therefore, the notion of national treasure was applied from an early stage to privately-owned objects seen as important to the public and for which the public felt a loss when they were exported abroad.²³ The export control of artworks in the UK grew out of the Second World War, and rather than being introduced to “safeguard our national treasures” it “came at the end of a long period of anxiety” caused by the depletion of private collections and the export of their objects abroad.²⁴ The terminology of national treasures is still used in the DCMS *Statutory Guidance on Export Controls on Objects of Cultural Interest* of March 2015, and is also clear in the EU legislation dealing with the exception to the free movement of goods.²⁵

The decision-making process

The UK’s export control process is administered by Arts Council England, an executive, non-departmental public body, on behalf of the Secretary of State. When an object meets the financial and age thresholds under either the UK or EU legislation, an export licence is required before it can leave the country (whether tempo-

¹⁸ See, e.g., Case 7/68, *Commission v. Italy*, ECR, 1968, 423 which makes it clear that the exception should be construed restrictively.

¹⁹ DCMS, *Export of Objects of Cultural Interest 2016-17*, April 2018, p. 5.

²⁰ Historical Manuscripts Commission, *Calendar of the Manuscripts of the Most Hon. the Marquis of Salisbury, K.G., preserved at Hatfield House, Hertfordshire*, HMSO, London 1883, p. iii. This comprised a full description of the papers from the Cecil archive, including two holograph letters from Cardinal Wolsey, one of which referred to the divorce of King Henry VIII: p. vii.

²¹ *Ibidem*, p. iii.

²² *Report of the Committee of Trustees of the National Gallery, Appointed by the Trustees to Enquire into the Retention of Important Pictures in this Country, and Other Matters Connected with the National Art Collections*, HMSO, London 1915, p. 4.

²³ *Ibidem*.

²⁴ Waverley Report, p. 2.

²⁵ See art. 36 TFEU.

rarily or permanently).²⁶ Licences under the UK legislation are required for export within the EU and a licence is required under the EU legislation for export outside the EU. As part of this process, an object may be referred to an Expert Adviser who considers whether the object may be a national treasure²⁷ by applying the Waverley Criteria;²⁸ this halts the automatic granting of an export licence. Whether or not a cultural object falls within the canon of national treasure depends on how long it has been in the UK. Only those objects that have been in the UK for 50 years or more can be considered under the Waverley Criteria, which pose the following questions:

- (1) Is it so closely connected with our history and national life that its departure would be a misfortune?
- (2) Is it of outstanding aesthetic importance?
- (3) Is it of outstanding significance for the study of some particular branch of art, learning or history?

If the Expert Adviser believes an object meets one or more of these criteria it refers the matter to the Committee, a non-statutory independent body²⁹ comprised of eight permanent members drawn from experts in the fields of paintings, furniture, and manuscripts.³⁰ It assesses the object again against the Criteria³¹ and recommends whether the Secretary of State should defer the grant of an export licence to allow time for public institutions – such as national or local authority museums (or private individuals who give undertakings ensuring appropriate levels of public access to the object³²) – to make offers to purchase the object at the fair market price.³³ The Secretary of State's power to grant or defer export licences includes a provision for him/her to take into account the Committee's advice.³⁴ Under the UK system there is no right of pre-emption, therefore whether or not

²⁶ The Export of Objects of Cultural Interest (Control) Order 2003, SI 2003/2759 (enacted pursuant to The Export Control Act 2002, Section 1) and EU Council Regulation 116/2009 unless there is an applicable Open General Export Licence or an individual open licence.

²⁷ DCMS, *Statutory Guidance...*, para. 10.

²⁸ Waverley Report and amended following the *Quinquennial Review of the Reviewing Committee on the Export of Works of Art*, DCMS, London 2003; DCMS, *Statutory Guidance...*, para. 12. For a background to the establishment of the Waverley Criteria see V.F. Wang, *Whose Responsibility? The Waverley System, Past and Present*, "International Journal of Cultural Property" 2008, Vol. 15.

²⁹ Arts Council England, *UK Export Licensing...*, para. 38.

³⁰ *Ibidem*.

³¹ And thus considering it to be a national treasure: DCMS, *Statutory Guidance...*, para. 17.

³² *Ibidem*, para. 22, which talks about the situation where the export licence for a national treasure is deferred and the owner refuses an offer from a private collector who would have provided such access; in such a situation the Secretary of State will then refuse to grant the export licence.

³³ *Ibidem*, para. 18.

³⁴ *Ibidem*, para. 19.

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a national treasure is “saved for the nation” and retained in the UK depends on the funding available, since the purchaser has to match the market value attributed to the object by the Committee.

Advisory nature of the Committee and extraneous factors

In two recent decisions the Committee has emphasized that it only has a power to assess an object based on the Waverley Criteria,³⁵ rather than taking into account additional factors, although several cases discussed below suggest that in the past the Committee has been prepared to consider other factors. The Secretary of State usually follows the Committee’s recommendation; however, he/she can depart from this recommendation because the Committee’s role is advisory³⁶ rather than prescriptive,³⁷ providing that his/her discretion is exercised reasonably.³⁸ It should be noted that in the Meissen figure case despite the provenance associating it with the forced sale of 1937, the Secretary of State nevertheless followed the Committee’s recommendation rather than taking into account additional factors.

In 2008 the then Secretary of State exercised his discretion to grant an export licence for the export of the papers of the 8th Earl of Elgin to Canada, even though the Committee had concluded that the papers met Waverley Criteria 3 and had recommended deferral of the licence.³⁹ There, the applicant had provided evidence showing that the papers had a greater historical significance to Canada than to the UK and that even though the anticipated purchaser (the Libraries and Archives of Canada) intended to present a digitized copy to the National Archives of Scotland,⁴⁰ the Committee considered the ultimate destination of the papers to be irrelevant within their terms of reference. They cited their task as being to assess the objects for national importance to the UK against the Waverley Criteria.⁴¹ In contrast, the Secretary of State concluded that the proposals ensured that the

³⁵ Reviewing Committee on the Export of Works of Art and Objects of Cultural Interest, *Note of Case Hearing on 4 June 2008: Papers of James Bruce, 8th Earl of Elgin, as Governor of British North America* (“Case 2, 2008-09”) and Case 19, 2016-17. Although see the discussion below regarding the recommendation of the Committee in the matter of *Carlo and Ubaldo Embarking in Pursuit of Rinaldo* by Claude Lorraine – *Export of Works of Art 1962-63. Tenth Report of the Reviewing Committee Appointed by the Chancellor of the Exchequer in December, 1952*, HMSO, London 1963.

³⁶ DCMS, *Statutory Guidance...*, para. 17.

³⁷ Court of Appeal (United Kingdom), *R (on the application of J Paul Getty Trust) v. The Secretary of State for National Heritage and the Trustees of the National Heritage Memorial Fund*, 27 October 1994, 1994 WL 1060613, para. 20.

³⁸ Arts Council England, *UK Export Licensing...*, para. 73.

³⁹ On the basis of their “outstanding importance for the study of British Imperial history, and of the history of British North America in particular”: Case 2, 2008-09, para. 10.

⁴⁰ *Ibidem*, para. 7.

⁴¹ *Ibidem*, para. 9.

national interest could be met through provision of digital copies.⁴² One interpretation of this is that, as an archive, the loss to the nation could be mitigated by access to copies in a major UK collection.⁴³ However, a much earlier recommendation of the Committee demonstrates a focus on the policy objective of building up collections in the Commonwealth nations and thus foregoing something that might otherwise be a UK national treasure. In an export licence case heard by the Committee in 1963 concerning a request to export a painting by Claude Lorraine to Canada, the Committee “concluded that the painting was of great importance and extreme beauty, one of the finest works by Claude in the country, but that having regard to the desirability of building up collections in Commonwealth countries we should not be justified in seeking to prevent the gift to the Toronto Gallery”,⁴⁴ Particularly noteworthy is the fact that the Committee itself was prepared to take into account additional factors when making its recommendations to the Secretary of State. In the Waverley Report of 1952, it was stated that application of the Waverley Criteria and the designation of an object as a national treasure should be operated primarily in the interest of the UK, with

the proposed destination of an object being a secondary consideration. At the same time, while we have thought it our duty to set out all the arguments, we have no doubt that in practice ties of history and sentiment will play an appropriate part in determining the destination of objects which leave the country.⁴⁵

This statement was in the context of the Committee expressing “a good deal of sympathy” with some of the arguments in favour of exporting to public institutions abroad rather than to private collectors; in the context of whether or not to give preference to Commonwealth countries, no formal set of rules was considered appropriate.⁴⁶ It seems to stem from these various cases that some preference has been given to Commonwealth collections. However, the Committee has considered extraneous factors in circumstances other than Commonwealth collections. In 1981 the Committee considered an application for an export licence for certain Baroque choir stalls originally from a monastery in Bavaria to the Bayerisches Landesamt für Denkmalpflege, Munich in the then West Germany. Despite them

⁴² Ibidem, para. 15.

⁴³ Indeed, the use of facsimile copies of printed materials have been present in the recommendations of the Committee since its inception – e.g. in October 1956 an export licence was granted for *The Newdigate News Letters* on condition that a microfilm was deposited at Bodleian Library, and in August 1957 a licence was granted for *The Westmoreland Papers* on condition that microfilming up to maximum value of £200 was undertaken: table in *Export of Works of Art 1962-63...*

⁴⁴ Ibidem, p. 10.

⁴⁵ Waverley Report, p. 31.

⁴⁶ Ibidem, p. 30.

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satisfying the Waverley Criteria,⁴⁷ the Committee recommended export rather than deferral to enable the choir stalls to be reinstalled in their original location. This was justified because of the “concern, on iconographic, aesthetic and art historical grounds, for the re-integration of a major artistic complex with its other surviving elements in its original architectural setting”.⁴⁸ Whilst acknowledging that the interests of the UK should generally be put first, they considered that “in the very special circumstances of this case” it was “right to consider the interests of the European, and indeed, the international cultural heritage generally”.⁴⁹

These various cases show that the Secretary of State could actually choose to take into account provenance as a factor when designating national treasures. Furthermore, the Committee seems also to take account of other factors in limited circumstances.

The current relevance of provenance for the Committee and Secretary of State

The question therefore arises whether provenance can and should have a greater role in the decision-making process of the Committee and Secretary of State. Provenance is clearly relevant to the Committee. In the introduction to its 2015-2016 and 2016-2017 reports on the Export Reviewing process it makes specific reference to the importance of applicants providing timely provenance information necessary for potential institutional purchasers, particularly since often UK funding bodies would become involved and would have required them to have undertaken appropriate due diligence checks in anticipation of acquiring the object.⁵⁰ However, this was set in the context of ensuring that an object has been in the UK for the last 50 years and also as a contributing factor to establishing whether an object meets the Waverley Criteria. This is also echoed in various Export Reviewing case notes – as provenance tends to be discussed in the context of its effect on recognizing the importance of the object for the purposes of the national interest. The ownership history and a connection with particular collections or individuals can add to its importance and ultimately contribute to its designation as a national treasure.

In addition, Arts Council England, which administers the export licensing scheme, provides specific information showing what provenance information applicants ought to provide.⁵¹ Setting out “first principles”, it makes clear that a cen-

⁴⁷ Case viii Baroque Choir Stalls Incorporating Carved Wood Figures of Apostles 17th Century, *Export of Works of Art 1980-81. Twenty-Seventh Report of the Reviewing Committee Appointed by the Chancellor of the Exchequer in December, 1952*, HMSO, London 1982, p. 15.

⁴⁸ *Ibidem*, p. 17.

⁴⁹ *Ibidem*.

⁵⁰ DCMS, *Export of Objects 2016-2017...*

⁵¹ Arts Council England, *Guidance on the Provision of Import, Proof, Declarations and Provenance* (updated 29 August 2017).

tral reason for provenance information is to ensure that the object has been in the UK for the last 50 years. There are clear statements about the need for evidence that the object is legally in the UK. Nothing is said about either the Committee or the Secretary of State taking account of provenance to override the application of the Waverley Criteria.

The application of the current Waverley Criteria without further reference to any ethical taints to its provenance, which arguably is what could be described as the “social life” of the object, does not address what the scholar Arjun Appadurai refers to as “the diversion of commodities from their customary paths”.⁵² He cites examples of this as including diversions caused by “warfare and the plunder that historically has accompanied it”.⁵³ In such circumstances the diversion “always carries a risky and morally ambiguous aura”.⁵⁴ Such an aura, or taint, will persist if not addressed before an object is designated as a national treasure. Furthermore, the Waverley Criteria do not address at all the effect that tainted provenance can have not only on the cultural heritage object *qua* national treasure, but also on the entire category of national treasures.

Given the recognized importance of tackling Nazi Era injustices and the UK's leading role as one of only a handful of nations that established bodies to hear claims for Nazi Era dispossessions, taking this provenance into account could be justified on the basis of the widespread support for this. The discussion now turns to this issue, as well as the other circumstances in which cultural objects may be tainted.

Tainted cultural objects

Cultural heritage objects may be referred to as tainted in different contexts; here four types of taint are discussed. First, taint is recognized in legal terms under section 2(2) of the Dealing in Cultural Objects (Offences) Act 2003, whereby a person deals with an object which was an illegally removed fixture from a listed building or was improperly removed from a scheduled monument.⁵⁵ However, there are also situations where cultural objects may be tainted by a moral stain. In the context of Nazi Era dispossessions it has been observed that “a work of art that is ‘tainted’ may remain so despite a good legal title”.⁵⁶ Moral taint is most usually caused

⁵² A. Appadurai, *Introduction: Commodities and the Politics of Value*, in: A. Appadurai (ed.), *The Social Life of Things: Commodities in Cultural Perspective*, Cambridge University Press, Cambridge 1986, p. 26.

⁵³ *Ibidem*.

⁵⁴ *Ibidem*, p. 27.

⁵⁵ Objects which are tainted under this Act would not fall under consideration by the Export Reviewing Committee as potential national treasures because they would not have been in the UK for at least 50 years – objects would only be tainted if an offence took place after the commencement of the Act in 2003.

⁵⁶ E. Campfens, *Introduction*, in: E. Campfens (ed.), *Fair and Just Solutions? Alternatives to Litigation in Nazi-Looted Art Disputes: Status Quo and New Developments*, Eleven Publishing, The Hague 2015, p. 4.

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by either a specific indication of a problematic provenance, or an absence of clear provenance information. Such a taint to the title is recognized irrespective of any extant legal title.⁵⁷ The object may have been seized during the Nazi Era, or it may have been transferred in a sale forced by persecution.⁵⁸

The UK has made a strong commitment to dealing with the dispossession of cultural objects during the Nazi Era. The UK was a signatory to the 1998 Washington Conference Principles⁵⁹ which, *inter alia*, committed over 40 States to identifying art confiscated⁶⁰ by the Nazis which had not been restituted, as well as to providing alternative dispute resolution mechanisms for claims⁶¹ and facilitating just and fair solutions.⁶² In response, UK museums undertook provenance research of their collections, identifying objects with gaps in their provenance between 1933-1945. In 2000 the UK government established the Spoliation Advisory Panel to hear claims from people who lost possession of cultural objects during the Nazi Era which are now in a national collection or other museum or gallery established for the public benefit.⁶³ As well as recommending the payment of compensation, an *ex gratia* sum or the display of an account of the object's history, the Spoliation Panel can recommend the object's return,⁶⁴ which represents an important exception to the usual restrictions on national museums transferring objects from their collections (even when wishing to restitute or repatriate).⁶⁵ The Spoliation Panel

⁵⁷ E.g. which might have been acquired under a valid legal transfer – or acquired under statutes of limitation which extinguish an original owner's title. See also ICOM, *Code of Ethics for Museums*, 2017, principle 2.2 on valid title.

⁵⁸ See N. Palmer, *Museums and the Holocaust*, IAL Publishing, Leicester 2000.

⁵⁹ Washington Conference Principles on Nazi-Confiscated Art, 3 December 1998.

⁶⁰ Despite the narrow wording of this concept, the approach to dealing with the commitments set out in the Washington Conference Principles in the UK has been to interpret it more widely to incorporate all losses of cultural objects during the Nazi Era, and the recommendations of the Spoliation Panel have involved not only direct seizure by the Nazis, but also forced sales to pay exorbitant tax demands or obtain exit visas as well as sales that were made after the war, but would not have happened but for persecution by the Nazis.

⁶¹ Principle 11.

⁶² Principles 8 and 9. The UK also signed the subsequent international commitments, Vilnius Forum Declaration, 5 October 2000; Terezin Declaration on Holocaust Assets and Related Issues, 30 June 2009; and was also a party to the Resolution 1205 of the Council of Europe "Looted Jewish Cultural Property", 5 November 1999.

⁶³ Spoliation Advisory Panel Constitution and Terms of Reference ("SAP ToR"), Hansard HC vol. 348, col. 255W (13 April 2000).

⁶⁴ The latest SAP ToR (<https://www.gov.uk/government/groups/spoliation-advisory-panel#terms-of-reference>), para. 17.

⁶⁵ This is under the Holocaust (Return of Cultural Objects) Act 2009, Section 2. The only other exception relates to human remains: Human Tissue Act 2004, Section 47. Restrictive powers of transfer are found in the British Museum Act 1963, Section 5; Museums and Galleries Act 1992, Section 4; and National Heritage Act 1983, Sections 6, 14, and 20. See also Chancery Division (United Kingdom), *AG v Trustees of the British Museum*, Judgment of 27 May 2005, [2005] Ch 397 (Ch).

can also hear claims for cultural objects in private collections, but only at the joint request of the parties.⁶⁶

A key principle of the UK Museums Association Code of Ethics is that museums should “[r]eject any item for purchase, loan or donation if there is any suspicion that it was wrongfully taken during a time of conflict, stolen, illicitly exported or illicitly traded”.⁶⁷ Therefore, assuming that the Meissen figure had been sold in a forced sale and a museum acquired it, that acquisition would arguably amount to a breach of this provision of the code. It may also have contravened the National Museum Directors’ Conference Principles on Spoliation of Works of Art, applicable to national museums, which state clearly that “[i]f there is evidence of wrongful taking then the institution should not proceed to acquire the object”⁶⁸ – in the case of non-national museums the institution should not proceed where there is “demonstrable or probable evidence of wrongful taking”.⁶⁹ There are therefore clear ethical impediments to a museum acquiring objects with a tainted provenance.

In the context of the illicit trade in cultural objects, the 1970 date has been described as a “clear, pragmatic and practicable watershed”⁷⁰ and it has been adopted in various professional ethical codes. The DCMS’ own Due Diligence Guidelines state that: “Museums should acquire or borrow items only if they are certain they have not been illegally excavated or illegally exported since 1970”.⁷¹ This means that presumably any museum faced with an opportunity to purchase a national treasure which has an uncertain provenance should refuse to purchase it. In this document, the focus shifts from a museum being certain that the object was in

⁶⁶ SAP ToR, para. 6.

⁶⁷ UK Museums Association, *Code of Ethics*, November 2015, principle 2.5. See also the ICOM, *Code of Ethics...*, principles 2.2. and 2.3 on valid title and provenance and due diligence respectively.

⁶⁸ National Museum Directors’ Conference (now National Museum Directors’ Council), *Spoliation of Works of Art during the Holocaust and World War II Period: Statement of Principles and Proposed Actions*, 1998, principle 4.4.

⁶⁹ Museums and Galleries Commission, *Statement of Principles on Spoliation of Works of Art during the Nazi, Holocaust and World War II Period*, 1999 (although the MGC is no longer in existence, non-national museums still adhere to these, as is clear from Collections Development Policies, e.g. Leamington Spa Art Gallery & Museum, *Collections Development Policy*, August 2018).

⁷⁰ DCMS, *Combating Illicit Trade: Due Diligence Guidelines for Museums, Libraries and Archives on Collecting and Borrowing Cultural Material*, October 2005, p. 4. Brodie describes the 1970 date as an ethical rather than legal watershed: N. Brodie, *Provenance and Price: Autoregulation of the Antiquities Market?*, “European Journal on Criminal Policy and Research” 2014, Vol. 20, p. 440. The 1970 date originates from the association with the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, although that convention did not enter into force until 1972 and its application to different countries depends on their date of ratification. Prött suggests that in 1970 “the international community was put on notice that a rule against reckless acquisition was in the course of adoption”: L.V. Prött, *The History and Development of Return of Cultural Objects*, in: L.V. Prött (ed.), *Witnesses to History: A Compendium of Documents and Writings on the Return of Cultural Objects*, UNESCO Publishing, Paris 2009, p. 10.

⁷¹ L.V. Prött, *The History and Development...*, p. 4.

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the UK before 1970 and “hav[ing] no reason to suspect it was illegally exported from its country of origin”⁷² to “be[ing] certain that the item was out of the country of origin (but not in the UK) before 1970 and hav[ing] evidence that its subsequent export to the UK was in line with the regulations of the country from which it was exported to the UK” or “be[ing] certain that the item was in its country of origin after 1970 and hav[ing] evidence that it was legally exported in line with the regulations of the country of origin”.⁷³ Similarly strong ethical commitments are again found in principle 2.5 of the UK Museums Association Code of Ethics. Having said that, any object with a questionable provenance (rather than post-1970) could raise ethical issues worthy of consideration by decision-makers before it is designated a national treasure.

Another situation in which a cultural object may be tainted is if it was acquired in colonial times where there were unequal power relations.⁷⁴ It could have been seized, or handed over in a seemingly friendly exchange, but the objects may have been of cultural or sacred significance and would not have been handed over but for the context of the colonial power dynamics.

With the increased concern about the retention of colonial era objects by museums there is a clear need for museums to undertake due diligence to ensure that objects with a problematic ownership history which may have been taken during times of unequal power relations are not acquired. It appears out of step with re-evaluating collections to treat such objects as national treasures. If one were to take, for example, objects acquired during the Benin punitive expedition which may have been in a private collection but which might objectively satisfy the Waverley Criteria, this could cause ethical issues for the Committee. Similar issues arise when considering objects acquired during the Maqdala expedition, which it would seem unlikely that a museum would nowadays acquire based on principle 2.5 of the UK Museums Association Code of Ethics set out above.

Finally, a taint could derive from association with a particular event or person – e.g. a dictator, a significant figure in colonial history, or in instances where the creator’s moral character has been called into question.⁷⁵ Alternatively, a taint could result from the lack of provenance or export documentation which can prove that the object has not been illegally removed from an archaeological site or illegally exported.

⁷² Ibidem, p. 5.

⁷³ Ibidem.

⁷⁴ See J. Greenfield, *The Return of Cultural Treasures*, 3rd ed., Cambridge University Press, Cambridge 2007.

⁷⁵ This could include the effect on an artist’s work of a conviction, such as for example the artist Rolf Harris who was convicted of sexual offences but who had painted, amongst other works, a portrait of the Queen.

The Trope of Tarnished Treasure

This section puts forward the concept that categories of objects may be tarnished by virtue of the admittance of tainted objects into that group. “Tarnish” means not only the loss of brightness, but also the existence of a stain or blemish.⁷⁶ In its most literal meaning, it involves a chemical change altering an object. The term also has the more figurative meaning of “to take away from the purity of, cast a stain upon; to sully, taint; to bring disgrace upon”.⁷⁷ The trope of tarnished national treasures is used here to refer to the category of national treasures, rather than any particular individual tainted cultural object. One talks about things being “tainted by association”, and this terminology is used in situations such as banking or commerce. There the taint is focused on individual people who are connected to something else or someone else who is tainted. The argument advanced in this article is that, rather than other, seemingly “innocent”, individual objects in themselves being simply tainted by association, the category as a whole – that is, the UK national treasures as a superlative category of objects designated of national importance – is adversely affected by an association with individually tainted objects. Instead of suggesting that the category is tainted, the terminology “tarnished” is used to show a dulling of what is otherwise a category which is revered because the objects within it are of such national importance that they are worthy of making every effort to find funding with the sole purpose of keeping them within the country’s borders for the benefit of the public. The loss of these objects is seen as a significant misfortune. Therefore, the principal argument is that the effect of designating a *tainted* cultural heritage object as a national treasure *tarnishes* the entire category. At the same time it undermines the parallel efforts made to deal with Nazi Era claims. An analogy can be drawn with museums that acquire tainted cultural objects; this may tarnish the reputation of the institutions, as museums are said to be founded on public trust.⁷⁸ Similarly, by admitting tainted objects into a select category of objects which are designated as national treasures this could have the effect of tarnishing that category.

Returning to the Meissen case

In the Meissen case concerning the figure formerly in the collection of Emma Budge, the Secretary of State clearly found himself in an unenviable position. First, in objective terms the object met two of the Waverley Criteria for designation as a national treasure. It was of such outstanding aesthetic importance and significance

⁷⁶ Oxford English Dictionary, “tarnish (n)”.

⁷⁷ Oxford English Dictionary, “tarnish (v)”.

⁷⁸ See Britainthinks, *Public Perceptions of - and Attitudes to - the Purposes of Museums in Society*, March 2013.

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to the study of a branch of art, learning, or history that its departure from the UK would be a misfortune, but it potentially had a troubled history that appeared to be as yet unresolved. In such circumstances museums and other purchasers would usually avoid purchasing it.

Secondly, there is no automatic referral of cases to the Spoliation Panel where cultural objects are owned by private collectors.⁷⁹ There was a clear juxtaposition in the Committee's annual report of, on one hand, the questionable provenance of the object as originating from Emma Budge's collection and the dilemma of the legal obligation of confidentiality and the lack of a joint request to the Spoliation Panel for resolution of the dispute,⁸⁰ while on the other hand this questionable provenance did not affect the object's designation as a national treasure, and even though such an object would not normally be acquired by a museum, the same report included the figure in a list of national treasures that "unfortunately" could not be saved for the nation by being acquired by a museum.⁸¹ There is therefore a clear tension between recognizing on the one hand that an object with a potentially tainted provenance is something that the UK wants to keep within its borders, and on the other hand discouraging museums from acquiring such objects where there are doubts over provenance through government guidance and commitments to international instruments.⁸²

Designating "Pulcinell" as a national treasure and presenting the Secretary of State's decision as a stand-alone news item in a press release treats an object with an apparently questionable Nazi Era provenance as something with which the UK claims a significant relationship as part of its national heritage. This fails to reflect the UK's strong commitment made elsewhere to tackling Nazi Era dispossessions (such as the work of the Spoliation Panel and attempts to remove the sunset clause in the Holocaust (Return of Cultural Objects) Act 2009). It gives the perception of marginalizing the claims of heirs and appropriating the object as the UK's national heritage, and at least makes a public statement which, on its face, encourages museums to acquire objects with a tainted provenance.⁸³ Arguably, the ultimate act of granting an export licence also demonstrated that whilst there was an ethical commitment to resolving these disputes (through the establishment and continued support of the Spoliation Panel), nevertheless this could not prevent the export.

⁷⁹ Referral to the Spoliation Panel in such circumstances depends on the joint request of the parties: SAP ToR, para. 6.

⁸⁰ DCMS, *Export of Objects 2016-17...*, pp. 54-55.

⁸¹ *Ibidem*, p. 15.

⁸² See L. Chesters, *Budge Estate Seeks Return of Böttger Figure*, "Antiques Trade Gazette", 3 June 2017, and M. Bailey, *op. cit.*

⁸³ Language used in the press release about the Meissen figure appeared more muted than other press releases which usually announce the deferral of export licences in terms of them being designated as national treasures; neither the language of "saving for the nation" nor that of "national treasures" was used in it, although it did mention the possible loss to the nation.

This effectively facilitates the free circulation and trading in objects with tainted provenance – albeit a moral rather than a legal taint.

“Objects are already appropriated as national treasures primarily for their aesthetic importance or their contribution to learning (Waverley 2 and 3),⁸⁴ rather than for their” direct connection to UK national history. This amounts to a wide reading of what constitutes a national treasure. Yet the effect of this decision is to go further, by extending this limited and privileged category of objects⁸⁵ to a category of objects about which there is a strong commitment for public institutions to not only avoid acquiring them, but also to actively return them to their original owners.⁸⁶

Specific Issues Related to Other Categories of Tainted Objects and Their Potential to Tarnish National Treasures

Cultural heritage objects with gaps in provenance – 2020 as a key date

At present any object that would fall under consideration as a national treasure would necessarily have to have been acquired before 1970 (on the basis of having been in the UK for more than 50 years); however even where objects are acquired before 1970 the export or removal of the object may have contravened a specific national law in force at the time.⁸⁷ Moreover there is a further ethical issue of whether an object has a questionable, or missing, post-1970 provenance which does not yet arise. However, after 2020 the Committee would start to consider objects entering the UK after 1970. This increased group of objects could bring with it some significant ethical issues.

At the moment, when an object has been in the country for more than 50 years the applicant is required to provide the provenance information, but an applicant can also make a statement explaining why proof of a previous export licence cannot be provided.⁸⁸ After 2020 objects that come before the Committee could fall within the category of those where museums need to be “*certain*” that there is no illegal excavation or export, rather than “having no reason to suspect”, and for that reason there is a higher ethical obligation on museums. It would follow (for

⁸⁴ These criteria encourage the maintenance of a culturally rich nation rather than one rich in its own culture – C. Woodhead, *Cultural Heritage Principles and Interference with Property Rights*, “Cambrian Law Review” 2011, Vol. 42, p. 65.

⁸⁵ National treasures are “something to be cherished and preserved for future generations” – C. Maurice, R. Turnor, *The Export Licensing Rules in the United Kingdom and the Waverley Criteria*, “International Journal of Cultural Property” 1992, Vol. 1, p. 294.

⁸⁶ This case brings into sharp focus the real difficulty faced by claimants for the recovery of objects that are now in private hands.

⁸⁷ See DCMS, *Statutory Guidance...*

⁸⁸ Arts Council England, *Guidance on the Provision of Import...*, Annexes.

the Committee and Secretary of State to act in a manner consistent with the DMCS Due Diligence Guidelines) that information relating to any post-1970 arrivals of objects into the UK would require additional information to be certain that there is no illegal removal or export before an object is admitted into the category of national treasures.

Repatriation of objects by museums

With the increased focus on repatriation by museums, there is a potential problem in the future in situations where a museum has decided to give effect to its moral obligation to return an object to a community or country of origin and where an export licence needs to be applied for because the object has been in the country for more than 50 years and passes the relevant financial thresholds. In such a situation, if an object were designated as a national treasure under circumstances whereby it has been decided by a museum on ethical grounds that the object is better placed in a foreign collection or returned to a community, this potentially undermines the attempt to do justice through repatriation.

In the context of Spoliation Panel recommendations in 2015 the Secretary of State made provision for the granting of an Open General Export Licence for “any article that the Secretary of State has approved for return to the claimant following a recommendation to that effect by the Spoliation Panel”.⁸⁹ This inclusion of restituted Nazi Era cultural objects means that claimants who have received an object owing to the moral strength of their claims would not have any impediments to exporting the object. It does not, however, apply to other objects that museums decide to repatriate on moral grounds.

Dulling brightness

“Tarnish” can also refer to the dulling of something’s brightness. In adopting this latter metaphor, one can see the act of seeking to bring objects into the canon of national treasures in circumstances where there is a stronger association with another country⁹⁰ as having the potential to tarnish (or dull) the category of national treasures. In the Waverley Report of 1952 the committee clearly saw the UK’s interests in an object as taking priority over those from other countries.⁹¹ In an application to export a silver plaque by Paul van Vianen to the Rijksmuseum in Amsterdam, the claimant argued that it formed part of Dutch cultural heritage and was potentially a Dutch national treasure; however, the Committee took the view that it

⁸⁹ Open General Export Licence (Objects of Cultural Interest) dated 12 March 2015 granted by the Secretary of State, para. 1(o).

⁹⁰ For some objects may be “symbolically valuable to a nation” – D. Gillman, *The Idea of Cultural Heritage*, revised ed., Cambridge University Press, Cambridge 2010, p. 39.

⁹¹ Waverley Report, p. 31.

was unable to take this into account.⁹² In contrast, the following year – when faced with a request to export the *Inspeximus* of Magna Carta by Edward I (1297) to New Zealand – the Committee agreed that although the object satisfied Waverley 1, the object's proposed destination mitigated the loss.⁹³ It therefore recommended the grant of a licence.⁹⁴

As discussed above, the Secretary of State was prepared to permit the export of the papers of Lord Elgin because of their greater relative importance to Canada than the UK (although in the circumstances a copy was made),⁹⁵ and the Committee recommended the granting of a licence to reunite the Baroque choir stalls with the German church in which they were originally installed.⁹⁶

These three cases demonstrate the differing extents to which the importance of cultural objects to other countries is taken into account by the Committee. Unfortunately, there appears to be an inconsistency which could result in some situations where the UK appropriates cultural heritage as a national treasure in circumstances where another country might have a stronger connection to the object.

Tangible Recommendations

This section offers various proposals on how to avoid tarnishing the category of national treasures by not admitting morally tainted objects into this category, as well as how to address difficulties in provenance.

Using the Secretary of State's existing power

The Secretary of State already has the discretion to depart from the Committee's recommendations,⁹⁷ and even if the Committee concludes that an object meets one or more of the Waverley Criteria, nevertheless in cases where an object has a tainted

⁹² Case xxxiii A Silver Plaque by Paul van Vianen, *Export of Works of Art 1978-79. Twenty-Fifth Report of the Reviewing Committee Appointed by the Chancellor of the Exchequer in December, 1952*, HMSO, London 1980. The applicant argued that Article 36 of Treaty of Rome prevented the Committee from recommending the deferral of a licence other than where an object satisfied Waverley 1 (connection with history and national life). In its following report the Committee confirmed that it had taken advice regarding the interaction of Waverley 1 and the Treaty of Rome and that it was possible to use Waverley 1 even when dealing with applications from within the EU – *Export of Works of Art 1979-80. Twenty-Sixth Report of the Reviewing Committee Appointed by the Chancellor of the Exchequer in December, 1952*, HMSO, London 1981.

⁹³ Case xvi *Inspeximus* of Magna Carta by Edward I – 12th October, 1297, *Export of Works of Art 1979-80...*

⁹⁴ The purchaser in New Zealand did not acquire it and the Committee considered it again and recommended a short deferral of the export licence. Ultimately no UK purchaser came forward and it was exported to the USA – *Export of Works of Art 1982-83. Twenty-Ninth Report of the Reviewing Committee Appointed by the Chancellor of the Exchequer in December, 1952*, HMSO, London 1984.

⁹⁵ Case 2, 2008-09.

⁹⁶ Case viii, *Export of Works of Art 1980-81...*

⁹⁷ Case 2, 2008-09.

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provenance he/she could refuse to designate the object as a national treasure. Indeed, in the Meissen case it would have been possible to do that and yet still alert potential claimants to the facts. Arguably, had the Meissen figure not been referred to the Expert Adviser, then on to the Committee and in turn to the Secretary of State, the Budge provenance of the Meissen figurine may not have been made public. Even if the Secretary of State had departed from the Committee's recommendation in these circumstances, this information would still have been made public, for all decisions arising out of the Committee's work are published in its annual reports, although the deferral did give time for the Budge heirs to make enquiries of the DCMS.

Since provenance is a key concern for museums when applying the DCMS's policy in its Due Diligence Guidelines for museums to any acquisition of national treasures, it is likely that a Secretary of State taking such a matter into consideration when deciding whether or not to designate an object as a national treasure would be reasonable and his/her decision unlikely to be subject to judicial review.⁹⁸ An owner is unlikely to object to the granting of an export licence; however, if the Secretary of State makes a direct statement on the provenance of an object – designating it as tainted – then it may be that an owner might object to this if for some reason there were inaccuracies in the information which might hinder a potential sale.

Change to statutory guidance

To solidify these changes, the DCMS statutory guidance under the Export Control Act 2002 could be amended to include a specific section regarding the additional consideration of provenance as part of the determination as to whether an object is a national treasure. This would be in addition to the Waverley Criteria. In the first place, this would make it clear that they need to ensure a clear Nazi Era provenance and also a post-1970 provenance, which would send a clear signal confirming the UK's commitment to dealing both with the legacy of this era and also the international commitment to fighting the illicit trade in cultural objects.

One way of making this process transparent would be to publish the reports of objects which have been referred to the Committee and in appropriate cases to make it clear that for reasons of provenance they were not admitted to the category of national treasures. Therefore, it would seem more appropriate for the Committee to take this into consideration rather than it being dealt with by the Expert Advisers and not considered by the Committee. By carefully setting out the reasons in the report, this would elevate the importance of provenance and make it an integral part of the decision-making process. Alternatively, the Secretary of State could consider it when reviewing the recommendation of the Committee as to whether

⁹⁸ Arts Council England, *UK Export Licensing...*, para. 73.

the object met the Waverley criteria and also in considering whether it is appropriate to defer the granting of an export licence. However, including provenance as an additional factor when determining whether an object is a national treasure would send a stronger message and avoid tarnishing the category of national treasures.

Specialist advice or referral to Spoliation Panel

The onus is on the applicant to provide the relevant provenance information about an object.⁹⁹ However, in cases involving objects which have been imported into the UK after 1970, or where there is a gap in provenance for 1933-1945, the Expert Adviser could include in his/her report a statement about whether the elements of the DCMS Due Diligence Guidelines in Paragraph 6 have been met. If necessary, the Expert Advisers could highlight any gaps or ambiguities in provenance that might ultimately be problematic for a museum were it to acquire the object.

One way in which the Secretary of State could obtain advice about the provenance of an object specifically for the years 1933-1945 would be to refer a case to the Spoliation Panel in circumstances where there were particular indications that there might have been a Nazi Era dispossession. The Secretary of State could either convene the whole Spoliation Panel, or refer the matter for consideration by a sub-Panel. In this way the Spoliation Panel could provide advice or an expert opinion on the provenance of the object, thus informing the Secretary of State's decision-making. Such a process is not currently available under the Spoliation Panel's Terms of Reference, but it could be added with relative ease. Amendments to the Terms of Reference do not require any statute; instead, revised Terms are laid before Parliament. It is clear that in the case of objects in private collections both parties need to consent for the matter to be considered by the Spoliation Panel.¹⁰⁰ It would seem clear that the reason for such consent is that to compel a private owner to submit to the jurisdiction of the Spoliation Panel would have the potential to interfere with their rights under Article 1 of the First Protocol of the European Convention on Human Rights. It is unclear whether this could be justified given that the current possessor is likely to have the best entitlement legally to an object, given the passage of time and the fact that the Limitation Act 1939¹⁰¹ would have extinguished the original owner's legal title to the cultural object. Providing for a process whereby the Secretary of State could arguably undermine this provision and unilaterally require an owner's private property to be considered by the Spoliation Panel might be too much of an interference. However, the Secretary of State could refer the matter to the Spoliation Panel for a preliminary consideration in a similar way to a claim for summary judgment, where the court has

⁹⁹ Arts Council England, *Guidance on the Provision of Import...*

¹⁰⁰ SAP ToR, para. 6.

¹⁰¹ Under Section 3.

to determine whether there is an arguable case or a real prospect of success at trial. Such a consideration could consist of a statement from the Spoliation Panel expressing any doubts about the provenance which would merit further consideration, or a statement that could reassure the Secretary of State that provenance was suitably catalogued for the years 1933 to 1945. Unlike some of the other restitution committees across Europe,¹⁰² the Spoliation Panel does not have a dedicated research team, instead relying on claimants to provide the relevant information and then supplementing this with further information from Spoliation Panel members. Therefore, this proposal has some resource implications. Alternatively, provision could be made for the Expert Adviser to identify any gaps in provenance and to raise any concerns which might merit further investigation before the Committee makes a determination. This would have the effect of insulating the Secretary of State from making a decision to designate a morally tainted cultural object as a national treasure.

A very practical consideration, though, is whether or not such a referral to the Spoliation Panel and consideration of the matter could be completed within the usual time frame of consideration of an export licence application.¹⁰³ If introducing a referral to the Panel were to unduly stall the processing, and determination, of a licence application then this could be a barrier to introducing such an amendment.

What this proposal does not succeed in doing though is to provide a mechanism by which the original owners (who lost them during the Nazi Era) could be reunited with their objects. It would come down to the goodwill of the particular private owner (who is seeking the export licence) as to whether they would enter into dialogue with the original owner to come to an agreement or settlement.

Active engagement with potential claimants

Therefore, an even stronger commitment in the context of Nazi Era objects would be for the Secretary of State, or rather the offices of the DCMS, to make efforts to broker potential agreements between the current owner of the object and the original owners. Arguably this would enhance the way in which claimants could interact with private owners; it might more closely reflect the recommendation of the Select Committee in July 2000, which suggested that the DCMS investigate ways in which the Spoliation Panel could be “engaged to investigate issues” relating

¹⁰² E.g. the Expertisecentrum Oorlogskunst Tweede Wereldoorlog in the Netherlands can undertake research referred to it by the Dutch Restitution Committee, but can also undertake research at the joint request of the parties.

¹⁰³ When objects are referred to Expert Advisers, applicants would usually hear the outcome within 28 working days: Arts Council England, *UK Export Licensing...*, para. 12. Where the object satisfied the Warley Criteria, in the Expert Adviser’s opinion it would be referred to the Export Reviewing Committee, who meet 11 times a year.

to cultural objects in private hands, thus demonstrating the commitment to deal with the issue of Nazi Era cultural objects owned by private owners.¹⁰⁴ This would obviously have to be balanced with the confidentiality commitment that Arts Council England and the DCMS make to current owners when applying for an export licence. It may also involve a short deferral of the grant of a licence. A similar active engagement could be developed between claimant nations and communities and the current owners in the context of other tainted cultural objects.

Conclusions

The case of the Meissen figure raises a number of important questions that go to the heart of the way in which national treasures are designated by the Secretary of State in the UK. The admission of objects that have a tainted provenance into the category of national treasures risks undermining the very category itself. The recognition of objects as national treasures already affects owners of private property and their ability to export objects – thus anything that risks tarnishing the category has a potentially serious effect.

There is a mismatch between the UK's strong commitment to dealing with spoliation and the Secretary of State's decision to provide an opportunity for UK museums to acquire an object to "save it for the nation" but where museums were potentially ethically prevented from acquiring it. Had an object been sold at a forced sale and in a UK museum collection (as similar objects had been in the past), it is most likely that the heirs of the owner could have claimed its return.

Whilst the Meissen case may have been seen as an unusual on its facts (and the deferral at least made the issue public), nevertheless other situations may arise where an object has a morally tainted provenance and where an application is made to export it. If the Committee and the Secretary of State apply the Waverley Criteria in isolation, i.e. without taking into account an object's morally questionable provenance, there is a risk that the decision provides tacit, if not overt, support for the illicit trade or undermines the efforts made in respect of objects with Nazi Era provenance by making a public statement that a particular object is worthy of saving for the nation and entreating a public collection to purchase it.

Although the Government has no published policy dealing with repatriation requests for colonial era dispossessions, nevertheless if it does so in the future the current approach to designating national treasures does not provide space for consideration of whether and how to avoid appropriating for the nation a national treasure which may have more significance to communities elsewhere in the world.

¹⁰⁴ House of Commons, Culture, Media and Sport Committee, *Cultural Property: Return and Illicit Trade*, HC (1999-2000) 371-I, para. 198.

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