

Discussion on should museums sell items from their collections

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Abstract: *In May 2009, the Art Institute of Chicago raised admission prices by 50% in order to pay for operating expenses. When Chicagoans threatened to stop visiting the museum, the person in charge explained that the increase was essential for the museum to continue sustaining its mission, unless losses could be reduced by selling the collection. In 2019, the increasingly severe financial crisis hit museum operations harder due to the global outbreak of Covid-19, Stephane Destinquin, founder of the French creative consultancy (Fabernovel), suggested that the French government could help eliminate the huge debt France had accumulated during the covid-19 epidemic by selling the Mona Lisa. Both of these examples reflect a question, that is whether museums can subsidize their operating costs by disposing of their collections in a profitable way during a difficult economic climate. Although the public and the media are generally resistant to and critical of this issue, there are many successful cases of market-based disposal of collections in practice. This article will therefore provide a legal analysis on the feasibility of museums selling their collections so as to provide some insights and direction of research for museums to better deal with their collections.*

Keywords: *Transferability of museum collections, Protection of museum collections, the public trust doctrine*

1. The legal status of museums

One of the main functions of museums is to acquire, preserve, study and disseminate knowledge from collections. And it is this function that gives museums a characteristic of public welfare, which makes museums peculiar. Namely, it is improper for us to put museums in the same position with other economic agents. Therefore, before discussing the feasibility of the sale of museum collections, the author considers that the discussion of museums' legal status is quite necessary.

In China, museums are defined as non-profit social service institutions which collect, conserve, study and display testimonies of human activity and the natural environment. Museums are open to the public. Coincidentally, the organizational structure of European museums is very similar to Chinese museums, that is also dominated by publicly funded national organizations. On the contrary, the situation is somewhat unique in the United States, where museums cover the genres of art, natural history, anthropology and science, and are largely privately contracted. In other words, individual drive is essentially the driving force behind museums in the US —Individuals create museums by developing the mission, financing the facility and operations, and building the museum collection from their personal collections and new purchases^[1]. But even so, there is a preference for scholars to understand the American museums as a private institution with a public role^[2], shouldering a public responsibility. Thus, even though the definition of museums varies from country to country within their unique legal systems, the mission of cultural preservation and transmission that museums themselves carry has never been denied by the laws of any country, regardless of how they are defined.

In fact, the sharing and exchange of culture is an important function assigned to museums by law. Of course, the focus of the different types of museums varies to some extent, but there is always a certain commonality in the original purpose of the different types of museums, which is to provide the public with a variety of cultural information through different means, such as the display of the testimonies of human civilization. This leads to the second characteristic of museums, which is service. When visiting a museum, a large part of the public's experience comes from architecture and interior design of museums. Even though the objects on display in a museum can speak for themselves, in a museum environment, visitors see objects through the lens constructed by the museum and the curators^[1]. To ensure that visitors have a good experience, museums generally make special rules, such as restricted opening hours throughout the year and concessions for special groups, which reflect the public interest and service

nature of museums.

Because museums not only provide public service, but also keep cultural heritage, they can be considered as an important civic institution that plays a significant role in national and regional identity^[3]. Given their function and nature, which is based on the collection and display of cultural objects, museums inevitably fall under the supervision of the administrative authorities, making their legal status different from that of a general market economy, and they are apparently more strictly bound by laws and rules when engaging in transactions in a free market.

2. Does museum collections belong to transferable asset

There is still no unified definition of what constitutes a 'collection', but they are usually described as 'objects that bear witness to human activity and the natural environment' in academic terms. The question of how to clearly define museum collections in a juridical context remains an unresolved issue in academic circles. Of course, apart from the legal definition of museum collections, there is a concern for their legal status, in other words, whether they are property in the traditional private law sense and can be freely transferred in the marketplace without limitation.

2.1 Whether museum collections have property attributes

From the author's perspective, museum collections have property attributes. In the legal context, the property of items is displayed in the form of economic benefits through exchange and utilization in most cases. In practice, museum collections are usually used as a cultural resource, as they are a tangible form of cultural property that must be used without destroying the original appearance and authenticity of the object^[4]. Of course, the property nature of museum collections is reflected more in their exchange value than in the use of museum collections as accessible cultural resources. By analogy with the circulation of non-museum collections, it is in the process of circulation that the property nature of cultural objects is maximized, that is they have the characteristics of pure commodities and are given the function of storing property value. Despite museum collections cannot circulate freely in the marketplace in the same way as other property, their potential property properties are obvious. Moreover, it is this property that makes museum collections the subject of civil law regulation and protection, which is primarily concerned with regulating property relations. Many countries, such as Japan, Greece and Egypt, have adopted civil legislation to regulate museum collections as cultural property.

2.2 Transferability of museum collections

The main difference between museum collections and non-museum collections is that they are legally mimetic, resulting in museum collections being very different from non-museum collections in terms of collection, management and disposal, even if they are also cultural objects. In some countries, such as China, museum collections are even the subject which should be particularly legislated.

As mentioned above, museums, as public institutions, have a social service function. Therefore, the legal fiction of museum collections is in fact an expression of this function. The significance of a museum collection as a witness lies in a statutory collection procedure through which it can be distinguished from non-museum collections and it is also promoted to transform from 'general property' in the private law sense to 'object' in the public law sense. A clear public-law character was entitled to museum collections when applying legal norms to regulate museum collections^[5]. In contrast to private law, public law is much more complex in its regulation of the legal attributes of property. The author will discuss this point of view in the following paragraphs.

2.2.1 How public law regulates "items" in Civil Law legal system

Although *the French Museums Act* (released in 2002) does not specifically conclude the positioning of museum collections, the following characteristics can be drawn from the provisions of the Act on the collection and management of museum collections.

First of all, the plurality of ownership subjects is respected in French museum legislation. Ownership can be considered as the core of the legal rights of museum collections in France. The types of ownership in *the French Museums Act* include state ownership, corporate ownership of a public nature, and corporate ownership of a non-profit private nature. How different French museums manage their collections are consistent with the aforementioned three different types of ownership. The collections of the Louvre and the Musée Guimet d' Art d' Asia, for example, are owned by the French State; the

collections of the Musée d' Histoire de Paris and the Musée de la Senouche are owned by a public legal person, the City of Paris; and the collections of the Musée d'Art d'Orient are owned by a non-profit private legal person^[6].

Secondly, *the French Museums Act* distinguishes museum collections from non-museum collections in its legislation by explicitly stating that they are not to be preserved and exhibited for profit. There is a very clear statement in the legislation of this law: 'If the collection and the exhibition of the collection to the public change to a profit-making act The title of 'French Museum' is withdrawn by a decision of the Minister of Culture and, in other cases, by a decision of the relevant Minister'^[7].

Furthermore, France imposes certain restrictions on the transfer of museum collections. The transfer of museum collections is prohibited in the majority situations, which is an important principle, while some kinds of transfer can be allowed based on strict limitation as exception. In the case of public museums, museum collections are absolutely non-transferable as they are owned by the State, and even if they can be transferred from one public institution to another with the permission of the Minister of Culture, the user must be a publicly owned museum, which means that museum collections that are publicly owned are not actually allowed to circulate in the market. Private museums, on the other hand, are much freer to sell their collections, but whether the transfer is valid is still subject to the supervision of the administration. Precisely, when the owner of a private museum collection is about to sell a museum collection that is not in public ownership, he or she needs to inform the administration of his or her intention to sell the collection and of the proposed sale price, in order to regain free rein over the collection. In the event that the buyer and seller cannot reach a consensus on the price, the competent judicial authority would make the final decision.

The above-mentioned provisions of French museum legislation on museum collections show the property nature of museum collections, which is a necessary expression of the principle of equality in private law required by the market economy in public law. At the same time, the exclusion of profit-making and the restriction on the free transfer of museum collections reflects the fact that French legislation has positioned museum collections as 'property' that is specifically protected by French law for the public good, with the ultimate aim of making them available to the public. Such property, which is based on the value of public interest, regulated by the government and provided for the public, is regarded as 'public property' in French administrative law, in other words, so-called 'public property' in the traditional administrative jurisprudence of civil law countries. It is important to note that although the free transfer of public property is extremely strictly limited, its transferability is not therefore absolutely denied.

2.2.2 Brief summary on the public trust doctrine in Common Law legal system

Due to the non-statutory custom of common law countries, systematic statutory regulation of museums is rare in common law jurisdictions and has been replaced by standard regulation of museum accreditation and review. Compared with the French approach of treating museum collections as 'public property', countries such as the United Kingdom and the United States prefer to classify museum collections as 'public trust resources'. In the UK, for example, the Accreditation Standards for Museum Accreditation adopt the following statement in the objectives of the accreditation system: 'to build confidence in museums as structures that hold collections in trust for the community and that manage public resources appropriately'^[7]. In the United States, the Standards for Accreditation - Characteristics of Accreditable Museums begins by stating that museums are competent custodians of their public trust resources. In short, in common law countries, museum collections are 'Trust Property', the government and museums are 'Trustees' and the public are 'Beneficiaries'. It follows that 'public trust resources' in common law systems and 'public property' in civil law systems are in fact the same concept, both of which are specifically created by the public power of the state for the purpose of achieving public access. In other words, 'public trust resources' and 'public property' are just different expressions of the legal attributes of museum collections in the civil law and common law systems, but what they have in common is that, apart from the need to serve the public, the role played by public authorities in ensuring the safety of the collections and the public's access to them cannot be ignored.

Thus, it is easy to see that both civil law and common law systems have essentially the same position regarding the legal attributes of museum collections, Namely, on the basis of the affirmation of their private law property attributes, they are regulated by public law so that they fall within the scope of public property.

As already mentioned, although the free transfer of public property is restricted, it is not in fact completely prohibited. In the author's opinion, the division between public and private property is in fact relative, just like the approach taken in French museum legislation, where a private object can be made

public through a statutory procedure based on the public interest, while a public object can follow the same path, that is, be restored to its private state through a statutory procedure, provided that the basis and manner of conversion between the two is in accordance with the relevant legal provisions. It is therefore clear that museum collections are transferable.

3. Analysis on the feasibility of selling museum collections

As discussed in the second part of this paper, despite museums have a public service function, none of the countries has completely eliminated the possibility of selling museum collections in its legislation. Most of the reasons why museums propose to sell their collections can be attributed to the need to relieve the heavy financial pressure placed on museums by high operating costs and the need to renew their collections. In recent years, the increasingly lively debate on the sale of museum collections seems to be making the matter more justifiable. Inevitably, of course, there are opposing voices. In the following section, the author is going to analyze the feasibility of selling museum collections through a comparison of the pros and cons.

3.1 The benefits of selling museum collections

3.1.1 Maintaining the operation of museums

Museums are mainly funded by government and private donations, but the ongoing financial crisis that has swept the world has made many museums be caught in debt crisis. 2010, within one year, approximately as many as 20 museums in the US closed permanently, including the Gulf Coast Museum of Art in Florida, the Minnesota Museum of American Art, the Fresno Metropolitan Museum of Art and the Las Vegas Museum, to name but a few. The consequences of museum closures are far-reaching and negative. From a business perspective, employment and tourism are affected by the closure of museums; from a public service perspective, regional heritage is disseminated to museums in different regions, which means that communities lose important educational institutions and the public is deprived of the opportunity to see art^[1]. Besides, given cultural preservation, museums' valuable collections can even suffer rapid depreciation in value. This is because when a museum closes, the collection may be stored and sold quickly to private collectors for less than market value, worse still, creditors may hypothecate the collection to pay off the museum's outstanding debts. In the case of the Fresno Metropolitan Museum of Art, when it closed in January 2010, it still owed creditors 4 million dollars after selling off its non-art assets. As a result, the museum plans to sell its art collections at auction houses across the country to pay off the remaining debt. It would seem that the most immediate benefit of selling the museum's collection would be the ability to add a significant amount of income to the museum to alleviate its existential crisis, which is important for its survival. The Art Institute of Chicago has earned 910,000 dollars from the sale of artworks and then used it for the maintenance of the collection and staff salaries. This suggests that the sale of collections can go a long way towards reducing a museum's reliance on government grants and individual donations, minimizing the impact of economic deficits on museum operations. Despite the dispute that selling museum collections remains illegal, it should be seen as a tool for museum survival.

3.1.2 Promoting the development of museums

According to incomplete statistics, museums store 90% of their collections in warehouses at a high cost^[6]. Selling collections can therefore enable museums to remove items that have become a financial burden and ensure that the remaining collections are more properly cared for. At the same time, this raises another question. As is known to all, the artistic and cultural value of some collections can be eliminated over time. If museums only sell artworks to other museums or public institutions, the artworks would drop out of the market and the prices of the works that remain on the market would increase. And in other words, if private collectors are unable to purchase artworks, they may be less likely to agree to lend their existing collections to museums, which will directly affect the quality of museum collections. If some artworks are of poor or declining quality, then this will inevitably reduce the attractiveness of the museum to the public. Selling collections is therefore a desirable way for museums to improve and enhance the quality, use and character of their collections. Such sales can also be adapted to changing artistic tastes and cutting-edge scholarship. Such a sale is necessary for the development of the museum itself and its collections, allowing the museum to ensure that it retains only those items of the highest educational, historical and artistic value^[1].

3.2 Legal risks of selling museum collections

3.2.1 A lack of legal basis for the usage of selling profits

Out of concern for the loss of cultural objects, many countries have restricted the scope of use of the proceeds from the operation of museums, and although this is not explicitly stated in the law, the author believes that the proceeds from the operation here should cover the proceeds from the sale of the museum's collections.

China has stipulated in *the Law of the People's Republic of China on the Protection of Cultural Relics* that the business income of state-owned museums, monuments and cultural relics protection units is to be used exclusively for the protection of cultural relics. In 2012, the State Council issued the *Opinions on Further Improving the Protection of Cultural Relics in Tourism and Other Development and Construction Activities*, which requires that 'the operating income of cultural relics tourism scenic spots should be used for the protection of cultural relics as a priority'^[7]. From the textual expression, 'priority use for cultural heritage protection' is relaxed compared to the description, 'specifically for the protection of cultural relics', in *the Law of the People's Republic of China on the Protection of Cultural Relics*^[8]. With the introduction of the *Guidance on Promoting the Reform and Development of Museums* in 2021, museum income is approved to be used for collection, career development and performance incentives for eligible personnel. The scope of use of operating income has been further relaxed. Despite the gradual relaxation of restrictions on the use of museum operating income, there remains the inescapable problem that at the level of legal validity, *the Opinions on Further Improving the Protection of Cultural Relics in Tourism and Other Development and Construction Activities* and *the Guiding Opinions on Promoting the Reform and Development of Museums* are merely guidelines issued by the State Council and the Ministry of Culture of China, among others, neither of which has been authorized to override *the Law of the People's Republic of China on the Protection of Cultural Relics*. Therefore, in the absence of a simultaneous amendment to the law above, it remains highly controversial whether the scope of usable income from the operation of state-owned museums can be expanded.

Coincidentally, the restrictions on museum operating income in the United States are similar to those in China. Even though the common law has not addressed this issue in judicial practice, museums are guided by professional codes of ethics promulgated by the American Association of Museums and the Association of Art Museum Directors. Both associations, in turn, have codes of ethics that restrict what kind of objects are eligible for sale and how the proceeds are to be used, and explicitly prohibit the sale of museum collections to finance 'traditional and customary operating expenses'^[7]. Although the provisions mentioned above are ethical and cannot be legally enforced, these codes of ethics are strictly enforced in the museum world to avoid far-reaching association sanctions.

3.2.2 Breach of Duty of Candour to the Public and Donors

Apart from the lack of a clear legal mandate for the use of operational income, the obstacles to the sale of museum collections also focus on whether the sale of museum collections and the use of sales proceeds from the sale of collections as operating costs violate the museum's obligations to the public. In the second part of this paper, the author argues that current scholarship on the legal nature of museum collections is based on the idea that they are 'public property' or 'public trust resources'. Museums acting as trustees for the public are doomed to the museum's role as a trustee for the public therefore precludes it from disposing of its collections at will for the sake of institutional operations.

In addition to this, as part of the museum's collection comes from donor contributions, it is terrible that when selling their collections, museum breach their commitments to the donor and may also lose the trust of potential donors. There is a concern that if museums are allowed to dispose of their collections to relieve financial pressures, people may perceive the donated collections as effectively becoming open reserves - after all, once the sale of artworks to cover operating costs is allowed, it will become the first resort in times of economic downturn, and donors may then be less willing to donate. When it comes to the obligation of integrity that museums owe to the public, it is not only the sale of museums themselves that deserves our attention, but also the problems in addition to the sale of collections should be considered by us. For example, how do we compensate for the loss of public interest when collections used for exhibitions are sold and then enter private collections? How can the collection be assessed and secured when it loses its professional museum conservation conditions^[9]? If there is no way to provide a reasonable response to these questions, then the sale of the collection is likely to be detrimental to the interests of society and cultural heritage.

Nevertheless, the legal risks faced by museums in selling their collections do not, in the author's view,

render the sale of collections undesirable. The most important legal argument held by the opponents is that the ownership of the museum's collection does not belong to the museum and therefore it has no right to dispose of it. However, as the author argues in the second part of this article, public and private property can be interchangeable through certain procedures, as long as the legal requirements are met. The possibility exists for the museum's collection, as a public object, to be restored to a private state, which tackles the problem of ownership. Besides, the sale of a museum's collection does not necessarily damage the public's interest in art. The sale of the artwork does not destroy it, as it still exists and circulates in the art market, and can be offered again to the museum through private owners^[1]. Many American collectors describe themselves as 'mere temporary custodians' of their collections and are committed to sharing their collections with museums and the public through donations, loans and other means. Thus, despite the controversy, it should be legal as well as ethical for museums to sell their collections. For it is as important to support the continued existence of museums as to protect the collections that they have a responsibility to preserve and exhibit^[1].

4. Practices of museums collections' selling in all around the international society

The not-for-profit nature of museums makes it unacceptable for many people to sell their collections for profit. This has led to a long-standing debate about whether museums can sell their collections. In the author's view, even though different countries have different views on the sale of museum collections, from the practice of each country, we might be able to have a conclusion on the government's attitude towards the sale of museum collections.

In China, for example, although the law does not explicitly grant museums the power to sell their collections, the *Measures for the Administration of Museums* does allow Chinese museums to reasonably go into collections. Article 22 of the aforementioned legal document states that 'museums that do not have enough collections to meet the standards of their own collections, or collections that cannot be repaired and have no further preservation value due to corrosion and damage, etc., may apply to the provincial administrative department of cultural relics to withdraw their collections after an assessment and determination by the museum or an expert committee entrusted to them'^[7]. The museum's collection can be restored to its 'private' status and thus the possibility of circulation in the market after it has been withdrawn from the collection through formal and legal channels. In other words, Notwithstanding the law does not allow Chinese museums to sell their collections directly, it does not eliminate the possibility of Chinese museums selling their collections through indirect means.

Even if the large proportion of private, not-for-profit museums in the United States, American museums have always represented the public interest. The American Association of Museums recognizes that a museum may transfer an object to another museum or sell it, but requires that the proceeds of the sale shall be only used for the purchase of a new collection or for the direct management of the collection. Nevertheless, the U.S courts have also invoked the business judgment rule, which originally deals with fiduciary duties, to protect a museum's legitimate interest in the sale of its collection. In *Dennis v. Buffalo Academy of Fine Arts*¹, the court ruled that the gallery's decision to sell its collection of Victorian antiquities and use the proceeds of the sale to refocus the collection and the gallery on contemporary art was unreviewable. Similarly, in *Rowan v. Pasadena Art Museum*², a California court ruled that the Pasadena Art Museum's board of trustees had broad discretion in managing the museum's affairs, including which artworks to sell. It follows that the U.S courts have held that the common law should not prevent a museum from selling its collection as long as it acts in good faith as a fiduciary and exercises a reasonable duty of review when selling its collections. As a matter of fact, museums choose to sell their collections in accordance with a considered decision 'would best serve the interests of the collection as a whole'³.

Indeed, as early as the early 1990s, the Glenbow Museum in Canada has already provided us with a successful example of Market-oriented de-accessioning of collections. After defining its purpose as the collection and conservation of objects related to the history, development and migration of the Northwest Territories^[10], the Glenbow Museum developed specific criteria for evaluating its collections, including typicality and integrity; relevance to the purpose of the Glenbow Museum; provenance; condition of the collection; current and future utilization of the collection; and ethical and moral issues related to the collection. The Glenbow Museum made a list of collections to be disposed of and then hosted an "open auction", ensuring that the entire process of selling the collections was open and transparent. Most

¹ *Dennis V. Buffalo Fine Arts Acad.*, 836 N.Y.S.2d 498, 498 (Sup. Ct. 2007).

² *Rowan V. Pasadena Art Museum*, Case No. C 322817 (Cal. Super. Ct. 1981).

³ *Wilstach E.* 1 Pa. D. & C.2d 197, 206 (1954).

importantly, in accordance with the law. While there are many examples of museums disposing of their collections in a market-oriented approach since this kind of de-accessioning of collections is permitted by Canadian law. It was the first time that a museum has disposed of its collections in a market-oriented way on such a large scale. The success of the Glenbow Museum makes the arguments that advocates museums should sell their collections even more compelling and convincing.

5. Conclusion

According to the author's point of view, the way in which museums dispose of their 'redundant' collections is an urgent issue that governments and museums must address and resolve in today's society, as economic policies continue to be adjusted to meet the self-imposed need for museums to remain viable. Even though it is true that the special legal status of museums and the peculiar nature of their collections may require higher procedural and operational standards for the sale of museum collections, museums should not be banned from selling their collections. In fact, there are a lot of practices which show that the international community is gradually softening its stance and becoming more moderate towards the sale of museum collections. The law does not act as a practical brake on the sale of museum collections.

On one hand, as an important part of the vitality of a museum, if the collection is simply collected without an exit mechanism, it will only increase the financial burden of the museums and weaken the vitality of them. On the other hand, if collections neither be added in the list nor be de-accessed, the vitality of the museum would no longer exist, not to mention that it would keep developing. Only when museum have the discretion on whether or not continuously preserve the collections, can the vigor be activated. In this way, museums can be provided an opportunity of continuous development. Therefore, museums sell their collections will not only achieve a goal that collections can be disposed in a reasonable way, but also increase funds for the management of museum collections, enhance promote the healthy development of museums. It is obvious that the advantages outweigh the disadvantages. Thus, museum shall sell their collections and this ought to be supported by the whole society.

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