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COMMENT

Treasure Found on Consecrated Ground

A G Guest
Formerly Professor of Law, King's College London

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BACKGROUND

Finds of treasure in England, Wales and Northern Ireland are currently governed by the Treasure Act 1996. The definition of 'treasure' in the Act is complex, but in broad and general terms an object of treasure may be said to be an object of value, at least 300 years old, which has usually, but not necessarily, been found buried in the earth, the true owner of which is unknown or cannot be traced. Treasure belongs neither to the finder nor to the owner or occupier of the land on which it was found, but to the Crown or to its franchisee to whom the Crown has granted the right to treasure. A find of an object which the finder believes or has reasonable grounds for believing is treasure must be reported to the coroner for the area in which the object was found. He or she will hold an inquest to determine whether or not the object is treasure. Until the nineteenth century, treasure was regarded simply as a source of revenue for the Crown or its franchisee. But from that time the law of treasure came to be regarded as the means by which valuable objects of historical, archaeological, or cultural interest might be preserved for the nation.

Prior to the 1996 Act the law of treasure was the common law of treasure trove. For an object to be treasure trove it had to be of gold or silver and

i. The object had to be found;
ii. There had to be such a substantial amount gold or silver in the object (maybe more than 50 per cent) that it could properly be described as a gold or silver object;
iii. The object must have been hidden with a view to subsequent recovery;
iv. The object must have been hidden in the earth or some other private place;
v. The owner of the object had to be unknown or untraceable.

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These requirements – in particular the second and the third – imposed limits that restricted the utility of treasure trove for its modern purpose. Articles of base metal such as armour, weapons or bronze coins, and gemstones, though they might be of outstanding archaeological importance, could not be treasure trove as they were not of gold or silver, and objects deliberately abandoned by their owner, such as ritual or votive offerings cast into a well or tomb, and grave goods, could not be treasure trove as they had not been hidden with a view to subsequent recovery. Objects which had been lost, such as individual objects dropped by accident or mislaid, were likewise excluded. Such objects could not be claimed by the Crown and made available to museums. They could be – and often were – sold by the finder or by the landowner commercially in the market.

To a certain extent the 1996 Act removed these limitations. It replaced (though not entirely) the common law of treasure trove with a new and extended definition of 'treasure'. As a result, objects which are not of gold or silver may in certain circumstances be treasure and, where objects are still required to be of gold or silver, 10 per cent gold or silver will suffice. Objects are no longer required to have been hidden with a view to subsequent recovery. They can have been left in any circumstances, including being lost or mislaid or deliberately abandoned. They can also be found anywhere – not necessarily hidden in the earth or some other private place: they can be found buried in the ground or on the surface, in a building or structure, and in a public place or on private property. However, the Act requires as a general rule, subject to exceptions, that objects of treasure shall be at least 300 years old when found. Nevertheless, the main purpose of the Act was not to correct the limitations of the law of treasure trove. It was to replace that law with a legal, administrative and procedural framework which would more effectively ensure the preservation of important historical, archaeological and cultural finds for the benefit of the public. The Act itself provides only a skeletal outline of the law of treasure, the essential procedures and practice being contained in a code of practice prepared by the Secretary of State for Culture Media and Sport. The current code of practice for England and Wales is *The Treasure Act 1996 Code of Practice* (second revision 2008).

In outline, the procedure for treasure is as follows. A person who finds an object which he or she believes or has reasonable grounds for believing is treasure is still under a duty to notify the coroner. Failure to do so attracts a criminal penalty. In England, in practice, the report will be made by the finder to the local Finds Liaison Officer (FLO) appointed under the Portable Antiquities Scheme, rather than to the coroner. The FLO will issue a receipt (a copy of which will be sent to the coroner) and the object will be deposited with the FLO or, sometimes, with a local museum or with an appropriate archaeological organisation. Unless the coroner concludes that the object is clearly not treasure, he or she will open

an inquest – usually a paper inquest – to determine whether or not the object is treasure. An object determined by the coroner to be treasure will then be offered to a museum or museums by the Secretary of State for Culture, Media and Sport. The Secretary of State will first determine the value of the object and will do this on the recommendation of the Treasure Valuation Committee at the British Museum. The basis of the valuation is 'what may be paid for the object in a sale on the open market between a willing buyer and a willing seller'. The acquiring museum will have to pay this amount to acquire the object. The amount will also form the basis of an *ex gratia* reward which will be paid to the finder and the landowner (in the absence of a contrary agreement, usually on a 50–50 basis). This is one of the most important features of the regime established by the 1996 Act. However, a finder may expect to receive no reward at all or an abated reward if he or she was trespassing, failed to report the find or deliberately or recklessly damaged the object found. Archaeologists are not entitled to a reward.

If no museum wishes to acquire the object or no museum can raise sufficient funds to do so, the Crown's title to the object will be disclaimed by the Secretary of State. The effect of a disclaimer will be that the Crown's title to the object will be retrospectively annulled. The Crown will be deemed never to have become the owner of the object. In the absence of any agreement between them, title to the object as between the finder and the owner or occupier of the land on which the object was found and as between the finder and any other person will then be determined by the common law. At common law the landowner will have the better right to objects found attached to or under his or her land. The finder will prima facie be entitled to objects found on the surface of the land or in a building and not attached to the building, but 'finders keepers' does not apply where (as is very often the case) the occupier of the land has, before the object is found, manifested an intention to exercise control over the land or building in question and the things that may be upon it or in it. The disappointed claimant, whether the finder or the landowner, will in no event be entitled to a reward at common law, nor will the value of the object be split between them. 'All or nothing' is the rule of the common law.

It is generally acknowledged that the 1996 Act has worked reasonably well. Finders, perhaps encouraged by the prospect of a reward, have as a general rule duly reported their finds and taken care of the objects found. More than a thousand finds are reported to coroners each year. Approximately 96 per cent of these are found by metal detectorists. Nevertheless, certain criticisms have emerged. The definition of treasure in the Act is such that certain base metal objects of great value and importance have fallen through the statutory net, as for example occurred in 2010 with the find by a metal detectorist of a single copper-alloy Roman cavalry helmet at Crosby Garrett in Cumbria. The find, described by the British Museum as 'an immensely interesting and

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outstandingly important find', fell outside the categories of treasure specified in the Act. It was sold by auction at Christie's to an anonymous private collector for £2.3 million. The reward system has also been criticised in that the whole market value of the treasure found is distributed as a reward. In the case of the Staffordshire hoard, the largest hoard of Anglo-Saxon gold and silver metalwork yet found, which was discovered by a metal detectorist in a field near Lichfield in Staffordshire in July 2009, the hoard was valued by the Treasure Valuation Committee at £3.85 million. This was the sum which had to be paid by the Birmingham Museum and Art Gallery and the Potteries Museum and Art Gallery to acquire the hoard. This sum was distributed as a reward in equal shares to the finder and to the farmer on whose land the hoard was found. It is argued that a much smaller percentage or sum would be an adequate reward. Museums have limited resources and frequently no museum feels able to afford to purchase an individual object of treasure, with the result that it is disclaimed by the Crown and sold on the open market.

In addition, there is a certain antipathy between archaeologists and metal detectorists, the latter being regarded by the former as bungling and dangerous amateurs in an important scientific field. Some criticism has also been levelled at the choices made by the Secretary of State as to the museums to which objects of treasure are offered and as to the priority allegedly afforded to the national museums, that is, in England to the British Museum and in Wales to the National Museum of Wales.

OBJECTS FOUND ON CONSECRATED GROUND

Section 2(2) of the 1996 Act empowers the Secretary of State to designate and thereby exclude any class of object which (apart from the order) would be treasure. No such order has yet been made. However, paragraph 18 of the *Code of Practice*, under the heading of 'Objects found on consecrated ground', states that:

> The Government has given a commitment to the Church of England that it will bring forward an order under section 2 of the Act exempting objects found in association with human burials in a consecrated place and objects (except for treasure trove) covered by the Church of England's own legal systems of controls. The Church has indicated that all the objects will be dealt with under the ecclesiastical law in a manner that is analogous to that under the Act. The Government agreed to do this on the basis that the Church of England is in a unique position in having its own legal regime applying to movable articles that belong to it and the purpose of the order is essentially to provide clarification of the law

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> in so far as it applies to such objects. Its scope will be limited to the Church of England (it is not expected that such cases will arise very often).

The final words provide, perhaps, the reason for the absence of any order. Objects falling within the definition of treasure will very rarely be found on consecrated ground. If, indeed, such an object has been deposited or left on consecrated ground, this is most likely to have been 'in association with human burial'. But it is not readily conceivable that metal detectorists, for instance, will have been given permission by church authorities to roam in churchyards, burial grounds and cemeteries to search and dig for objects, and no metal detectorist is likely to trespass in such a place of his or her own initiative. Objects are only likely to be found in the very infrequent event of exhumation. In any event, the Crown's title to treasure vests on finding and the Crown's title to treasure vested in it may, under section 6(3) of the Act, be disclaimed at any time by the Secretary of State. It is therefore probable that the matter of treasure found on consecrated ground has been adjudged to be of insufficient importance, or to be likely to occur so infrequently, that an exclusion order would not be justified.

Since no order has been made, the procedure established by the Act must take its course with respect to objects of treasure found on consecrated ground. If the Crown's title to the object is disclaimed, the better right to the object will, at common law, almost inevitably be that of the church as landowner and not the finder. Otherwise the object will vest in the Crown. It will be valued and offered to museums.

It is of some interest to note, however, that it was proposed that objects of treasure trove should be excepted from the exclusion order. Had an exclusion order been made, the provisions of the Act would have continued to apply to treasure trove. It is difficult to discern the reason for this exception, save perhaps that objects of treasure trove are likely to be of greater value and importance since they must consist substantially (more than 50 per cent) of gold or silver. But objects associated with human burial would ordinarily not be treasure trove since they would be grave goods and not hidden by the person depositing them with a view to subsequent recovery. Paragraph 63 of the *Code of Practice* deals with 'principles and procedures' to be followed in the offering of treasure to museums, namely the pecking order. Sub-paragraph 7 states:

> A find from consecrated land that would have qualified as treasure trove under the common law of treasure trove, and which therefore falls outside the scope of the order described in paragraph 18, will be offered to a local church museum (if there is one) if the national museum does not wish to acquire it.

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Since no exclusion order has been made, it seems probable that any object of treasure which is of value or importance found in consecrated ground would now be treated in a similar manner. An object determined by the coroner to be treasure under the Act (whether or not it is treasure trove at common law) and not disclaimed would likewise first be offered to an available local church museum if the national museum did not wish to acquire it. Otherwise it would be offered to another local museum. But it cannot be said that the overall position is clear.

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A Veiled Threat: *Belcacemi and Oussar v Belgium*

JASPER DOOMEN
Assistant Professor, The Open University

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INTRODUCTION

The freedom of the individual can easily come into conflict with his or her obligation to integrate in society. The case of *Belcacemi and Oussar v Belgium* provides a good example.[1] It is evident that some restrictions of citizens' freedoms must be accepted for a state to function and, more basically, persist; as a consequence, it is acceptable that certain demands, incorporated in criminal law, are made of citizens. The issue of the extent to which such restrictions are justified has increasingly become a topic of discussion. The present case raises a number of important questions with respect to the right to wear a full-face veil in public if the societal norm is that the face should be visible, the most salient of which are whether women should be 'protected' from unequal treatment against their will and to what extent society may impose values on the individual. I will argue that Belgian law places unwarranted restrictions on citizens and that the values behind it testify to an outlook that is difficult to reconcile with the freedom of conscience and religion.

1 App No 37798/13 (ECtHR, 11 July 2017).