Introduction

During the past two decades, heritage has become a feature of the contemporary cultural landscape in many countries. People feel that their heritage is distinctive if often hard to define. They are proud of their past and also keen to capitalise on it, and thus tourist literature is full of references to the heritage of the nation, of the region, of the city. As Sir Nicholas Goodison notes in his review of funding for Britain's museums, "Recent surveys have suggested that nearly 30 per cent of all visitors are attracted by our heritage, in which museums and country houses play a large part. Tourism is one of the biggest earning services in the country".[1] Heritage justifies governmental regulation and now provides an important part of the background to discussions about private rights, common ownership and general welfare. But the idea of heritage is not immemorial, and we can reasonably ask questions about its origins and about how much weight we should give to this idea, aside from the economic benefits just noted.

During recent decades, two parallel debates have occurred with respect to public policy on heritage. The first has involved cultural officials, museum administrators, archaeologists, anthropologists, collectors and lawyers. It has been notably framed by the Stanford jurist John Merryman as 'two ways of thinking about cultural property', represented respectively by cultural cosmopolitans, who seek to promote the idea of 'the heritage of all mankind', and cultural nationalists for whom art, architecture, theatre, music and food are always a part of someone's particular

[1] Sir Nicholas Goodison, *Goodison Review: Securing the Best for our Museums: Private Giving and Government Support* (London: HMSO, 2004), 7.

heritage. Merryman proposes that these two ways are enshrined in the preambles to two UNESCO conventions, dating from 1954 and 1970. Certainly, versions of these positions have been employed to make the case for preserving and controlling cultural sites and objects. The second debate takes place between political philosophers, especially liberal and communitarian thinkers of various shades, who argue about human agency and whether the individual or community has primacy in the political arena. The present work relates these two debates to each other.

The book is divided into three parts, each of two chapters, which are intended to address the issues raised by these overlapping debates. The first part deals with how we talk and write about heritage; the second with how we construct it; and the third with the tension between private rights and a feeling of common ownership, and how, in liberal democratic nations at least, we might make sense of the idea of heritage. They are ordered in this way because the discussion of rights and valuable practices in Part III is, I believe, best informed by some understanding of the idea of heritage, its rhetoric and its construction.

Part I addresses claims made about heritage objects and buildings, and the importance they are seen to have for communities and individual lives. It introduces a theme that runs throughout the book: local ownership and the sense of belonging that attaches to cultural objects and customs. This is never simple. So Chapter 1 leads off with the tragic case of the Bamiyan Buddhas, destroyed by the Taliban in 2001, and immediately raises the question of whose culture these remarkable statues belonged to, if anyone's. It then offers three further well-known examples of 'national treasures' on which people have made claims in the name of heritage: Pablo Picasso's *Guernica*, the Parthenon/Elgin Marbles and Gilbert Stuart's 'Lansdowne Portrait' of George Washington. The *Guernica* section concludes with thoughts about basic values, from John Rawls and John Finnis, the latter providing a list of intrinsic values to which I refer throughout the book.

The strongest moral claim – which may come in rhetorical, diplomatic or legal form – argues that, because of their associations, certain cultural properties (works of art, other artefacts and parts of the built environment) are crucial to the well-being of all individuals in a particular community. Hence there are collective rights to them, such as the right formally claimed in 1983 by the Greek government to the sculptures removed from the Parthenon and sent to England by Lord Elgin in the early nineteenth century. Chapter 2 reviews John Merryman's influential assessment of cultural property debate. His 'two ways of thinking'

are, respectively, the retentionist approach, which makes strong moral claims to cultural properties that are deemed to belong in some sense to a people, and the internationalist approach (his own), which defends against collectivist claims.[2] These 'two ways' have their origin in an originally eighteenth-century dispute about the respective merits of particularism and cosmopolitanism that I sketch out here, and to which I return in the final chapter.

If claims on 'national treasures' are predicated on 'national heritage', then we need to ask what we mean by this term, and how the idea has come to seem important. Part II addresses the construction of national heritage in different places at different times. There are certainly commonalities across cultures, one of which is the significance of cultural narratives to our individual and collective lives. Heritage is profoundly associated with the stories we tell about ourselves, and these stories usually elevate our achievements. We assign ourselves the best roles and marginalise others. Since the relationship between narrative, ideology and identity is a huge subject, I limit my discussion here to Britain and medieval China. Chapter 3 begins with the sale, twice over, of a grand Medici cabinet ordered in the early eighteenth century by the Duke of Beaufort, and then turns to the role of Protestant narratives and customary law in the construction of British heritage. I argue that the Anglo-Irish political thinker Edmund Burke had a highly influential hand in shaping current ideas about national heritage, ideas that now have a currency far beyond Britain. Lastly, I consider Alasdair MacIntyre's communitarian thesis about narrative and personal identity. Although supporting the idea of national heritage, it raises problems for liberals worried about supporting practices that restrict opportunities for citizens.

Chapter 4 continues the theme of constructing heritage, which excludes as much as includes. Here I focus on the competition between cultural narratives, with a particular focus on late medieval China, where neo-Confucianists argued for a particular version of 'our culture' and fought a strong rearguard action to promote the value of indigenous custom against 'foreign' Buddhist religious relics, images and practices. This leads

[2] There are large areas pertaining to cultural property and heritage debate that I exclude from the present work. For example, I do not cover export controls in general, other than those discussed in Chapter 5, nor laws designed to protect archaeological sites from illicit plundering, nor the requirements for passing good title under common and civil laws. Current laws will be covered by Stephen Urice and Alexander Bauer in their forthcoming text, *Cultural Heritage Law & Policy*. See also Barbara T. Hoffman, ed., *Art and Cultural Heritage: Law, Policy and Practice* (Cambridge: Cambridge University Press, 2005).

to a discussion of how value is assigned, and how it relates to changing social conventions and expectations. I then consider two significant Chinese paintings in the American national collections. We are reminded that practices and values can cross cultural boundaries without losing their integrity. This nicely complicates the question of national heritage and of what belongs to any particular people.

Part III returns to the tension between individual and community, and to those claims and rights raised by the cases in Chapters 1 and 3. Are there collective rights to cultural objects? And how far may democratically elected state and regional governments regulate cultural objects and buildings that are privately held? Private owners of culturally important objects and buildings are prone to cry foul when moral claims conflict with established property rights. In Chapter 5, because of their strong private rights regimes, I concentrate on regulations in three common law countries (Britain, the United States and Australia). Suppose, for example, the Liberty Bell had ended up as the private property of a Philadelphian family, who now decide to sell it to a new Japanese 'museum of liberty'. Since there are no export controls in the U.S. to prevent such an act, Americans would be left to worry about the merits of defending the national heritage over private rights. The threatened removal of a Tiffany mosaic from Philadelphia to another American city, perhaps Las Vegas, leads to a discussion of whether there are rights to the integrity of works of art and architecture.

In the final chapter, I attempt to resolve some of the issues raised above. To set the stage, I rehearse a debate between strong versions of Merryman's cosmopolitan and particularist positions. What I omit from this, however, is a liberalism that acknowledges the social dependence of individuals, which I introduce in the second section of the chapter. A feature of recent political thinking is that liberals now lean not only towards cosmopolitanism (as Merryman does), but also towards community, offering a more socially located individual. Ronald Dworkin and Will Kymlicka signal the importance of language to the members of cultural groups, the latter arguing for group rights to spoken and written languages. But can other valuable cultural practices (architecture, painting, music, dance, etc.) be similarly privileged? I suggest that the case for this is thin.

Lastly, I discuss how state and regional governments can justify regulating privately held buildings and works of art. Here I draw on the thinking of Dworkin and Kymlicka, and particularly of Joseph Raz. I find that they can do so precisely because, as individuals, we are dependent for

our well-being on the social forms that surround us. That helps answer the question, conventionally beyond these debates, about the extent to which liberal democratic states should support cultural life from the public purse. I believe they should, for the same reasons that the state may regulate art and buildings, even when, as Dworkin puts it, programming is controversial and the arts appear to benefit only a relatively small proportion of the population. A liberalism that acknowledges our dependence on socially sustained practices offers more resources than liberal cosmopolitanism here. Debates over cultural heritage should, at the least, make us look more closely at the relationship between individual well-being and the opportunity to engage with a wide range of valuable cultural goods.

PART ONE

CLAIMS ABOUT HERITAGE

1

Heritage and National Treasures

> Heritage creates a perception of something handed down; something to be cared for and cherished. These cultural manifestations have come down to us from the past; they are our legacy from our ancestors. There is today a broad acceptance of a duty to pass them on to our successors, augmented by the creations of the present.
>
> Lyndel V. Prott and Patrick J. O'Keefe[1]

1. The Bamiyan Buddhas

"It is not a big issue. The statues are objects only made of mud or stone". Thus spoke Qudratullah Jamal on 3rd March 2001 as the militia began its systematic annihilation of the Bamiyan Buddhas, the second and third largest surviving early Buddhist figures in the world. The elimination of the two Buddhas by the Taliban regime in Afghanistan shocked many people and especially those who highly value the material culture of Asia. "The destruction work is not as easy as people would think. You can't knock down the statues by dynamite or shelling as both of them have been carved in a cliff".[2] Destroying the 'gods of the infidels' was evidently a pious act for Taliban soldiers drafted from outside the Bamiyan valley when local members refused, yet one cannot but think that the chief of the Taliban Foreign Ministry press department, Faiz Ahmed Faiz, was

[1] '"Cultural Heritage" or "Cultural Property"?' (1992) 1 *International Journal of Cultural Property* 311.

[2] See *New York Times*, 4 March 2001, and M. Darrol Bryant, 'The Tragedy of Bamiyan: Necessity and Limits of the Dialogue of Religions and Cultures', in K. Warikoo, ed., *Bamiyan: Challenge to World Heritage* (New Delhi: Bhavana, 2002), 185.

being somewhat disingenuous when he commented that "this decision was not against anyone. It was totally a domestic matter of Afghanistan. We are very disappointed that the international community doesn't care about the suffering people but they are shouting about the stone statues of Buddha".[3] As indeed they were.

These extraordinary images had always been objects of wonder in the Buddhist world, visited by the celebrated Chinese pilgrim Xuanzang in the early part of the seventh century only decades after their construction.[4] Bamiyan was then part of a pan-continental Buddhist culture that stretched from west Central Asia to China, lasting in Afghanistan until the early eleventh century when Central Asia was overrun by Islamic tribes and the long-standing commercial routes to western China were severed. The two (originally three) colossi were a focus of individual worship and ceremonial practice and, though now faceless, appear to have represented the historical Buddha, Shakyamuni, in the manner of a recently lost, life-size stele from Shotorak, depicting the Dipamkara Buddha (Fig. 1, 2).[5] They were not only inordinately impressive but also highly important to the documentation of Central Asian material culture.

[3] *New York Times*, 26 March 2001. See Andrew Solomon, 'Art in Jeopardy', in Kate Fitz Gibbon, ed., *Who Owns the Past? Cultural Policy, Cultural Property and the Law* (New Brunswick: Rutgers University Press, 2005), 243, and Richard MacPhail, 'Cultural Preservation and the Challenge of Globalisation', in Warikoo, *Bamiyan*, 164–5.

[4] Deborah Klimburg-Salter, 'The Meaning and Function of Bamiyan in the 7th-8th Centuries', in Warikoo, *Bamiyan*, 33–9. Xuanzang came at the invitation of the western Turkic ruler probably responsible for the construction of the Buddhas, Tong Shi hu Yabghu Khaqan, who was murdered before the pilgrim arrived.

[5] Each face was constructed from a wooden mask inserted above the lips, overlaid with a metal – probably brass – skin that was likely gilded and also set with coloured glass or semi-precious stones; the arms were built up over wooden armatures, as was the right leg of the larger figure, which also had shoulder flames like the Shotorak image. See Deborah Klimburg-Salter, *The Kingdom of Bamiyan: Buddhist Art and Culture of the Hindu Kush* (Naples and Rome: Instituto Universitario Orientale and Instituto Italiano per il Medio ed Estremo Oriente, 1989), 87–92. The monuments were damaged by Genghis Khan in 1222. Earlier schools of Buddhism focused on the historical Buddha Shakyamuni, who lived during the sixth to fifth centuries BCE in northeast India. A major development occurred around the beginning of the first millennium in which Shakyamuni was understood to be a particular manifestation of the cosmic Buddha principle. Northern India and Central Asia embraced this new school, which called itself the Great Vehicle (Mahāyāna), and witnessed a proliferation of Buddhist texts and images of cosmic Buddhas ruling over myriad universes. Yet larger than the Bamiyan figures is the 70 m. seated Maitreya (Future Buddha) at Leshan, south-west China, carved during the eight century CE to protect Sichuanese sailors and merchants on the Min and Dadu rivers, the face of which was recut during the twentieth century; see Angela Falco Howard, Li Song, Wu Hung, Yang Hong, *Chinese Sculpture* (New Haven: Yale University Press, 2006), 319 and 322. Mt. Emei and Leshan together have constituted a UNESCO World Heritage site since 1996.

FIGURE 1. *Great Buddha, Bamiyan Valley, Afghanistan, beginning of the seventh century CE, carved into cliff-face, 55 m. Photograph by Deborah Klimburg-Salter © 1975. Courtesy of the Western Himalaya Archive, Vienna.* The larger of the two monumental figures at Bamiyan, a centre of Buddhist activity on the trade route connecting Central Asia and northwest India during the 1st millennium CE, both of which were destroyed by the Taliban in March 2001.

As the world was to learn, it wasn't just the Bamiyan Buddhas that were destroyed. All over Afghanistan, and within the Kabul Museum itself, Taliban authorities were endorsing a systematic iconoclasm to remove as much pre-Islamic sculpture as possible. The desire to maintain a context for this material was rapidly becoming less important than simply saving it from obliteration. An 'Afghanistan-Museum in Exile' at Bubendorf, near Basle, had been set up to serve as a repository in trust for the country's material culture. It was defeated in its attempt to save much, however, by the technicalities of arranging for Afghanistan's artefacts to enter Switzerland in contravention of the 1970 UNESCO Convention (on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property). In March 2007, the some fourteen hundred items were sent back to Afghanistan and deposited at the National Museum in Kabul.[6] One outcome of the awful saga was the adoption by UNESCO in June 2001 of a resolution that strongly condemned these acts as "crimes against culture".[7] Further, it invited competent bodies, including the World Heritage Committee, to identify the means of ensuring better protection of the "common heritage of humanity".[8] How can one argue against such noble sentiments, which see the Bamiyan Buddhas and other major monuments as a part of the common heritage? And yet this language leads us directly into a discussion that embraces not only the Bamiyan Buddhas but also the contest over the Parthenon/Elgin Marbles, as well as issues of export controls and of what goods countries should attempt to protect and promote.

Does the Afghani heritage comprise the heritage of all those who have ever lived there, or the heritage of those who live there now, or the heritage of some of those who live there now? It is clear that the Taliban didn't consider the Buddhas to be part of their heritage. Indeed, given the continuance of 'Great Vehicle' Buddhism in both cultures, Tibetan and Japanese Buddhists might reasonably think that the Buddhas were more a part of their heritage. Thus there arises a question about the degree to which 'other people's heritage' is also part of one's own. Certainly we can ask this about the Bamiyan Buddhas. After all, papers from the

[6] On the Museum in Exile, see also Kwame Antony Appiah, 'Whose Culture Is It?', in James Cuno, ed., *Whose Culture? The Promise of Museums and the Debate over Antiquities* (Princeton: Princeton University Press, 2009), 80–2.

[7] 'On the Protection of the Cultural Heritage of Humanity'.

[8] The World Heritage Committee is the intergovernmental organ established under the aegis of the 1972 UNESCO Convention (Concerning the Protection of the World Cultural and Natural Heritage); see Jean Musitelli, 'World Heritage, between Universalism and Globalization', (2002) 11 *International Journal of Cultural Property*, 323–36.