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ARTICLE

Excavating the field of heritage law: support, renewal, and iconoclasm

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Abstract

This article maps the field of cultural heritage law, arguing for the need for its renewal, even if at the cost of some iconoclasm of notions we hold dear in our conceptual thinking about heritage. The article pursues this thesis by excavating a conceptual archaeology (broadly in the Foucauldian sense) of four key assumptions or conceptual pillars of cultural heritage law, which are the assumption of inherent value of cultural heritage; the pillar of authenticity; the assumption that human rights can work as a panacea for the renewal of the field; and the pillar of expertise. The archaeology of these ideas shows how much of what we take for granted in cultural heritage law is no longer fit for purpose, and the article shows those stakes by contrasting the work of these pillars and assumptions against some of the key challenges to the field: interdisciplinarity; the Anthropocene; enforcement; and the growing use of heritage as an ideological target in armed conflicts.

Keywords: cultural heritage law; authenticity; discourse analysis; expertise; Anthropocene

Introduction

In any field of knowledge, we think of ourselves as standing on the shoulders of giants, as Isaac Newton famously put it.[1] While I hope to be or become one of the giants on whose shoulders one might wish to stand, there is also a distinct (and related) possibility that one day I will become obsolete as those in the field of cultural heritage law stand on the shoulders of their own giants and see further than I could. In the meantime, standing on the shoulders of giants allows us to get a better sense of the lay of the land. My goal in this article is to map what I see as the *zeitgeist* of heritage law. I want to focus on the key basic assumptions and pillars of how we imagine the law's relationship to heritage and identity.[2] Having identified these basic assumptions, I will attempt their conceptual archaeologies, with a view to exposing the stakes of what we deem to be heritage, for what, and for who it serves using the language of the law.

[1] In a letter to Robert Hooke in 1675, Isaac Newton said: "If I have seen further it is by standing on the shoulders of Giants." This statement is now widely seen as speaking to scholarly and scientific progress. For a discussion, see Chen 2003.

[2] I am mindful that I am making fairly broad assumptions when I use the collective first person "we." I do not of course mean to include everyone in the field here but use the word as a means to invite collective reflection on what I see as the received wisdom in the field.

I will contrast these archaeologies to the major (and somewhat clichéd) challenges that currently overlay much of our rhetoric about heritage, such as the Anthropocene,[3] renewed calls for interdisciplinary engagement,[4] the resurgent interest in the safeguarding of heritage during conflict,[5] and pathways for the enforcement of heritage law globally through mechanisms like international criminal law.[6] These desirable goals, while important in their own right, could also benefit from being contrasted to the archaeology of our key concepts in the field as a means of asking a fundamental question: as the field keeps on growing, can we build upon past successes, or do we need to rethink our foundational normative commitments?

Asking this question allows us to better understand cultural heritage law, our own commitment thereto, and the direction in which we may want to steer the field as emerging scholarship and scholars enter it. It is a difficult conversation, but one worth having as we decide how to use our current momentum. This question also is useful, to me, because it encapsulates the three themes in the title of this article: support, renewal, and iconoclasm. And I want to free us from the reverence we feel toward those who have been in the field longer than we have, particularly so we can free ourselves to imagine iconoclasm. The important thing for us to bear in mind is that the respect we owe each other is to our shared goal, not our individual egos.

A note on iconoclasm: I use this term deliberately and provocatively, because of the undertones it carries in cultural heritage law. But I see iconoclasm in its original meaning, as destroying not that which we idolize, but its effigy – the way in which that which we idolize has become contained in a rigid and unwielding form to which we continue to attribute importance even though the society that originally created this effigy has changed. I do not want in this article to move us past our concern for heritage, but I do want to challenge the effigies of the field of heritage law and how they authorize, mediate, and filter our concern for heritage through certain practices, pillars, and assumptions.

As we stand on the shoulders of giants, we can do any of those three things – support, renewal, or iconoclasm. Our responsibility, it bears stressing, is to the field and not to the giants. As indebted as I am to the giants, the reason I am indebted is because they allowed me to perhaps see further, and it may be that the new horizon necessitates, for us to achieve our shared goals as a field, doing something else than what the giants might do, like correcting course to adjust to new goals we can now see and wish to pursue.

I will stop belabouring the metaphor. Instead, let us move to the core of this discussion. First, I wish to identify four pillars and assumptions in the field and then excavate their conceptual archaeologies. Two of these speak directly to the "what" and "why" of heritage safeguarding – the notions of inherent value of heritage and its authenticity. The other two speak to "who" engages with heritage and "how" – human rights and expert rule. They are interconnected and show us how heritage law attempts to hold on to its founding "what" and "why" by reforming the "who" and "how." The discussion below also shows that these reforms are nonetheless burdened by commitments to authenticity and inherent value, notions that I argue need to be rethought in – and maybe expunged from – our heritage safeguarding practices. After unpacking these four notions, I wish to recast these pillars and assumptions in light of how I suggest we should understand them on the basis of these archaeologies, against current challenges in the field. Doing so will force us to revisit the possibilities of support, renewal, and iconoclasm in this mapping of cultural heritage law.

[3] Harrison 2013.
[4] Lixinski 2015.
[5] Jackson 2022.
[6] Wierczyńska and Jakubowski 2020.

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Conceptual pillars and assumptions of the field

There are four conceptual pillars and assumptions in cultural heritage law, both domestic and international, with which I wish to take issue. I chose these four because they are pervasive, and they do important work today in the field. Most of them are also deeply ingrained in our historical thinking about heritage law. In the history of international heritage law, of course, one cannot forget the influence of colonialism in shaping and normalizing certain legal design choices.[7] This theme, because of its importance, cuts across all the four concepts I want to unpack in this piece, which are: (1) the assumption of heritage's inherent value;[8] (2) the pillar of authenticity;[9] (3) the assumption that human rights can work as a panacea for the renewal of the field;[10] and (4) the pillar of expertise or our field's trust in expertise.[11]

As we think about each of these pillars and assumptions, to understand the work they do today, we need to understand the historical, political, and theoretical contingencies that underpin their rise. Once we do that, we are better equipped to see that the work they do is not essential or to be assumed.[12] It is rather a political choice we make – to accept, reinforce, or challenge these ideas. Let me examine each in turn.

Our assumption of heritage's inherent value

The idea that heritage has inherent value is certainly not new or unique. In fact, it is so deeply ingrained in our commitment to, or investment in, cultural heritage that we do not often stop to examine it. It means, in short, that there is something about heritage that gives it value that belongs uniquely to heritage, is created by the heritage itself, and can only exist within the heritage.[13] This inherent value is what prompts us to think of heritage as irreplaceable,[14] as existing for its own sake,[15] as almost having dignity (to borrow from the Kantian imperative).[16] Here, I problematize the attribution of inherent or intrinsic value both to heritage as a set of practices and discourse and to individual items, artifacts, or manifestations of heritage. It is unclear from where this notion of inherent value in relation to heritage came. It seems to have been around since at least the nineteenth century. Early accounts of the history of heritage protection focus on the nineteenth century as a point in which our concern for heritage safeguarding galvanized into legal action. It may be at this point, from a legal perspective, that we came to understand heritage as having inherent value.[17]

If this history, which focuses on Western Europe and particularly the French Enlightenment, is true, then there are two key things driving this move toward inherent value. One is humanism and its accompanying secularism;[18] the other is the protection of elites and their identities in the face of calls for social reorganization. On the first, one of the things the French Revolution and the Declaration of the Rights of Man and of the Citizen of

[7] Spitra 2020; Vrdoljak 2006.
[8] Francioni 2011.
[9] Deacon and Smeets 2013.
[10] Donders 2020.
[11] Lixinski 2013.
[12] Foucault 1966.
[13] Francis-Lindsay 2009.
[14] Nickel 1999.
[15] Lenzerini 2020.
[16] Alatalu 2021.
[17] Sax 1990.
[18] Law 2011; Cristaudo 2012.

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1789[19] called for was the separation between church and state. The reason for that call was to turn away from the manipulation of the masses by religious authorities, to diminish the privileged role of church in social and legal institutions, and to effectively replace organized religion with a secular philosophy based on the ideas of liberty, equality, and fraternity.[20] The replacement of religion with humanist philosophy also tracks closely with the idea of the inherent rights of man and citizen, one that attempts to re-establish social and cultural membership not around religion as a cultural reality and mechanism of gathering but, instead, the state as an institution that wanted to separate itself from the power of religion by taking its place in social and cultural life.[21] To do so, the artistic achievements that largely derived from ongoing Catholic Church patronage, and that performed religious and educational functions via their display in churches and other religious spaces, needed to have another reason for existing. If they were no longer relevant because they reflected and taught religion, morality, and social norms, then they needed to exist simply on the basis of their artistic merit, which was inherent to the artwork or monument. In other words, inherent value exists to try and occupy the vacuum left by expunging the educational and religious functions of cultural objects and monuments with, quite bluntly, nothing at all. This strategy obfuscated the power and endurance of more archaic powers by rendering them redundant.[22] It was a fiction designed to make nothing into something that could re-stabilize the social fabric. A turn to intangible cultural heritage has come a certain way to reconnect heritage to social practices, but it is yet to fundamentally shift the field.

The same mechanics operate in relation to the elite-protective function of inherent value. After all, not all monuments and artworks were religious. A lot of them were already secular, and they primarily displayed the up-until-then ruling aristocracy, imposing their ways of life and preferences onto society as a whole via their portraits, landscape choices, and social scenes.[23] Even when other subjects were included in the relevant artworks, they still were commissioned by elites so they represented an elitist gaze and worldview.[24] As these elites lost their property (and, in some cases, their heads) during the French Revolution, their artworks, for what they were and what they represented, also came under attack. If one thought of them as representing a certain elitist view of the world that the French Revolution sought to displace and replace, then they needed to go; on the other hand, if there were some redeeming quality to them, which divorced these artworks from the context of their production, they could stay. Thus, inherent value became a means to salvage these objects and monuments. Of course, the consequence then is that we continued to elevate and praise aristocrats and aristocratic ways of life, reinforcing them as the pinnacle of human aspirations and achievement. We told ourselves that we separated those lives from the objects, but we kept on gazing at these lives as something that merited respect and protection.

More contemporarily, this idea of inherent value is deeply intertwined with what Walter Benjamin describes as the "aura" of the art object.[25] Benjamin was himself very critical of this concept in his work on aura and authenticity, a theme to which I return below. For now, this historical example of the French Revolution had ripple effects elsewhere, of course. It has justified dispossession; it has enabled racism. Particularly during colonialism, for instance, European colonizers arriving in the Kingdom of Benin (largely contained in today's

[19] Declaration of the Rights of Man and the Citizen, France, 26 August 1789.
[20] Censer and Hunt 2001.
[21] Troper 1999.
[22] Cristaudo 2012, 255.
[23] Reichardt and Kohle 2008.
[24] Wisner 2000.
[25] Benjamin (1935) 2010.

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Nigeria) were so astonished by the "inherent" artistic value of the Benin Bronzes that they disconnected from the historical fact of their production as the achievements of the local people. Instead, they thought that those bronzes were so sophisticated that they surely meant that Europeans had been to Benin before these specific colonizers had made it there and taught the "primitive" locals how to make those beautiful sculptures.[26] And because they were masterpieces of art with inherent value divorced from the local society, they could (or even should) be taken to Europe to be displayed as part of a collection of the masterpieces of artistic achievement of humanity.

What this anecdote shows is that inherent value serves to divorce the heritage from its creators. It works well to connect heritage to all of humanity as long as this humanity works toward or represents stabilization of a status quo where elites get to spell out what culture is, how it is appreciated, and its value. Stabilization of political volatility is useful. And the instinct to insulate heritage from the same political volatility is very understandable and in some ways noble.[27] Otherwise, purges would happen every time there was a major social change, and we would always be burning books and artwork, Nazi style.[28] But this separation between heritage and its social and political context that inherent value produces is only useful as a temporary measure; otherwise, it is more often than not co-opted by elites to promote elite ideas and power relations.

Thinking of a contemporary example, imagine the ongoing dispute around the Parthenon Marbles.[29] Among the ethical arguments that the British Museum advances to not return the marbles to Greece is the idea that the inherent value of these marbles means that they belong to all of humanity and are not just the product of, and part of the identity of, the Greek nation.[30] More contemporary debates on return and restitution, even if they attempt to shift our attention toward vernacular values around heritage, still rely on the idea of great importance to humanity, which is a proxy for inherent value, to justify attention and protection from international organizations like the United Nations Educational, Scientific and Cultural Organization (UNESCO).

Therefore, in a way, inherent value does similar work to this idea of heritage belonging to all of humanity, which is important to live up to the UNESCO Constitution's promise of peace through cultural understanding and cooperation.[31] But it also means that whoever gets to wave that flag (and that is often wealthier cultural brokers in wealthy nations) gets to effectively control it.

And, perhaps most crucially, inherent value (as administered within a discourse that privileges expert rule and Eurocentric elite perspectives) makes us turn away from the ways in which people relate to their own culture and gives us the legal tools to demonize those practices and separate people from their own culture. Once we do that, cultural creators and stewards will be less invested in safeguarding a culture that they can no longer use in their own terms, and we end up compromising cultural heritage (or at least its vibrancy) by separating the heritage from what made it vibrant in the first place.[32]

A contemporary example in the dynamics of heritage law is that of the economics of heritage.[33] We tend to think of heritage as being *hors de commerce* or outside the stream of

[26] Hicks 2020.
[27] Lixinski 2021.
[28] Nicholas 1995.
[29] Robertson 2019.
[30] Merryman 1985; Jenkins 2018.
[31] United Nations Educational, Scientific and Cultural Organization (UNESCO), Constitution of the United Nations Educational, Scientific and Cultural Organisation, 16 November 1945, (1949) 16 ILR 331.
[32] Lixinski 2019.
[33] Lixinski 2019.

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trade. In accepting this idea that heritage will somehow be sullied by its trade, heritage law treats economics as either unlawful or just, overall, a threat to heritage. We then create disincentives for people to use, and maintain alive, their own cultures because it becomes something "extra" and separate from them pursuing their own livelihoods. We also then get to the point where only those who can afford the time to focus on culture (that is, economic elites) get to produce it, save for producers of intangible cultural heritage, where the relationship to economics has become less problematic in recent implementation activity under the 2003 Intangible Cultural Heritage Convention.[34] So we perpetuate this idea of the world's cultural treasures being seen by a system of cultural patronage that focuses primarily on the elite gaze.

Being more critically aware of these dynamics helps us understand that heritage has no inherent value. It serves a social function, which is necessarily attached to other aspects of social life. To separate heritage from its social function is to spell out its doom or at least to allow heritage to be co-opted to promote a specific social status quo. That the law allows this co-option is a great example of the law being made largely by, and for the benefit of, white, cis, able-bodied, straight, property-owning men. We allow culture not to be a wellspring of social justice and reinvention but, rather, a means of conformity to injustice. Culture is about the fringe, questioning society and the social order. We accept that to be the case with art but somehow reject that the same should be the case with heritage. This conceptual incongruity to which we are so accustomed must go.

The pillar of authenticity

Authenticity is the idea that we need to be able to verify where heritage came from so that we can truly appreciate its value and worth. This idea comes from the art world, primarily, and the notion that cultural objects as non-fungibles (that is, one of a kind) need to have their non-fungibility ascertained so that we can properly value them in the market.[35] It spills onto cultural heritage law because cultural heritage, at least in its origins, seems to be simply old – and nationalism-serving – art. The legal origins of authenticity, from a Western perspective, go further back than inherent value. They go back at least to the first millennium BC in China and Europe.[36] A Christianity-centric account would suggest that authenticity came from the need to verify relics, and their worth, as they travelled throughout Europe to validate and expand Christendom itself.[37] To have a sacred object in a parish meant some mystical power and drew people into the new faith. Because the origins of Christendom are in the Middle East, these objects needed to travel from there at least initially, but one needed to be able to ascertain that a fragment of the Holy Cross was just that rather than a piece of wood someone picked up just outside the door. In some ways, thus, authenticity goes hand in hand with justifying and enabling the expansion of ideas, authority figures, and institutions in an empire. Note here the intertwining with religion, which mirrors the discussion of inherent value in the previous section.

Another historical example of the use and importance of authenticity goes back to Benjamin. In his work *The Work of Art in the Age of Mechanical Reproducibility*, Benjamin engaged with the idea of authentic works of art, and the aura they contained.[38] That is an idea that has maintained a long and powerful grip on the imaginaries of how we conceive of and regulate heritage. Culture, and the heritage within it, is at its best when it has this aura

[34] Bortolotto 2021; Convention for the Safeguarding of Intangible Cultural Heritage, 17 October 2003, 2368 UNTS 1.
[35] Merryman 1992.
[36] I am thankful to one of the anonymous reviewers for this insight.
[37] Lowenthal 1998.
[38] Benjamin (1935) 2010.

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(which is a version of intrinsic value) and the authenticity that comes with it. What most people who still use Benjamin and aura to justify heritage safeguarding forget, however, is how critical Benjamin was of this concept.[39] Specifically, Benjamin thought that aura and authenticity led to the disconnection between culture and the context in which it arose. It led to elitist numbness and manipulation and, in many ways, enabled Fascism.[40] In other words, authenticity has the effect of separating culture and politics in potentially very counterproductive ways.

Other, more contemporary, examples of authenticity at work relate to a painting attributed to Leonardo Da Vinci, *Salvator Mundi*,[41] and the destruction of the World Heritage site of Timbuktu during the civil war in Mali.[42] *Salvator Mundi* is a painting attributed to Leonardo Da Vinci and hailed as the ultimate lost-and-found story. It went to auction and fetched an astonishing US $450 million. And then its authenticity, already confirmed by some experts, was disputed by others, and now the painting is no longer considered to be an "authentic" Da Vinci.[43] Its valuation plummeted, and people are less interested in seeing it. And then there's Timbuktu, historically an epicentre of Islamic scholarship and worship in Africa. During the civil war in Mali in the 2010s, Timbuktu came under attack by a radical Islamic faction, and it was destroyed. World Heritage rules require that a cultural site, for inscription on the World Heritage List and having "Outstanding Universal Value," be authentic.[44] After destruction, the local residents rebuilt many of the eleventh-century mausoleums. Were they still authentic? And what does this possible loss of authenticity mean?

These examples showcase the work of authenticity as a value-creating, gatekeeping conceptual pillar.[45] It allows experts to determine whether a cultural object or site has value, and it is these experts, and not the communities that create the heritage, that get to determine whether culture is worthwhile, whether it receives resources for its safeguarding, whether it is worth seeing, visiting, appreciating. The law has largely enabled authenticity and its reign. Normally, lawyers and legal institutions are very deferential to art and heritage experts in these matters. The law is preoccupied with authenticity, but it dares not question what work it does and whether the work is just.[46] It simply assumes that justice will derive from upholding and reinforcing authenticity. The law plays a key role in shoring up this pillar, but we need not take it for granted. Authenticity can play a similar elite-protecting role to inherent value (in fact, as Benjamin in the 1930s and even my description of the concept above show, they often go hand in hand). But we must not allow our own ghosts to separate heritage from the people who, on justice grounds, we have vowed to defend.

Human rights as a panacea for renewal of cultural heritage law

Human rights are the bread and butter of a justice-oriented international legal order.[47] They are also at the core of humanism as a belief and morality system that has, since the French Revolution's 1789 Declaration on the Rights of Man and of the Citizen I mentioned above,

[39] For examples, see Immonen 2012; Morris 2014; Sheffi 2019; Olsen and Vinogradova 2020.
[40] Benjamin (1935) 2010; Hanssen 2005.
[41] Lewis 2019.
[42] Casaly 2016.
[43] Lewis 2019.
[44] Doppelhofer 2016.
[45] Lixinski 2022.
[46] Lixinski 2022.
[47] Buergenthal 2006; Cassese 2008; Francioni 2011.

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sought to replace organized religion as a key structuring backbone for social relations. In the context of cultural heritage, safeguarding human rights play an integral role to the extent we recognize the right to participate in cultural life and the rights of minorities to their own cultures.

For present purposes, I want to focus on the right to culture as a relatively contemporary, twentieth-century, United Nations-era phenomenon. From a legalistic perspective, the idea of connecting human rights to culture stems from instruments like the Universal Declaration of Human Rights,[48] the International Covenant on Civil and Political Rights,[49] and the International Covenant on Economic, Social and Cultural Rights.[50] But, of course, this idea that human rights and culture intertwine is not obvious or settled. From the origins of twentieth-century human rights movements to today, there have been those who query human rights and the attempt to replace religion as an organizing set of practices and institutions and an imperial imposition (partly because it seeks to displace the religious monopoly of local elites, like it did in the French Revolution).[51] There are also those who see in human rights a pathway to protection against, and emancipation from, harmful cultural practices.[52]

The debate between cultural universalism and relativism in human rights goes back at least to the 1940s when the Universal Declaration was being drafted.[53] There, cultural heritage as a physical marker of culture was not often at stake, but cultural practices that we may describe today as intangible cultural heritage were very much at the forefront. Anthropologists decried the imposition of human rights and its calls for universalism on cultures that they sought to appreciate in their differences, whereas human rights sought to find commonalities. Never mind that anthropology itself as a discipline has very often been charged with the same imperialism from which they sought to protect peoples outside the North Atlantic;[54] anthropologists now saw human rights as an ideology, rather than the empire that facilitated their fieldwork, as the problem.

Over time, even anthropologists have come around to embracing the idea of human rights.[55] And human rights became universally hailed as a language of emancipation and "empowerment," to use a favourite liberal trope. And it certainly has those effects. But human rights can also judge and flatten culture.[56] And, most importantly, it will not necessarily do everything we promise it can do. Let us look at Indigenous rights, for instance. The 2007 United Nations Declaration on the Rights of Indigenous Peoples[57] and the 2016 American Declaration on the Rights of Indigenous Peoples[58] both have a number of provisions specifically dedicated to Indigenous heritage and culture. In fact, as Karen Engle has persuasively shown,[59] culture is the backbone of all Indigenous rights, for better or worse.

[48] Universal Declaration of Human Rights, UN Doc. A/810, 10 December 1948, 217, para. A(III).

[49] International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171, Art. 27 (on minorities).

[50] International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights and Optional Protocol to the International Covenant on Civil and Political Rights, 16 December 1966, 993 UNTS 3, Art. 15 (on cultural rights).

[51] Mutua 2001.

[52] Longman and Bradley 2016.

[53] Engle 2010.

[54] Stauder 1974.

[55] Engle 2001; 2010.

[56] Kapur 2017.

[57] United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295, UN GAOR, UN Doc. A/RES/61/295, 13 September 2007.

[58] Organisation of American States, American Declaration on the Rights of Indigenous Peoples, Doc. AG/RES.2888 (XLVI-O/16), 15 June 2016.

[59] Engle 2010.

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These provisions on heritage in both these instruments recognize that Indigenous peoples have the right to access and benefit from their own heritage and loftily declare such. But they fall short of creating effective remedies through which these rights can be exercised.

Let me be clear, international human rights law is terrific in many ways and a great aid to how we think about cultural heritage and the power within it. International human rights law in the context of heritage forces us to think outside of heritage as a static thing with inherent value and to think of heritage as something that matters because it is important to human beings and, at the very least, their identities.

But human rights cannot always deliver everything we want from heritage. The excessive focus on declaratory rights over remedies, for instance, exemplifies that limitation. Further, human rights require individualization, which does not always sit well with culture as a collective endeavour.[60] Finally, the human right to culture is relatively weak, left at the mercy of subsidiarity and the nation-state's own description of what culture is and who it serves.[61] Therefore, the emancipatory promise of human rights, particularly international human rights, as a pathway against the state when the state fails is undercut in the context of culture.

Human rights law is a language of power that transcends religion and its elitism. It is also, in its legalistic version, relatively open to being used by vulnerable groups (in fact, so is precisely its objective). But the same legal mechanisms that promote emancipation, in the name of legitimacy and the voluntary cooperation of the states that claim to be bound to them, tend to sacrifice culture as being too diffuse, individualize the collective, and defer to state sovereignty and subsidiarity particularly against historically disadvantaged groups like minorities and Indigenous peoples.[62] As these groups lack resources to go against the state in other fora, the human right to culture ends up serving the same nationalistic and disciplining narratives that the idea of human rights was meant to undermine in favour of a universal humanism.

Therefore, regardless of our rejection of human rights in the name of relativism, or our embrace being undercut by legal mechanisms engaging poorly with the ideas of culture, identity, and heritage, human rights is not the solution to all problems. Nor is it meant to be. It can work as a backstop and infuse cultural heritage law with more participation, but it cannot transform the underlying logics of heritage law. It does important work in humanizing the stakes of cultural heritage discursively, but its legal mechanisms are weaker than we like to acknowledge. Being critically aware of these shortcomings does not necessarily mean that we should give up on rights; rather, it means that we need to be more mindful of where strategic and tactical possibilities lie, instead of putting all our proverbial eggs in the humanist or human rights basket.

Cultural heritage law's reliance on expertise and expert rule

What this notion means is that, much like in other areas of law and governance,[63] we depend on experts to tell us what things mean, how to value them, and what we value them for. So, we end up in a system in which it is largely not the culture creators but, rather, the outsiders who make themselves experts on that culture as consumers (some of whom can be creators, but their creator credentials are seldom why they are deemed experts) who get to decide whether something is heritage, how it is safeguarded, and for what purposes it is safeguarded.

[60] Francioni and Lixinski 2017.
[61] Francioni and Lixinski 2017.
[62] Garcia and Lixinski 2020.
[63] Kennedy 2016.

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This notion of expert rule is prevalent most firmly in international heritage law. But, because international heritage law trickles down to domestic practices very effectively,[64] it is worth considering in general. As with other challenges in heritage law, intangible cultural heritage and regimes under it offer a counterpoint, but, in my view, they are still meant to fundamentally transform the field at large. In international heritage law, the origins of this practice lie with UNESCO and the Cold War. When UNESCO was first created, and started working toward implementing its culture mandate, the voices in the conversation were local craftspeople associations and mayors around many parts of the world (even if, admittedly, mostly in Europe). But then, as UNESCO initiatives turned to standard setting, experts took control.[65] Why is that? One explanation, and the one I am using for present purposes, is that the reliance on local craftspeople associations and other mayors was seen as two things: first, too granular and difficult to generalize, second, too political.

On granularity and the difficulty of generalization, the issue is that there was no common language that these organizations spoke. They also spoke to their own interests and did not purport to speak to the entire heritage domain wherever it existed around the world. The lack of generalization made them too small, too niche, and, therefore, their voices were difficult to distil and easy to dismiss. A similar dynamic happens when we talk about culture as a local concern. On politics, the problem was that, at about the same time that UNESCO was starting to work, the Cold War grew in prominence. Then everything became polarized and paralyzed. It was impossible to create instruments, norms, and institutions if they were political. They needed to appear as neutral, scientific, apolitical.[66] Enter the experts as scientists, who were, speaking to the first point, adept at distilling local granularity into generalizations. Hence, the rule of experts. Over time, every UNESCO treaty has deferred in one way or another to expert rule to tell us what heritage is, whether it is worth safeguarding, and how to safeguard it.[67]

On its face, there is nothing wrong with expertise. It is people invested in creating a common language of practice and undertaking said practice (and with the time and resources to do so). But the problem here is that, over time and almost subconsciously, experts have become increasingly self-referential, stopped deferring to the communities that created or lived in, with, or around heritage, and became extremely invested in protecting heritage against all threats, even the sources of the heritage itself.[68] That is part of the reason why we end up with ideas like intrinsic value and authenticity. The problem here is that heritage divorced from people is dead and static. Also, over time, experts became so invested in the operation of heritage law that heritage law could not move forward without them, and the experts were paid by states to make the system function. So, we get to the point where experts are either working for the heritage (separated from creators) or for the state that pays these experts (which, in the case of minorities, often oppress these cultural creators and would rather have these cultures disappear in favour of a single or at least fully harmonized national narrative) instead of the people whose causes they should be representing.

For instance, in the World Heritage system, nothing gets inscribed unless at least one out of three expert non-governmental organizations mentioned in the text of the World Heritage Convention says heritage should be listed as world heritage.[69] These experts were

[64] Lixinski 2019.
[65] Lixinski 2019.
[66] Lang 2011.
[67] Lixinski 2013.
[68] Smith 2006.
[69] Convention Concerning the Protection of the World Cultural and Natural Heritage, 16 November 1972, 1037 UNTS 151, Art. 14(2): "The Director-General of the United Nations Educational, Scientific and Cultural Organization, utilizing to the fullest extent possible the services of the International Centre for the Study of the Preservation and the Restoration of Cultural Property (the Rome Centre), the International Council of Monuments and Sites

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present when the Convention was drafted.[70] Now they are paid for by states to visit and assess potential world heritage sites (or, in the case of monitoring, existing ones).[71] The livelihoods of these experts depends on them being used by states. And we are supposed to believe that they are entirely independent, that there is no incentive for them to privilege a sanitized national narrative, for instance, over one that talks about minority resistance against the state in a World Heritage site. Even if we do believe that to be the case, we are further asked to believe that, in speaking for the heritage, these experts have a better sense of how that heritage has come about, what it means, and how it should be safeguarded than the local communities who created and have safeguarded that heritage for years, sometimes centuries. However well-meaning these experts are, the system works in this direction almost subconsciously.

In other words, we have chosen privileged expertise over the local connections. We have done so, much like with the other pillars and assumptions we discussed earlier today, as a means to separate heritage from distracting politics. But we did too good a job, and heritage lost its connection to the vibrancy and inherently political nature of our identities. We lost sight of the forest of heritage and identity for the individual trees of the beautiful things we sought to safeguard. By protecting heritage from ourselves, we have also cut off the supply of life and cultural connection that makes heritage valuable. We gave ourselves less opportunities to transform heritage through our connection to it, we became increasingly interested in heritage as a performance for outsiders rather than as a reaffirmation of our identity, we catered to expert expectations of what heritage should look like in an attempt to gain access to recognition and safeguarding resources. All of these actions set us down a path that allowed the regulation of heritage to change, rather than simply safeguard, that which it sought to regulate.

Being critically aware of this shortcoming invites us to rethink more broadly why we are doing what we are doing and in whose name. As legal scholars trained to think about justice, we need to think of heritage justice as being social justice rather than elitist expert justice. Therefore, the archaeology of these pillars and assumptions calls for a more political engagement with heritage. To do so gets us reassessing what we take for granted and should never have: why does heritage exist; why is it valuable; for whom is it valuable; and what is our role in using the law as a language of power to channel the power of heritage and identity?

Clichéd challenges

After excavating these ideas and exposing their assumptions and politics, I wish to frame them in relation to some of the key challenges that I believe lie ahead for cultural heritage law. These challenges range from disciplinary to global survival. They speak to the ways in which cultural heritage, and the law accompanying it, are products of and mirror society and its anxieties. Also importantly, because of cultural heritage's role in fostering and shaping social cohesion and resilience, the import of cultural heritage in response to these challenges cannot be underestimated. Therefore, as we think through these clichés, I wish us to try and see them afresh, through the lenses of our commitment to cultural heritage as a field

(ICOMOS) and the International Union for Conservation of Nature and Natural Resources (IUCN) in their respective areas of competence and capability, shall prepare the Committee's documentation and the agenda of its meetings and shall have the responsibility for the implementation of its decisions."

[70] Cameron and Rössler 2016.

[71] Operational Guidelines for the Implementation of the World Heritage Convention, UNESCO Doc. WHC.21/01, 31 July 2021, para. 31.

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and a cause, so we can peer into the stakes and the possibilities of action that are available to us.

In relation to inherent value, I want to connect those issues with the Anthropocene. Human impacts on the world now amount to primal geological forces.[72] And, in this conversation, cultural heritage can play a key role in our preparedness and response to Anthropocene-related impacts on our lives.[73] But doing so assumes thinking of heritage beyond intrinsic value. We cannot think of heritage just as something to be gazed at; it needs to be an integral part of how we live. We have done some work in this area already, in instruments like the Council of Europe's 2005 Framework Convention on the Value of Cultural Heritage for Society (ratified by half of the Council of Europe's member states at the time of writing).[74] The UNESCO Intangible Heritage Convention's Operational Directives, further, acknowledge the role of heritage in responses to disasters.[75]

But our actions still need to catch up since everything that is listed as heritage related to disasters in the Intangible Heritage Convention's lists is more for gazing at, than for in fact helping us respond to, disasters.[76] While, understandably, the lists are primarily aimed at visibility and awareness raising about heritage, and not aimed at safeguarding measures *per se*, they are a vital pathway through which communities and states connect to intangible heritage and tend to attract greater safeguarding resources than unlisted heritage, meaning that they are in my view an important measure of the possibilities of safeguarding. In this context as elsewhere in cultural heritage law, heritage is only worth the name if it helps us be a better society in the future. Let us make sure that our work as heritage lawyers pushes toward that view.

On authenticity, the biggest lesson here is one about the value of interdisciplinarity. As I mentioned above, the law tends, more often than not, to endorse our reliance on authenticity as a key maker of the value of heritage. It does not query the work that authenticity does, however pernicious it is. If we open ourselves more to interdisciplinarity, we are better equipped to query the work that concepts like authenticity and many others do because we will see them as an integral part of our arsenal rather than as something we simply accept from elsewhere.

On human rights, the potential and limitations of human rights become apparent as we respond to conflicts. New and ongoing conflicts increasingly target heritage.[77] The language of human rights can remind us of the connection between heritage and identity as well as the importance of heritage as a site of social resistance, of continuity, and of renewal in the face of oppression. But it can also undercut heritage because human rights (at least in its adjudicatory version) individualize issues and prioritize certain effects of conflict over those on culture. Therefore, human rights are not a full response, but they can get us to think about heritage in fuller human terms.

Finally, and related to conflicts, the challenge of the enforcement of international law in response to international crimes helps highlight the stakes of our reliance on expertise and perhaps even break away partly from our dependence on it. The International Criminal Court's (ICC) response to the destruction of Timbuktu, for instance, is a terrific example of how enforcing international heritage law through international criminal institutions forced us to reconsider our reliance on experts. Even though the ICC ultimately did rely very

[72] Harrison and Sterling 2020.

[73] Bartolini 2020.

[74] Framework Convention on the Value of Cultural Heritage for Society, 27 October 2005, CETS no. 199.

[75] Operational Directives for the Implementation of the Convention for the Safeguarding of the Intangible Cultural Heritage, Doc. 9.GA, 2022, para. 191.

[76] Lixinski and Williams, forthcoming.

[77] Hausler 2015.

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heavily on cultural heritage experts, it also reminded us that heritage exists and is relevant because of its life within a community and that it is okay for a community to reconstruct their own heritage even if some experts will consider it to be no longer "authentic."[78] It is the connection that the community experiences, rather than what an expert says, that matters in determining why heritage is worth safeguarding.

Taken together, these four challenges, even if clichéd individually, remind us of the importance of rediscovering the political stakes of cultural heritage safeguarding. They also remind us of the possibilities of the law in redefining these stakes and how the law should serve social justice via culture and not use culture as a pawn for elitist conformity and oppression (as the historic examples around inherent value show). The law matters most for those upon whom it bears harshly,[79] and our commitment as heritage lawyers should also be a drive to wield the law as a tool of power in favour of a better future. Heritage is for the future and the society we want to be; so should heritage law.

Concluding remarks: back to support, renewal, and iconoclasm

Therefore, in thinking back about the three issues in the title of this piece – support, renewal, and iconoclasm – what do I suggest happens to the four assumptions and pillars we have discussed? What is the call of this article? First of all, I wish us to support more interdisciplinary work. This type of work will help us keep the ever-changing stakes of heritage law and heritage safeguarding fresh in our minds as missions, commitments that we renew frequently rather than assumptions we do not query. Second, I wish us to renew our use of human rights, our thinking about the possibilities of enforcement and how they can help us see the forest for the trees. There is potential here, even if it is still tethered to the pillars and assumptions we have discussed. But these are key tools for us to realize the possibilities of heritage wielding the tools of the law at our disposal.

However, for this renewal to take place, some iconoclasm is due. I wish us to destroy the effigies of authenticity and inherent value, for us to realize that expertise is only relevant if it speaks for cultural creators, rather than for culture as a divorced trinket from the past. Interdisciplinary work can help us notice what these problems are. The legal tools I wish us to renew tell us how to deal with these problems. Iconoclasm gives us the pathway to the ultimate liberation and unburdens us to realize a mission of heritage law that is more in line with why heritage exists and why we care about it – support, renewal, and iconoclasm. That is my call for action in what I see in the field of heritage law and what I would like to see in the field. It is how I wish to be made obsolete. It is what I invite you to do. I look forward to pursuing these objectives with you until you no longer see any use for me.

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[78] Lixinski 2019.

[79] Wootten, as quoted by Dixon 2019.

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