

Info on Strehlow case.

## 'Cultural Heritage' or 'Cultural Property'?

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Is it time for law and lawyers to recognize that the term 'cultural heritage' is rightfully superseding that of 'cultural property'? To our minds the answer can only be 'Yes'. Our argument in brief is first, that the existing legal concept of 'property' does not, and should not try to, cover all that evidence of human life that we are trying to preserve: those things and traditions which express the way of life and thought of a particular society; which are evidence of its intellectual and spiritual achievements. On the other hand, they can be encompassed by the term 'heritage' which also embodies the notion of inheritance and handing on. This is central to our second objection to the existing legal concept of property; that 'property' does not incorporate concepts of duty to preserve and protect.

### 1 What are We Discussing?

The cultural heritage consists of manifestations of human life which represent a particular view of life and witness the history and validity of that view. The expression of culture or evidence of a way of life may be embodied in material things such as monuments or sites. Archaeological sites and human-built structures are clearly accepted as important evidence of the past to be preserved. Thus the remains of ancient cities, complexes of historical character and urban ensembles which show the evolution of modern life or a now abandoned way of living are important. Not only buildings but also their gardens and parks are seen to be an integral part of many constructions. It also covers sites where fossil evidence shows the evolution of humanity, such as the early hominid sites in Africa, as well as prehistoric caves with evidence of the life and artistry of our early ancestors (such as the rock art at Lascaux, Altamira and Kakadu). But other immovables are also of primary importance, especially in cultures whose cultural energies have not been poured primarily

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into buildings or landscaping. Thus ritual and ceremonial sites are significant among all races and peoples whether or not they have been redesigned by their users from their natural state, as well as natural sites held by human beings to be of special meaning, such as rivers, lakes and mountains endowed with particular significance (e.g., among Native American tribes and Bantu peoples and in Oriental cultures among others); billabongs, rocks and 'dreaming tracks' (among Australian Aborigines); and other natural objects such as a tree regarded as having some special character (legislatively protected in the Seychelles).

Besides immovables there are movable objects. This category encompasses artworks of every kind (paintings, drawings, sculptures, ceramics, textiles and so on); objects of historic importance such as those related to important historical figures; objects of archaeological importance (human and animal remains, evidence of habitation and of particular, perhaps vanished, skills); objects of daily life such as utensils, clothing and weapons. There are also objects of scientific importance such as early inventions or fossil evidence of biological evolution. Some are masterpieces, some are merely representative, a 'snapshot' as it were, of a particular way of life at a particular time, especially valuable as a historical record where that way of life is under threat.

These two groups represent tangibles. There are also intangibles. For example, the ideas on which new skills, techniques and knowledge are built. Included, as also in need of protection, are other traditional aspects of cultural life such as patterns of behaviour and knowledge embodied in skills (e.g. samurai sword making in Japan;<sup>1</sup> beadwork in Sarawak;<sup>2</sup> mat weaving in the Maldives), ceremonies (e.g., the tea ceremony in Japan, corroborees among Australian Aborigines), rituals (e.g., initiation in many cultures) and ceremonies where tradition may be handed on in song, dance or spoken words. Oral history embodied in myths, sagas, songs or poetry falls into this category. Music and dance are also included: physical evidence of them may be kept by musical or choreographic scores, or on film, while stage sets, musical instruments and costumes may be preserved as part of the movable cultural heritage. The performance, or historic evolutions of a particular style of presentation (e.g., of one of Shakespeare's plays), is part of the cultural heritage which cannot be so embodied.

A professional commitment has emerged among art historians, sociologists but especially archaeologists and anthropologists of the essential need to preserve information. It is evident that how a musical instrument was used, on what occasion and by whom, adds a great deal to our understanding of the human context from which it comes. A cultural object whose textual information has been lost is less valuable to the further development of culture than it would otherwise be. Conversely, information about it can never be quite

as valuable to a performer without the opportunity of actually holding the instrument and trying to perform on it.

There is widespread agreement among States today that a substantial representation of this material should be preserved for future generations. Not everything can, or should, be preserved. The choice depends on numerous factors: the nature of the material in question, its rarity; its significance as illustrating development of the human condition. On the other hand, the cultural heritage does not consist solely of a few select objects singled out by national legislation — a notion put forward by some lawyers<sup>3</sup> but completely at variance with that held by cultural experts in the social sciences.

## 2 Problems with 'Property'

There is no doubt that many of these manifestations of human life have traditionally been dealt with in the law within the concept of property. 'Property' is a category of cardinal importance in the Common Law, around which important politico-philosophical theories have been developed. This means that, where traditional values attached to property need to be modified in order to secure other social goals (such as effective land usage, environmental protection or protection of the cultural heritage), opposition is often mustered on the basis that 'property' has some kind of fundamental importance in our culture and its traditional legal incidences must be given priority. This fundamentally ideological argument should not be prejudged by the unconscious use of a term such as 'property' which carries an ideological load with it. The social goals behind property law and cultural heritage law should be clearly admitted and properly balanced so that a judgment of the social goal to be achieved can be made in a clear-headed way. While 'cultural heritage' is a relatively new term and has far less ideological baggage in tow, 'property' has acquired a wide range of emotive and value-laden nuances, from the arguments of John Locke to the challenge of Communism in the first two-thirds of this century.

The fundamental policy behind property law has been seen as the protection of the rights of the possessor. If this policy is carried to its logical conclusion then the owner can be buried with a painting that he purchased for millions of dollars but which represents a peak achievement of human culture. The fundamental policy behind cultural heritage law is protection of the heritage for the enjoyment of present and later generations. This means not only physical protection but the possibility of access for persons other than the owner. It may involve restrictions on the right of the possessor whether that be an individual, a legal person, a community or a State. For example, in many states of the United States of America there are no controls on archaeological excavation on privately owned land because to impose them would interfere with rights of

private property. This is contrary to the community interests in the cultural heritage. Such policy conflicts should be decided clearly and not pre-empted by reliance on existing categories of law.

The important function of 'property' and 'ownership' in Western law is historically evident: yet that function has little in common with heritage values. It is an especially Western concept and has particular commercial connotations: it implies control by the owner expressed by his ability to alienate, to exploit and to exclude others from the object or site in question. Yet this way of delineating an individual or group's relationship to a thing may be quite alien in other societies. In *Milirrpum v Nabalco Pty. Ltd.*<sup>4</sup> the Judge considered the relationship of Australian Aboriginals to their tribal land. He held that, rather than believing that the land belonged to them, they believed that they belonged to the land: that it had been entrusted to them by their spirit ancestors and that they had certain duties towards it and rituals to perform on it. In other societies certain objects such as idols are regarded as themselves divine, or as made by God. Such attitudes are deeply respectful of heritage objects: should a claim based on such a relationship be denied because it cannot be regarded as a property right? In *Mullick v Mullick*<sup>5</sup> the Privy Council held that a Hindu family idol was not a mere chattel (movable property) which was owned and could be dealt with by an owner as he pleased in the same way as he would deal with secular property, but a legal entity in its own right to which duties were owed and which was entitled to have its own interests represented in court by a 'next friend'.<sup>6</sup> Such examples show that, if the word 'property' is used, it must be used with great care and will have to be re-interpreted in many cases. Indeed, the potential for misunderstanding is so large that it seems better to use the term 'heritage' to help us keep in mind the very different aims of the law in this area to those behind the formulation of property law.

Property connotes ownership and this, as stated above, has been defined in the Common Law as meaning the right to exploit, to alienate, to exclude. While that legal definition may not be consciously held in those terms by members of the public it is sufficiently strong for there to be a perception of ownership as being the right to do what one wishes with what one owns. That perception is of course over-simplified to the point of distortion. It is difficult to think of anywhere in the world where such a concept of absolute ownership applies. In virtually all States there is legislation regulating what one can do in relation to the kinds of things we have described as 'cultural manifestations'. It takes many forms: prohibitions against destruction or damage, import or export, copying; zoning of cities to protect historic areas; establishment of the rights of creators in their works even after they have sold them; formation of registers of works subject to periodic inspection to test their state of conservation. Nevertheless, while distorted, that perception is

powerful and needs to be displaced. Use of the term 'heritage' can assist in this. Heritage creates a perception of something handed down; something to be cared for and cherished. These cultural manifestations have come down to us from the past; they are our legacy from our ancestors. There is today a broad acceptance of a duty to pass them on to our successors, augmented by the creations of the present.

The term 'cultural property' has yet other connotations contributing to the commoditization of the cultural manifestations outlined above. There is an increasing tendency for many people to think of heritage items solely in terms of their commercial value. The public is bombarded by prices paid for objects on the market. Paintings are sold for tens of millions of dollars. Individual items at more than a million dollars are commonplace. Art takes on the nature of a financial security; so much so that in New York there is a proposal that such sales be regulated by the provisions of the law controlling deals in stocks, bonds and securities. In Japan there are scandals involving art secured loans in the order of many million yen and some of the nation's leading commercial companies. The United States Financial Accounting Standards Board proposes that museums capitalize — in other words, record on their balance sheets as monetary assets — all donations plus their entire collections of artworks, historical material, and similar holdings. Some would argue that this commoditization of the cultural heritage is a good thing; that it helps to preserve the heritage by making it too valuable to destroy by neglect or desire. This is debatable. But there are definitely damaging consequences. One is increased theft; another the destruction of sites and monuments through looting to supply the international art market. 'Property' does nothing to counteract the concentration on commercial value whereas 'heritage', while not of course capable of doing away with it, can lessen the impact.

There are other reasons for using the term 'cultural heritage'. The cultural manifestations discussed above include very different sorts of material. They need to be considered together as essential elements of the cultural heritage. Early efforts to protect the cultural heritages of nations related to concrete objects; particularly to monuments and works of art. Legislation reflected this in its terminology of 'monuments' and 'Denkmaler'. As practice evolved, however, it became clear that there was far less value in an object alone than of the object accompanied by information about its significance and use in the society which created it; the context within which it emerged. Legislation, both national and international, is increasingly concerned, not with isolated objects, museum pieces such as were collected for chambers of curiosities in the eighteenth century, but with identifying and preserving what is representative of culture. Similarly, curators of sites are today meticulous to preserve the context and natural environment of sites and museum curators increasingly try to display articles in context. Cross-cultural under-

standing depends on information. In societies where intellectual and spiritual life has found forms not represented by great monumental complexes or the creation of a vast number of material objects, the preservation of cultural identity depends far more on the appreciation of tradition and the preservation of folklore, rituals and traditional skills. This has created a complex of protective needs which is not well comprehended by the word 'property'. It is true that there are various forms of property and property can exist in intangible things, including secrets and information quite outside the formal and artificial statutory regimes of patents, copyright and registered designs. Nevertheless, there is no unified system of property law applying to all aspects of these cultural manifestations. Indeed, in respect of folklore many would argue that there should be no concept of property although States have been endeavouring to create it through copyright. Overall, what exists are various notions of property law applying to particular aspects of the cultural heritage where those aspects happen to coincide with property rights in respect of other matters. **What is needed is a coherent system of law applying to all cultural manifestations; a system of law which will take account of the peculiar nature and requirements of those manifestations arising from the need to protect them.**

### 3 Where is the Law at Now?

The phrase 'cultural property' was first used in English in a legal context in the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.<sup>7</sup> That Convention amplified provisions originally contained in the 1907 Hague Convention for Respecting the Laws and Customs of War on Land.<sup>8</sup> Article 56 of its Regulations protected the property of municipalities and of institutions dedicated to religion, charity and education, the arts and sciences and prohibited seizure or destruction of or wilful damage to such institutions, historic monuments, works of art and science. The 1954 Convention coined the phrase 'cultural property' and defined it, at least for the purposes of that Convention. Before the 1954 Convention, 'cultural property' was not an established concept in the Common Law, although it represents the French 'biens culturels' and the Italian 'beni culturali' which have long acceptance in Civilian legal terminology but which are themselves inadequate to comprehend the whole of what is covered by the 'cultural heritage'.

It has been suggested that 'cultural property' is an addition to the law of property, to be placed and studied alongside the law of real property, personal property and intellectual property.<sup>9</sup> While the legal concept of 'property' might cover most of the items in the first two categories of the cultural heritage (monuments and sites, movable objects) and some of the third (intangibles, some of which

are controlled by the rules of intellectual property law), it does not include all of that category; nor does it include the fourth (rituals, ceremonies, oral history and the performing arts) and it is doubtful how far it applies to the fifth (information relating to the other four categories).

The legal concept of 'property' can be subdivided in a variety of ways: those stated above (real, personal and intellectual); movable, immovable; tangible, intangible. This process of classification is designed to make it intellectually easier to assess the interests involved and the appropriate response. In relation to the cultural heritage it is largely unhelpful in that cultural complexes often flow across the classifications in a way that the legal system has not been constructed to cope with:

The law classifies property as real (interests in land) and personal (everything else) with different rules as to ownership being applicable. Thus an initial question, at least in regard to excavated material, is under which classification is an archaeological relic placed? This simple question does not have a straightforward answer... title to land can be very complex and not vested in whom may seem the 'owner'. An Australian example of this problem is the ownership, at common law and under statute, of carved and canoe trees which may vary depending on whether the tree concerned is living and part of the land or merely a chattel.<sup>10</sup>

Equipment used for a ceremony, a place built for its performance, the record of its procedure, the unwritten traditions associated with it and information about it, perhaps found by sophisticated scientific research, will all contribute to understanding of that aspect of cultural life. Use of existing legal categories would allow some to be protected and not others, for, though the traditional categories of property will apply to some of these aspects of the cultural heritage, they are by no means coextensive with them, since they apply to many other items which are not part of the cultural heritage. Use of these categories for the purposes of cultural heritage protection is likely to lead to confusion and to some cross purposes, since these categories did not develop to meet the aims of cultural heritage protection, but for other purposes. All five categories of the cultural heritage are linked by the common need of protection and fit well within the policy framework of a category of cultural heritage law.

While cultural heritage is seen to merit protection in virtually every community, different relationships to land or objects of ritual in certain societies may be difficult for Western lawyers to understand and accept although they represent concepts of importance in cultural heritage law. Relationships to the cultural objects not based on concepts of property, the need to protect intangibles (a

pattern of drumbeats, for example)<sup>11</sup> not generally recognized in Western-style legal systems, mean that scholars from these systems have to make efforts, when dealing with the cultural heritage, beyond those generally required to adjust the rules to foreign concepts. Those unversed in these concepts of property, or dealing with objects which to them are not 'owned', can be faced with a situation where their actions bring them into conflict with property law which interprets those actions by its own standards. It looks for an owner and assesses everything from that standpoint, rather than looking to the preservation of the cultural heritage itself.

Consider the case of the Strehlow collection. Strehlow was the son of a Lutheran pastor at the Hermannsburg mission in Central Australia. As a child he had learnt the language of the local Aboriginal people — the Aranda — and come to understand their traditional lore. On graduating from University, he returned to Central Australia to collect songs, chants, legends and artifacts from these people. They became his lifelong study. He amassed a great and unique collection of this material, including films and sound recordings of secret and sacred rituals and other ceremonies. According to his own account, he was entrusted with *tjuringa* and the legends associated with them because the tribal elders thought the young men, much influenced by European ways, unworthy to receive this special knowledge. He promised that he would never show the pictures to other white people, especially never to a white woman.<sup>12</sup> In seeking a position at the University of Adelaide, Strehlow argued that, if given this position and appropriate funding, he could provide the University with anthropological material far beyond the reach of others; material, he stressed, which would place the University in the position of being able to marshal a unique collection of artifacts.<sup>13</sup> In subsequent years, members of the University became concerned that most of the artifacts and information brought back from research expeditions were either placed in Strehlow's home or locked in his room at the University. In his later years he taught some aspects of Aboriginal mythology first to a woman student and later to his second wife, although they covered subjects to which no woman was allowed to have access under tribal law, since they embraced certain sacred/secret ceremonies.<sup>14</sup> On his retirement from the University, Strehlow claimed ownership of the material. He wanted to set up a research foundation and sought funds from various sources to do so. One proposal was to sell his colour films of Aranda sacred/secret ceremonies. The Aborigines became disenchanted with Strehlow. A serious controversy emerged when he sold to the German magazine *Stern* an article illustrated by a series of pictures of sacred/secret tribal ceremonies. Secondary publication rights were sold back to an Australian magazine. When Aborigines saw the pictures and learnt of their source, they were outraged. Strehlow claimed that all the people in the pictures were dead and that his agreement with *Stern* was that the pictures would

not appear in Australia.<sup>15</sup> Aboriginal activists then claimed that the material should be returned to its 'rightful owners'.

This case thus shows the extreme complexity of determining ownership in such situations. Was the relationship of the Aboriginal elders to these materials ownership? Even if it were not, why should the Common Law concept of ownership override it? Should the transfer of possession to Strehlow be considered a transfer of ownership or simply of custody? If it is construed as a transfer of ownership, should it be considered subject to trust? Even within the white community, ownership was disputed between Strehlow and the University of Adelaide, and between Strehlow's divorced wife and his widow.<sup>16</sup> Conversely, what rights should present-day Arandas be recognized as having in the material? Although the elders might have considered their sons unreliable guardians at a time when Aboriginal culture was being challenged and to some extent destabilized by the intruding white culture, what of their grandsons, who may want to re-establish their tribal identity and take pride in their unique heritage? Formalistic application of legal rules as to ownership seems quite inappropriate in such a context and may work considerable injustice.

In the Civil Law systems another distinction also creates confusion in property law; different rules apply where the cultural resources concerned are owned by the State or by some other public body, to those which apply to cultural resources owned by a private citizen. Some systems have another set of rules for property owned by religious organizations. The degree of protection will then vary, not because of the different value (cultural or commercial) of a cultural object, but merely because of the incidence of its legal qualification. Thus most of the objects in French museums (belonging to the state or to local authorities) have the protection of inalienability and indefeasibility, while objects which are unique or very rare or of great cultural importance which are in the hands of private owners will have applied to them the normal legal rules, such as the protection of a *bona fide* acquirer. The result is that cultural objects which are public property and have been lost or stolen can be claimed back in circumstances where private property cannot.

Furthermore, it may be very difficult to decide when an object is public, and when it is private, property, though clearly the need for protection has nothing to do with this qualification. Consider the case of Arne Magnussen's Trust (*The Arnarnagnaean Foundation v Ministry of Education*).<sup>17</sup> The Iclander, Arne Magnussen, who was Danish Commissioner of Lands, lived in Iceland from 1702 to 1712 to compile a property register and report on the general condition of the country. At this time Iceland was very poor. Some families had in their possession manuscripts of the great Sagas from Iceland's Golden Age, but because of the poverty of the land they were in peril; the old farmhouses where they were being kept were in disrepair, and

no money was available for their restoration. On his own initiative, Magnussen collected these and took them back to Denmark to ensure their preservation. After this period only a very limited number of manuscripts remained behind in Iceland.

Magnussen's will bequeathed all his books and papers to the University of Copenhagen together with funds to set up a trust for their care. In the 1930's and 1940's the Icelandic Government asked for the manuscripts to be returned. Eventually, a treaty was signed between the two countries agreeing to the handing of the manuscripts to the University of Iceland and the Danish Parliament passed legislation altering the provisions of the Arne Magnussen Trust. Arne Magnussen's Trust (The Arne Magnussen Foundation) sued the Ministry of Education (the body responsible for the Danish universities, the Foundation being part of the University of Copenhagen) on the ground that the Foundation was a private person and that this legislation amounted to expropriation of private property which, according to Section 73 of the Danish Constitution, was only permitted under certain conditions. It thus became very significant to determine whether this was public or private property.

As often happens in cases concerning major items of the cultural heritage, the facts are quite unprecedented and challenge the existing internal conceptualization of the law. The Trust possessed 2572 manuscripts and a large number of legal documents. The oldest manuscripts dated from the 12th to the 13th century, but the majority came from the 14th to the 17th centuries. They covered a wide range of subjects, including astronomy, philology, physics, geography, history, law, mythology and aesthetics. A large proportion were sagas dealing with the Icelandic chieftains and their families in the period 930–1030 A.D.

In favour of their public status it could be argued that Magnussen had had the opportunity to collect as a Danish public servant, that he had never intended the collection for his private use or as a commercial asset, but established it for the preservation of the threatened cultural heritage of Iceland (the manuscripts are by far the most significant embodiment of Icelandic culture) and for scholarly access, and that he had entrusted them to the University of Copenhagen, clearly, it would seem, as custodian and for the public benefit.

In favour of their status as private property it was argued that the collection of manuscripts was undertaken by Arne Magnussen as a private person and solely by virtue of his personal interest and effort. Until his death they must have been his private property and the Foundation inherited them as such. It was further argued that it was not the State, nor the University, but the Foundation as an independent institution which owned them.

If it were public property, then the Government had the right to deal with the property as it wished. If it were private, it could only take over the property if such action were in the public interest and

subject to compensation. Should that be the case new questions would arise as to how to measure the 'public interest' (of Iceland? of Denmark? of their joint interests? of Scandinavia? of the world?) and compensation (commercial value? scholarly value? heritage value? and who should pay it?).

The Danish Supreme Court ingeniously decided that the Foundation, while an independent body, was of such a particular character in this case as to be decisively distinguished from private foundations and that it had, in any event, suffered no economic loss from the surrender of the manuscripts.

The division between 'public' and 'private' property may be not only unsuitable but obstructive in the heritage context. For effective protection it is necessary to know who has what rights in it. There should be a coherent body of rights and responsibilities devoted to the preservation of the cultural heritage. In an attempt to achieve a balance of private rights and public responsibilities, some national systems of law have developed a special regime in relation to heritage items, e.g., in relation to artifacts Ecuador has a law under which these were held by an Italian court to fall into an 'intermediate category between private property and property owned by the nation for public purposes'.<sup>18</sup> Peru has a similar regime, but a court in the United States has refused to recognize the interest of the State, considering the matter from its own conception of property:

Possession of the artifacts is allowed to remain in private hands, and such objects may be transferred by gift or bequest or intestate succession. There is no indication in the record that Peru has ever sought to exercise its ownership rights in such property, so long as there is no removal from that country. The laws of Peru concerning its artifacts could reasonably be considered to have no more effect than export restrictions.<sup>19</sup>

The notion of ownership underlying the court's view of the Peruvian claim is a narrow, conservative one. It is at odds with the emerging nature of the concept of the cultural heritage wherein ownership is seen in relative, not absolute terms.

Whether a legal system favours public or private property depends on the political and historical basis of that society: yet there is a consensus between the different systems on many aspects of cultural heritage protection: for example, as discussed above some systems treat heritage items as public property – but allow a private person to have possession. Others treat them as private property, but subject them to controls for the benefit of the community. This shows that the policy of cultural heritage protection is widely shared, and the means traditionally favoured in a particular legal system have been used to reach the same kind of conclusion. It also shows that there is no theoretical bar to such protection.

Of course, specialists in property law will be reluctant to admit any new classification of law, especially one which will intersect with their traditional classifications. The same kind of arguments were made when environmental law began to emerge as a new study, not fitting comfortably into administrative law, or property law or the law of tort (nuisance), although it was clearly dealing with matters which traditionally would have been qualified within all those areas. Now it is well accepted that this highly specialized field is an area of law *sui generis*, where public and private law intersect, and the prospective purpose of the law, relying on scientific evidence and impact assessment, has produced its own special technique and means of protection.

#### 4 Use of 'Cultural Heritage' in Law

As stated above the first use of the phrase 'cultural property' in a legal context in the English language occurred in the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict. The same phrase is used in the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.<sup>20</sup> However, in the 1972 UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage<sup>21</sup> the phrase used is 'cultural heritage'. The Preamble emphasizes the change by referring to 'the existing international conventions, recommendations and resolutions concerning cultural and natural property' whereas everywhere else in the text one finds the phrase 'cultural heritage'.

The Council of Europe uses 'heritage' in its international instruments. The first was the 1969 European Convention on the Protection of the Archaeological Heritage<sup>22</sup> which is currently subject to a revision which emphasizes the element of heritage. Another is the 1985 Convention for the Protection of the Architectural Heritage of Europe<sup>23</sup> which recognizes, to quote the Preamble, 'that the architectural heritage constitutes an irreplaceable expression of the richness and diversity of Europe's cultural heritage'. Not fitting within this classification is the 1985 European Convention on Offences Relating to Cultural Property<sup>24</sup> which, however, was drafted mainly by lawyers specializing in criminal law and, unlike the other two Conventions, has not been accepted by the European nations, in that it is not yet in force.

Turning to national law, one finds little reference in earlier legislation to either cultural 'property' or 'heritage'. Usually that legislation uses terms such as 'monument', 'site', 'antiquity', 'relic'. Folklore is usually subsumed in copyright legislation. However, more modern legislation is beginning to incorporate both terms, with the more frequent reference being to 'cultural heritage'. For example, both Canada and the United States of America used the phrase 'cultural

property' in their implementing legislation for the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.<sup>25</sup> However, Australia, in implementing the same Convention, did so by means of the Protection of Movable Cultural Heritage Act 1986. The movable cultural heritage of Australia 'is a reference to objects that are of importance to Australia, or to a particular part of Australia, for ethnological, archaeological, historical, literary, artistic, scientific or technological reasons' provided they fall within categories enumerated in the legislation and further refined in Regulations. Other relevant Australian legislation is the Aboriginal and Torres Strait Islander Heritage Protection Act 1984, the Australian Heritage Commission Act 1975 and, in New South Wales, the Heritage Act 1977. It is noteworthy that Canada has recently released for comment its Proposed Act Respecting the Protection of the Archaeological Heritage of Canada. The 'archaeological heritage' is stated to be 'a product of and witness to human achievement'. Moreover, 'the creation of a system for the management of Canada's archaeological heritage will contribute to the long-term protection and public appreciation of that heritage' i. e., recognizing the protection points made above.

#### 5 Conclusion

The concept of the 'cultural heritage' is one well recognized and universally used by historians, archaeologists, anthropologists and other researchers of human life both past and present. They virtually never use the term 'property' unless in a legal context. In the law which has embodied the notion of 'property' it is now coming to be recognized that this is inadequate and inappropriate for the range of matters covered by the concept of the 'cultural heritage'.

#### Notes

- 1 Adachi, B. *The Living Treasures of Japan* (Kodansha International Ltd., Tokyo, 1973).
- 2 Sheppard, M. *Living Crafts of Malaysia* (Times Books International, Singapore, 1978).
- 3 Referred to in Nahlik, S.E. 'International Co-operation to Prevent Illicit Traffic of Cultural Property' (1981-83) 51-53 *Annuaire de l'A.A.A.* 73, 76.
- 4 (1971) 17 F.L.R. 141.
- 5 LR LII Indian Appeals 245 (1925); the only English commentary on this case notes: 'though it was reported here, it does not seem to have interested English lawyers' (Duff, P.W. 'The Personality of an Idol' (1927) 3 *Cambridge Law Journal* 42).
- 6 Ibid. 255-56, 259-61.

- 7 249 U.N.T.S. 240; discussed in Nahlik, S.E. 'La protection internationale des biens culturels en cas de conflit armé' (1967) 120 *Recueil des Cours de l'Académie de la Haye* 61.
- 8 U.K.T.S. 9 (1910) Cd. 5030; (1908) 2 *American Journal of International Law* 90.
- 9 Crewdson, R. 'Cultural Property – A Fourth Estate?' (1984) 18 *Law Society's Gazette* 126.
- 10 Hammond, G.N. 'The Ownership and Control of Museum Property – Confidentiality and Restitution in Australia' (1982) 10 *Bulletin of the Conference of Museum Anthropologists* 14, 15.
- 11 Jonassen, J. 'Cook Islands Drums in a Polynesian Setting: A Study of Development, Instrumentation, Presentation and Rhythms' unpublished paper, University of Hawaii, 1981.
- 12 McNally, W. *Aborigines, Artefacts and Anguish* (Lutheran Publishing House, Adelaide, 1981) 38–40.
- 13 *Ibid.* 76.
- 14 *Ibid.* 130, 152.
- 15 *Ibid.* 190 ff.
- 16 *The Good Weekend*, 28–29 August 1987, 32.
- 17 1966 UfR 22; 1971 UfR 299 (Denmark); see also O'Keefe P.J. & Prott, L.V. *Law and the Cultural Heritage: Volume II Movement* (Butterworths, London, 1990) 878, 912, Greenfield; J. *The Return of Cultural Treasures* (Cambridge University Press, Cambridge, 1989).
- 18 *Republic of Ecuador v Danusso* District Court of Turin, 4410, 79.
- 19 *Government of Peru v Johnson* Daily Appellate Report, 5 January 1990, 180 at 182.
- 20 823 U.N.T.S. 231.
- 21 (1972) 11 *International Legal Materials* 1358.
- 22 E.T.S. No. 66.
- 23 E.T.S. No. 121.
- 24 E.T.S. No. 119.
- 25 Cultural Property Export and Import Act 1975 and Convention on Cultural Property Implementation Act 1983 respectively.

# The UNIDROIT Draft Convention on the International Protection of Cultural Property

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## 1 History of the Draft Convention

The preliminary draft Convention on stolen or illegally exported cultural objects, as approved by the UNIDROIT study group at its third session on 26 January 1990 and reprinted in our first issue,<sup>1</sup> is the result of research being done in Rome since 1987. The Governing Council of the International Institute for the Unification of Private Law (UNIDROIT) decided at its 65th session in April 1986 to include in the research programme of the Institute the subject of the international protection of cultural property.<sup>2</sup> This decision, however, was not taken by chance or because of no other reason than to contribute to an urgent problem of international legal and cultural relations. The Institute in Rome had already done some general research in the law on the acquisition in good faith of corporeal movables.<sup>3</sup> This work attracted the interest of the UNESCO asking whether these general proposals could be made fruitful for the specific purposes of the protection of cultural property. Hence the UNESCO asked the Institute to prepare a Convention on stolen or illegally exported cultural objects.<sup>4</sup>

The research, mainly done by Professor Gerte Reichelt of the University of Vienna, could make use not only of the previous research programme of the Institute on acquisition in good faith of corporeal movables<sup>5</sup> but also of the UNESCO Convention of 14 November 1970 on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property<sup>6</sup> and of other materials.<sup>7</sup> Additional materials and experiences were contributed by the members of the international study group in charge of the work programme on cultural property.

In May 1991 the draft of the Institute has already been discussed in the first session of government representatives and delegates of international organisations. The draft itself has not been modified by

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