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LEGAL ASPECTS OF THE PROTECTION

OF

CULTURAL HERITAGE

by

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THESIS

submitted in fulfilment of the requirements for the degree

DOCTOR LEGUM

in the

FACULTY OF LAW

at the

UNIVERSITY OF THE FREE STATE

Promotor: Professor H.A. Strydom

OCTOBER 2000

University Free State



34300000465165

Universiteit Vrystaat

Universiteit van die
Oranje-Vrystaat
BLOEMFONTEIN
3 1 MAY 2001
UOVS SASOL BIBLIOTEEK

ACKNOWLEDGEMENTS

I would like to offer sincere thanks to:

Prof. Strydom, for being a willing guide and for offering professional support whenever it was needed.

Koos, for your dedication and brightness of spirit, which continually fill me with joy.

My parents and my children, I owe you much.

Karen Breckon who, as a librarian, is in a class of her own.

Karen Calteaux, for offering to do the editing and working tirelessly with great patience and skill.

Dolf, for offering advice and reliable translations.

Mariki and Eleanor for your readiness to assist me.

Prof. D.H. van Wyk, for your support, especially in the initial stages of the thesis.

PANSALB, and Prof. C.N. Marivate, for financial assistance.

Our Father in Heaven Who Is With Us, Now and Always.

SUMMARY

Cultural heritage, whether tangible or intangible, has local, national and international dimensions. The study is concerned not only with the preservation of the physical existence and survival of cultural objects, but also the continuation of the social roles they fulfill. Culture plays a variety of roles today, the scope of which impacts on the definition attached to cultural heritage. Finding a workable definition for *culture* necessitated a consideration of sociological, anthropological and other meanings of culture. A workable definition for *cultural heritage* implies that culture must be distinguished from non-culture. Cultural self-determination is of growing importance in the modern world and it is our responsibility to continually reassess and improve our own methods of defining and interpreting our heritage, both tangible and intangible.

International law standards and trends regarding protection of cultural objects differ according to whether protection is required in times of war or peace. International criminal jurisdiction exists with respect to war crimes involving cultural heritage and crimes against humanity in the former Yugoslavia, amongst others. Considering the nature of international and internal conflict, it is important for states to be aware of the latest developments in international law. Earlier conventions were developed on the basis of a national idea, for example those that regulate import and export of cultural objects. Progress is evident from the latest international initiatives based on object-related values, which place more emphasis on claims for restitution of cultural objects. Since the international protection of cultural rights found in various international and regional instruments can inform claims before a domestic court, selected international materials were considered, including those containing minority rights. Definitions from selected national laws, on the other hand, give an idea of what states regard as worthy of protection.

International and regional initiatives that create mechanisms to facilitate return do not conclusively address the complex issue of who owns cultural property. This necessitated an investigation of different conceptions of and discourses on property and intellectual property.

The restitution of property stolen, lost or misappropriated across state boundaries is a complex issue and is explained with reference to examples. Strategies for retention and recovery include

rules belonging to the area of the conflict of laws and import and export laws. The trans-national consequences of recovery are investigated, utilising case studies of selected countries.

Progress made by South Africa towards the model of the 'cultural state' and protection of the cultural heritage is discussed. In South Africa, the new order is based on a Constitution that shows a commitment to protect multiculturalism. Income levels of the population and the degree of social cohesion are factors that may hamper effective cultural heritage management on the African continent and in South Africa. Given that there is no shared language, tradition or ancestry, constitutional devices have been included to deal with the divergent forces of culture, language and religion in the South African state. These devices are discussed and evaluated.

Internally, measures have been adopted to facilitate the management of cultural resources and to stem the flow of cultural heritage or heritage objects to the outside world. Developments pertaining to the legal protection of intangible heritage, such as a legislative framework for language and indigenous intellectual property rights legislation, have been particularly tardy.

South Africa faces a number of options under current public international law. To fully understand these options, they are considered separately and where appropriate, against the backdrop of South African conflict of laws. The suitability of different international agreements for South African conditions is indicated.

Cultural heritage lies central to how individuals, communities or nations identify themselves. Within this context, the study contributes to an understanding of what cultural heritage means to South Africa, and provides a point of reference for future strategies to improve the identification, protection and nurturing of our cultural heritage.

KEY TERMS: cultural heritage; cultural state; folklore; human rights; illicit export; museums; multilingualism; object values; PANSALB; right to culture; restitution of cultural objects.

OPSOMMING

Kulturele erfenis, hetsy tasbaar of ontasbaar, het plaaslike, nasionale en internasionale dimensies. Die studie is nie net gemoeid met die bewaring van die fisiese bestaan en oorlewing van kultuurvoorwerpe nie, maar ook met die voortsetting van die sosiale rolle wat hulle vervul. Kultuur speel vandag 'n verskeidenheid rolle en die omvang hiervan beïnvloed die definisie wat aan kulturele erfenis toegeskryf word. Die soeke vir 'n werkbare definisie vir *kultuur* het oorweging van sosiologiese, antropologiese en ander betekenis van kultuur genoodsaak. Enige werkbare definisie vir die *kulturele erfenis* impliseer dat kultuur van nie-kultuur onderskei moet word. Aangesien kulturele selfbeskikking in die moderne wêreld van toenemende belang geword het, is dit ons eie verantwoordelikheid om ons metodes van omskrywing en interpretasie van ons erfenis, tasbaar sowel as ontasbaar, op 'n deurlopende grondslag te beoordeel en te verbeter.

Internasionale standaarde en tendense van bewaring van kultuurvoorwerpe verskil afhangende daarvan of beskerming vereis word in tye van oorlog of vrede. Internasionale strafregtelike jurisdiksie bestaan onder meer in wat voorheen Joegoeslawië was, met betrekking tot oorlogsmisdade wat misdade teen die mensdom en teen die kulturele erfenis insluit. Gegewe die aard van internasionale en interne konflik, is dit vir state belangrik om bewus te wees van die jongste ontwikkelings op die terrein van die volkereg. Vroeëre konvensies het staat gemaak op 'n nasionale raamwerk, deur byvoorbeeld te fokus op die invoer en uitvoer van kultuurvoorwerpe. Die jongste internasionale inisiatiewe toon `n duidelike progressie vir sover dit op voorwerpgerigte waardes gegrond is en meer klem plaas op eise vir restitusie van erfenisvoorwerpe. Aangesien die beskerming van kulturele regte wat in verskillende internasionale en streeksinstrumente vervat word, eise in 'n binnelandse hof kan beïnvloed, is geselekteerde internasionale materiaal in ag geneem, insluitende daardie wat aan minderheidsregte beslag gee. Definisies uit geselekteerde nasionale wette word gebruik om aan te dui wat state beskermingswaardig ag.

Internasionale en streeksinisiatiewe wat meganismes skep vir die fasilitering van teruggawe, spreek nie die komplekse kwessie van wie kultuurgoedere besit, pertinent aan nie. Dit het 'n ondersoek van verskillende opvattings en diskoerse oor eiendom en intellektuele goedere genoodsaak.

Die regsreëls wat van toepassing is op die teruggawe van gesteelde, verlore eiendom of van eiendom wat oor staatsgrense heen wederregtelik toegeëien is, is 'n komplekse kwessie en word met verwysing na voorbeelde verduidelik. Strategieë vir behoud en restitutsie sluit in reëls wat betrekking het op internasionale privaatreg en invoer- en uitvoerregulasies. Die studie betrag hierdie reëls en ondersoek die transnasionale gevolge van restitutsie aan die hand van gevallestudies uit geselekteerde lande.

Die vordering wat Suid-Afrika gemaak het gemeet teen die standaard van die *kultuurstaat* en die beskerming van kulturele erfenis word bespreek. Die grondslag van die nuwe bedeling in Suid-Afrika is 'n Grondwet wat daartoe verbind is om die diversiteit van kultuur te beskerm. Inkomstevlakke van die bevolking en die graad van sosiale kohesie is faktore wat doeltreffende kultuurerfenisbestuur op die Afrika-kontinent en in Suid-Afrika kan belemmer. Gegewe die feit dat daar nie gedeelde taal, tradisie of afkoms is nie, is grondwetlike meganismes deur die grondwetopstellers bedink om die uiteenlopende kultuurkragte, taal en godsdiens te hanteer. Hierdie meganismes word bespreek en beoordeel.

Hier te lande is op munisipale vlak maatreëls aanvaar om die bestuur van kultuurhulpbronne te fasiliteer en om die vloei van kulturele erfenis of erfenisvoorwerpe na die buitewêreld te stuit. Die daarstelling van raamwerke vir die wetlike beskerming van ontasbare erfenis, soos vir taal en inheemse intellektuele goedereregte, het tot nou toe besonder traag geskied.

Suid-Afrika se toetrede tot die internasionale arena het 'n aantal moontlikhede ingevolge die hedendaagse volkereg oopgestel. Ten einde hierdie moontlikhede volledig te verstaan, word hulle afsonderlik bespreek en word die relevant reëls op die terrein van die internasionale privaatreg

ook beskou. Die toepaslikheid van verskillende internasionale ooreenkomste vir Suid-Afrikaanse omstandighede word aangedui.

Kultuurerfenis speel 'n belangrike rol in die wyse waarop individue, gemeenskappe, volke en nasies hulleself identifiseer. Teen die agtergrond van hierdie proses van self-definiëring, besin die studie oor die betekenis van kulturele erfenis vir Suid-Afrika, en bied dit 'n verwysingspunt vir strategieë wat nog ontwikkel moet word vir verbeterde identifikasie, beskerming en koestering van ons kulturele erfenis.

SLEUTELTERME: kulturele erfenis; kultuurstaat; menseregte; museums; onregmatige uitvoer; oorlewering; reg op kultuur; PANSAT; restitusie van kultuurvoorwerpe, veeltaligheid; voorwerpgeörienteerde waardes.

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ACRONYMS & GLOSSARY

ARPA	Archaeological Resources Protection Act of 1979
ATKV	Afrikaanse Taal- en Kultuurvereniging
BASA	Business and Arts South Africa
CBD	Convention on Biological Diversity
CBO	Community Based Organisations
CDCC	Council for Cultural Co-operation established under the Council of Europe
CILSA	Comparative and International Law Journal of Southern Africa
CPEIA	Canada's Cultural Property Export and Import Act
DACST	Department of Arts, Culture, Science and Technology
EC	European Communities (European Economic Community, European Atomic Energy Community and European Coal and Steel Community)
EEC	European Economic Community
ETS	European Treaty Series
FAK	Federasie van Afrikaanse Kultuurvereniginge
FCA	Foundation for Creative Arts
FISB	Forum for Independent Statutory Bodies
GA	General Assembly (UN)
GATT	General Agreement on Tariffs and Trade (UN)
GG	Government Gazette
HDI	Human Development Index
HSRC	Human Sciences Research Council (RSA)
ICCPR	International Covenant on Civil and Political Rights of 1966
ICESCR	International Covenant on Social, Economic and Cultural Rights of 1966
ICOMOS	International Council on Monuments and Sites
ILO	International Labour Organisation
LUAB	Draft Convention for a Uniform Law on the Acquisition in Good Faith of Corporeal Movables
MEC	Member of Executive Council

NAC	National Arts Council
NAP	National Action Plan for the Promotion and Protection of Human Rights
NCFHR	National Consultative Forum for Human Rights
NCoP	National Council of Provinces
NHC	National Heritage Council
NHCA	National Heritage Council Act, 1999
NHRA	National Heritage Resources Act, 1999
NILR	Netherlands International Law Review
NLB	National Language Body (established by PANSALB)
NMA	National Monuments Act, 1969
NMC	National Monuments Council
OAU	Organisation for African Unity
OAS	Organisation of American States
OJ	European Communities Official Journal
PANSALB	Pan South African Language Board
PLC	Provincial Language Committee (established by PANSALB)
SADC	Southern African Development Community
SAHRA	South African Heritage Resources Agency
SAJHR	South African Journal of Human Rights
SAPR/PL	SA Publiekreg/Public Law
SAYIL	South African Yearbook of International Law
TRIPS	Agreement on Trade Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods
UBCLR	University of British Columbia Law Review
UDHR	Universal Declaration of Human Rights of 1948
UN	United Nations
UNCITRAL	United Nations Commission for International Trade Law
UNCLOS	1982 United Nations Convention on the Law of the Sea
Unesco	United Nations Educational, Scientific and Cultural Organisation
Unidroit	International Institute for the Unification of Private Law
UNTS	United Nations Treaty Series

UNCED	United Nations Conference on Environment and Development
WHCA	World Heritage Convention Act
WTO	World Trade Organisation
WIPO	World Intellectual Property Organisation
ZAR	Zuid-Afrikaanse Republiek

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SUMMARY

OPSOMMING

INTRODUCTION

Cultural heritage can be localised, regional or international. The topic 'Legal Aspects of the Protection of Cultural Heritage' does not express a preference for a national, a regional or an international systems analysis. The reasons for this are threefold: the approach is a comparative one; protection at the level of communities or collectives, at national level and at international level, will be discussed; and the interrelationship between these levels will be canvassed throughout the work.

A number of key themes feature prominently in the discussion of the legal aspects of the protection of cultural heritage. Among these are the meaning and role of cultural heritage and therefore also of culture, threats against cultural heritage and the meaning of the concept 'protection'.

i) Culture

'Culture' assists us in differentiating between different communities. The concept has a role in most searches for an authentic identity. It remains a potentially powerful mobilising force in national and international conflict. In fact, the difficulties of intercultural understanding and the over-emphasis on 'cultural nationalism' have kindled, and continue to kindle war within and between states.

The definition of culture has become the subject of serious academic dispute. Uses of the term 'culture' have expanded and diverge greatly. This tendency has not helped a common understanding to be formed. The term has become over-determined and lacking in precision. Worst of all, it is susceptible to distortion and corruption.

Culture encompasses all the forms of expression that states and individuals utilise. As such, forms of expression for which minorities require recognition from a majority grouping (such as in

respect of language and religion) are acutely relevant.[1] While the right to use a language of choice and the right to practice a religion in community with others will not be singled out for detailed comment in this thesis, it is necessary to show how language and religion relate to culture.

ii) Culture in a constitutional context

In a constitutional context, culture is linked to the human rights debate. Significant tension inheres in the relationship between universal human rights and cultural relativism. Human rights, if understood to have universal effect, bind all cultures equally. In contrast, cultural relativism espouses that meaning, standards and morality are culture-bound. In a constitutional state, the distinction between universal content and specific national features of a culture shapes the rights of culturally defined groups (collectives with a distinct tradition, forms of life, ethnic origin etc.). In such a context, lawyers often need to recognise that values cannot easily be reconciled into one harmonised pattern, that values cannot be explained in terms of a hierarchy and that they may be open to a relationship of mutual development and enrichment. Scientific study and systematisation that ties in with theoretical aspects and modern ideas about the being and role of the state, are urgently required.[2]

iii) Dimensions of culture

Culture has both a territorial and a group dimension and both statehood and nationality are relevant.

To investigate the territorial dimension of culture, it is useful to consider national systems, regional systems and supranational systems. The group dimension of culture reveals that culture often finds a point of reference in the particular, *e.g.* in race, nation, religion or language. This explains why concepts such as nation, ethnicity and language are highly relevant to the field of study. Considering the necessity of protecting the cultural practices of all peoples means that one has to recognise the role of culture within national boundaries and within a nation. Considering

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[1] Wyss *Kultur als eine Dimension der Völkerrechtsordnung: vom Kulturgüterschutz zur internationalen kulturellen Kooperation* (1992) 30.

[2] Beukes *Kultuur: 'n Staatsregtelike Perspektief* LLD-thesis UNISA (1991).

the protection of the cultural practices of all peoples and not only those of the West, means that one is confronted with minority rights (group rights), the tension that exists between individual rights and group rights, as well as between group rights and the rights of a nation. Absolute inclusiveness at the level of the group may engender tension at the level of the nation.

Control of cultural objects is linked to the struggle of indigenous peoples to govern themselves. The legal implications of the concept 'culture' and the constitutional mandate of culture therefore inevitably touch on the politics of minority protection and the right to self-determination.

Views of the international community regarding the right to self-determination fluctuate. Many developing nations no longer accept the traditional notion that only colonial peoples have the right to self-determination. Individuals within minority groups have been demanding the same powers as a people – to have the right to enjoy their culture, to profess and practice their religion and to use their own language. Since the implications are far-reaching, a policy must be formulated to clearly state who is entitled to pursue the right and to stipulate the criteria that apply.

iv) Culture: a dimension of international regulation

International law relies on cultural co-operation between national systems. To a large extent, international regulation of culture derives from the conceptions of the United Nations Educational, Scientific and Cultural Organisation (Unesco), one of the specialist agencies established under the UN human rights instruments. Unesco's views of cultural relativism, cultural pluralism and cultural co-operation shape policy and law in this area. Regional organisations such as the European Union, the Council of Europe, the OAS and the OAU determine regional practice and the practices influence regional understanding.

v) Cultural objects

The concept of cultural objects is becoming more widely defined to include the sub-national (group) and the intangible such as knowledge or world view. In fact, it is undergoing an expansion in scope similar to that of culture. Leading illustrations include the 1972 Convention

on the World Cultural and Natural Heritage,[3] which initiated the development of a more comprehensive concept of cultural objects that includes immovables, groups of buildings and sites. The World Heritage Committee not only widened the scope of its activities under this Convention, but also that of the entries on the World Heritage List, a list of properties forming part of the cultural and natural heritage that is published by the Committee. Other examples include the European Convention on the Protection of the Architectural Heritage of Europe.[4] The Council of Europe engaged in a planned effort to revitalise the architectural heritage and to link the cultural heritage to public consciousness and an appreciation of the value of cultural heritage for tourism and for civilisation.

The universal value and appeal of certain cultural objects may be widely acknowledged and the need for protection agreed upon. Some objects, so abundantly available that they become susceptible to exploitation, may not qualify for the same level of care. Moreover, different conceptualisations of property rights and ownership from one legal system to the next may present difficulties. In addition, varying ideas on the validity, criteria, effects and even distinction between private and public law have implications for the protection of cultural heritage. Inter-penetration of the two branches of domestic law is evident from the role of the state and the regulation and protection of individual rights and interests.

Whether or not language is the single most important marker of national identity, it remains both a vehicle of culture and a part of the intangible cultural heritage, and is referred to under both categories.

vi) National cultural heritage

A state may base its claims of 'national heritage' on its historical self-concept. The 1970 Unesco Convention concerning the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property, emphasises the interests of states in the 'national

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[3] South Africa ratified the Convention on 10 July 1997. The World Heritage Convention Act, 1999, is discussed in chapter 9.

[4] 1985 Convention for the Protection of the Architectural Heritage of Europe *ETS* No. 121.

cultural heritage'.[5]

This concept is very different from the concept 'common heritage', which highlights the universal interest or the interest of all nations in cultural objects. This concept was put forward in the Hague Convention of 1954,[6] the preamble to which states that 'cultural property belonging to any people whatsoever' is 'the cultural heritage of all mankind'. Many artworks, artefacts and antiquities have artistic, scholarly and educational value, which together make up the cultural heritage of humanity.

vii) Pressures on cultural heritage

The definitions of culture impact on how cultural objects are regarded and regulated trans-nationally and internationally. The wider the definition attributed to cultural objects, the greater the number of social functions fulfilled by the objects requiring protection.[7] The wider the contexts in which cultural objects have social functions to fulfil, the greater the potential for conflicting interests to make themselves felt.

Diverse values are associated with the preservation of cultural objects. Preservation may clash directly with economic interests or interest in the development of science and technology; the aesthetic may clash with educational or scholarly interests. Some groups in contemporary society are driven by cultural and heritage values; others by considerations of science. Whereas some agendas are filled with social or family rights and prerogatives, others heed only money and prestige. To some, a particular work of art may be a saleable commodity; to others, that same object may represent a national icon. At several levels, it is very necessary to balance commercial interests with content that reflect the reality of diversity.

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[5] 'Cultural patrimony' is a widely used term; *cf* 1970 UNESCO Convention on the means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (14 November 1970) 823 *UNTS* 231; 10 *ILM* 289 (entered into force on 24 April 1972) [hereafter UNESCO Convention]. International Chamber of Commerce *International Art Trade and Law* Briat & Freedberg (eds) (1991) 69, in respect of the domestic laws of states in Europe. However, Warren identifies it as a gender-biased category of analysis; see Messenger (ed.) *The Ethics of Collecting Cultural Property: Whose Culture? Whose Property?* (1989) 1, 15.

[6] The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (14 May 1954) 249 *UNTS* 215.

[7] Wyss (1992) 84 ff.

Pressures on the cultural heritage fall into various categories –

- physical threats, which include war and illicit excavations;
- disintegrative threats, which include environmental threats such as: air pollution, enlarging desert areas, building works performed in the immediate vicinity of ancient monuments, but also the threats posed by the commodification of culture;
- the enormous demand for static material objects of historic, artistic or other cultural significance, which causes prices to soar and investors to flood the international art market; and
- threats posed by progress and globalisation.

The aforegoing begins to explain why one of the ideals of the post war years – to halt and suppress destruction and looting of heritage items and sites in times of war – grew into a more all-encompassing (peacetime) concern over theft, clandestine excavation, unlawful alienation, and illicit export or import of artworks, artefacts and antiquities. Efforts to curb theft and illicit excavation could be explained with reference to the interest that the source state has in possession, scientific research or trade. Not only the physical existence and survival of cultural objects, but also the preservation and continuation of the social roles fulfilled by these objects are worthy of concern. Legal protection of the various functions of cultural objects imply multidisciplinary solutions that reach beyond the physical level, often into the realm of intellectual property rights.

viii) Acts of war as a specific threat to cultural objects

War and political upheaval fan the flames of looting practices and tend to intensify the threat to cultural objects. Since the 16th century, international legal authorities have expressed the desire to exempt cultural objects from the consequences of acts of war. Most peace treaties contained clauses on restitution of war booty, of which cultural objects were often the most popular kind.

During World War II, the Axis and the Allies engaged in a play of theft and counter-theft, and both sides looted each other with gay abandon. When Russia avenged the Nazi looting, it was often the commanders among the Russian troops who took the Dürers, Rembrandts and Van Goghs. To this day, the issue of the restitution of German cultural objects held by Russia remains

emotionally charged.[8] Rough estimates put the number of museums in Russia at 1 143. A wealth of cultural material is also contained in the 3 000 functioning churches. Political and economic instability leaves this material vulnerable to theft and illegal export so that the rate of looting has increased dramatically during the 1990s.

Renewed international efforts after WWII to protect cultural objects against art vandalism in times of war notwithstanding, Eastern European wars again brought a wave of theft, destruction and disappearance of vast amounts of precious and priceless art. The collapse of communism and the unification of Germany led to an intensified search for wartime booty. The potential for conflict over treasures coming to light only now is growing steadily. Some 60 000 works of art go missing in Europe every year and the number of disputes over title to heritage objects for sale on the black market have also increased. Some of these disputes relate to several paintings that were stolen from German castles during the war only to reappear in the possession of art dealers and private owners in other parts of the world many years later.[9]

ix) Pressure exerted by illicit trafficking and excavation practices

At the start of the 21st century, illicit trafficking in cultural objects is widespread and economic incentives huge.[10] For many countries in Africa and parts of Oceania, countless objects of major significance from a cultural perspective have been taken abroad. The demand for antiquities is growing, and vastly exceeds the shrinking legitimate supply. Consequently, trade in stolen and illegally excavated or exported items has become exceptionally lucrative. Scope exists for using works of art for purposes such as initial collateral for narcotics transactions and then laundering

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[8] Relatively recently, Old Master drawings and classic Impressionist paintings, kept out of public sight for almost half a century, were revealed by the Hermitage Museum in St. Petersburg and the Pushkin Museum in Moscow. This almost kindled a protracted legal battle over ownership but fortunately, exhibition and negotiated return meant that the outcome was peaceful. See *The Economist* 24 December 1994-6 January 1995; *Sunday Times* 23 April 1995, 12.

[9] *Menzel v List* 246 N.E.2d 742 (N.Y. 1969); *Kunstsammlungen zu Weimar v Elicofon* 678 F 2d 1150 (1982); *DeWeerth v Baldinger* 836 F 2d 103 (2d Circuit 1987), cert. denied, 486 US 1056 (1988).

[10] See *e.g.* the *French statue of Maria* case (*De Raad v OvJ* NJ 1983 445, rev'd on appeal to the Hoge Raad); the *Cazenoves* or *Montpelier frescoes* case (*Fondation Abegg v Ville de Genève* D 1988,325; note Maury decision of the *Cour de Cassation*, reversing the decision of the *Cour d'Appel* Montpelier 18 December 1985 *Recueil Dalloz Sirey* 1985 205) and the *Kanakaria mosaics* case (*Autocephalous Greek-Orthodox Church v Goldberg & Feldman Fine Arts Inc* 717 F Supp 1374 (SD Ind 1989) affirmed 917 F 2d 278 (7th Circuit 1990) cert denied 112 S Ct 377 (1992)).

the profits.[11] As such, sophisticated illicit trafficking has a vast potential to corrode and corrupt other segments of the economy and disrupt the cultural life of communities.

A large variety of ways exists in which these items are acquired for supply. In respect of paintings, theft practices include designer theft (the commissioned theft of selected works of art), art napping (the capture of works of art for future ransom), virtuoso art theft from museums and galleries and the partitioning of readily identifiable pictures (which creates several marketable works from a single unmarketable parent work). Antiques traffickers often deliberately deface artefacts to render them less recognisable, easier to smuggle and easier to dispose of. Detachment of artefacts from an unknown or undocumented site robs artefacts of provenance. Consequently, their cultural affiliation may remain undecided. 'Provenance' refers to an object's history as cultural property, whereas 'provenience' refers to its original context. When an object becomes decontextualised, both object and context lose historical significance and meaning. Local contacts, middlemen, dealer identity and location, price, invoices and tangential correspondence may assist in re-establishing a degree of historical significance. Paintings are generally less dependent on context. Provenance and appreciation are less likely to be subverted by buying and selling when the object of the sale is an 18th century European painting, for example. Clandestine removal and illegal export of such archaeological finds and other artefacts virtually guarantee that information about precise origins will be lost. These practices of dismemberment have rendered the distinction between movables and immovables, so often made for legal purposes, almost entirely useless. Fear of looters also inhibits scholars to publish their findings.

In most developing countries, important sites are as yet unexcavated. In many of these countries, national crises of identity exist on account of the disintegration of the social and cultural systems, which further erode conservation efforts. Especially in countries rich in cultural objects such as China and Guatemala, a pressing need exists for international assistance to prevent further unsupervised and illicit excavations.

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[11] The US Drug Enforcement Administration stumbled onto pre-Columbian religious artefacts, including burial statues and incense burners smuggled into the US in 1993, when these were being shipped to a New York City dealer. *Reuters* 23 August 1996.

x) Major threats are changing

The nature of the major threats is changing, so that progress and changing social and economic conditions pose greater threats to the cultural heritage today than traditional causes of decay did. Natural or environmental processes, rapid urbanisation and industrialisation combine to put pressure on archaeological remains.[12] The Sphinx, ancient guard of the Egyptian pyramids for 4 000 years, and twice as old as Christianity, is falling apart for example, because of pollution and rising damp.[13] Development in the form of construction of motorways, underground railways and revised planning of old town centres must now be contended with.

Efforts at retaining cultural identity through the retention of important cultural heritage require scope for movement within national cultural policy. However, harsh social and economic realities do not always allow for this.

xi) The situation in South Africa

A hunter-gatherer economy in the distant past – when 'rock artists' embellished the surfaces of natural shelters with murals depicting their physical and spiritual experience[14] – South Africa has grown into an art market that displays both depth and variety. The enthusiasm for the preservation of tangible remnants from the past endures against all economic odds, even if the tendency is to buy erratically rather than to seriously collect and invest in art.

The general position of South Africa as regards threats against the cultural heritage is significant because South Africa constitutes a destination market as well as a potential transit state for African art.[15] South Africa is no exception to the international trend of increased threats to cultural heritage, in particular that of theft, dereliction and mismanagement. Countless incidents since the late eighties confirm that South African art and heritage are as much at risk from physical and other threats as temples, sites, wall-paintings and architectural statuary from the

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[12] Wyss (1992) 94 with further reference.

[13] *The Sunday Independent* 25 June 1995, 7.

[14] Berman *Art and Artists of South Africa* (1983) 1. There are in the vicinity of 15 000 known rock art sites in the Republic.

[15] Prott & O'Keefe *Law and the Cultural Heritage Vol. 3: Movement* (1989) 576.

Taklaman desert, or Hindu stone carvings from the Khmer ruins. One of the most exciting art finds of the century was discovered hanging on a wall in the derelict old Palace of Justice in Pretoria. The painting is a portrait of Johannes Voet, whose works constitute the basic text of the South African common law, by the 17th century Dutch master Jan Weenix.[16] Several of Gregoire Boonzaier's paintings (the oldest living South African painter)[17] were stolen between 1992 and 1996[18] and the tea set used by President Kruger disappeared from the Kruger House museum.[19] Statuary in public parks have not been spared. Magnolia Dell lost its Peter Pan on 1 August 1996,[20] and the bronze buck statue that was donated by sculptor Ernest Ullman to the Botanic Gardens in Emmarentia, was stolen in January 1998.[21] In the past few years, 14 of Jean Doyle's sculptures have been stolen, apparently on commission, from galleries, exhibition venues and public collections.[22] Detection and successful prosecution of even the most flagrant illegalities are strikingly rare. The recovery of nine of the sixteen paintings that disappeared from the house of Gregoire Boonzaier seems to be a happy exception.

South African museums, under pressure as they are, hold interesting and even impressive collections of international art. The bulk of their holdings are works by local artists.[23] The 400 museums on record (including satellite museums, but excluding former independent homelands)[24] are managed at local and provincial level. Museums are currently being grouped under and

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[16] *Sunday Times* 27 July 1997, 7.

[17] *Sunday Times* 25 August 1996, 4; *De Kat* January 1997, 66-73.

[18] Early in 1996, Gregoire Boonzaier, top South African artist, noticed that sixteen of his works had gone missing from his guest house and reception hall, which doubles as a repository for his art. While some pieces have been found, an arrest has been made and litigation has been concluded, at least five works remain missing. See *Sunday Times* 25 August 1996, 4.

[19] On 1 August 1996, cups and saucers from a dinner set with the ZAR coat of arms were discovered stolen from the Kruger House museum. The set was used in the official residence of President Kruger.

[20] Peter Pan has been replaced and nabbed four times since. Wendy disappeared for the second time during February 2000 and was found again on 10 March 2000. *Pretoria News* 24 February 2000, 9.

[21] *Northcliff/Melville Times* week ending 16 January 1998, 2.

[22] *Pretoria News* 10 June 1999, 6.

[23] Berman (1983) 179.

[24] Fransen *Guide to museums of Southern Africa* (1978); Coetzee *Directory of Cultural Conservation Bodies in South Africa* Department of Environmental Affairs (1990); interview with Mr. Bartmann Department of National Education on 7 April 1994.

managed by flagship institutions. In 1996 thieves raided the National Museum in Bloemfontein. In 1997 there were eight major thefts from museums. Recent museum thefts occurred at Paarl Museum, Bertrams House and the South African Museum for Culture and History.[25] Vandalism of museums and museum holdings is a new way of striking against the power of the state, or against groups that are resented in one way or another. Violence against the objects themselves is becoming increasingly common.[26] Threats are not merely physical in nature. Bad planning, neglect, poor access, corruption and biased collections deeply affect the social roles of cultural objects. Often, unintentional conduct affects intangibles adversely. The physical things help us to form our identities, but the beliefs we have about ourselves and others, as well as our languages, are central to our sense of self and our identity.[27]

Ultimately, we need to surmise what content is given to the right to culture; what level of adherence is afforded to the constitutional norms on language; and what prominence is accorded to cultural, religious and linguistic communities. Only a claim that a community or a nation has been able to make, and which it has been able and willing to exercise against the state concerned, can gather meaning beyond state boundaries. A country's comparative poverty often explains the commitment to national strategies to retain cultural objects. However, its lack of homogeneity may translate to a lack of interest to conserve the heritage of all the cultural groups involved. Usually, a nation's comparative wealth and opportunity to build and discover a national identity and its comparative social cohesion underscore a freer approach to exportation and trade.

xii) Protection and preservation

Measured in dollars, the world market in stolen art is larger than any other area of international crime except for arms and drug-trafficking.[28] Penalties are generally lighter than for dealing in comparably priced amounts of narcotics, but the recovery rate for stolen art remains dismal.

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[25] *Sunday Times* 18 January 1998, 1; *Bylae tot Beeld* 28 January 1998, 4. Stock was stolen from an ethnic craft shop in Proes Street, Pretoria during May 1997.

[26] *The Citizen* 10 October 1995, 15. In a recent incident, a fire destroyed the Rangiatea Maori Church in Otaki, near Wellington. The church was built by Te Rauparaha, chief and general of the Maoris.

[27] Shapiro 'Repatriation: A Modest Proposal' 1998 (31) *International Law and Politics* 95, 100.

[28] Palmer 'Recovering Stolen Art' 1994 *Current Legal Problems* 215, 217 with further reference.

Effective heritage policy and planning are required to counter the global, national and local tendencies described here.

In view of the different kinds of threats, protection is called for at several different levels.[29] Physical protection is necessary in respect of the tangible forms of culture (*e.g.* against illicit excavation, disfigurement, theft or illegal trade) facing physical threats. On another level, the enjoyment of culture and its embodiment in objects with social, historical, scientific or sacral significance ought to be protected in order to keep alive and stimulate the imagination and creativity of the human race. The protection of art in public places is also linked to mental health.[30] Firm links exist between the protection of cultural objects and human rights protection. Authorities seem to agree that only where human rights are respected can the protection of cultural heritage be expected. Further dimensions include the territorial and the national.

A multidisciplinary strategy has to combine constitutional and international law as well as national law. The sad truth is that few measures taken at the national and international levels have enhanced preservation of the world's cultural heritage. Indeed, the changing nature of the major threats to the heritage has complicated matters considerably. Any effective strategy will have to recognise the implications of three main 'agendas', since the 'protection' of the cultural heritage lies at their intersection. These are –

- preservation of the cultural heritage of the world;
- protection of national collections and treasures; and
- the freedom of the art market.

Not all of these agendas are mutually exclusive, yet the dynamics that shape the trade in cultural objects are driven by keenly competitive interests. These may include governments or nations, private citizens, collectors, art and antiquities dealers, museums and museum curators, suppliers or sellers, customs agents, investors and insurers, indigenous peoples, present and future generations, scholars and the public. Museums, collectors and the art trade have an interest in

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[29] *Ibid.* 82-84.

[30] Wyss (1992) 107.

acquiring and dealing in collectible antiquities. Superficially, this interest is consistent with the international and cosmopolitan interest in an active market in antiquities and freedom of trade.

The law develops in response to the main policy thrusts of the above-mentioned agendas. Law is an important factor in the international trade in antiquities and artefacts, since traffic is not entirely licit.

xiii) Law and cultural heritage: the limits of law

Research into aspects of the legal protection of cultural objects lies at the intersection of public international law, constitutional law, private and commercial law and the conflict of laws. Legal instruments for protection include national protective measures such as import prohibitions or the recognition and enforcement of foreign judgments and international efforts at harmonisation of regulation. The absence of regulation, or regulation that is too restrictive or too lenient, may threaten cultural resources. International law provides us with the benefit of comparative analysis and the tools for consideration of the trans-national implications of domestic decisions.

However, the law often complicates efforts to protect cultural objects. Traditional methods of art-dealing and international legal inconsistencies promote conditions that allow destruction and loss of critical archaeological information. One of the main legal problems in the modern epidemic of theft of cultural objects is that transactions across the borders of civil law countries may have a 'laundering' effect on title.[31] Another problem is the regularity with which legal complications arise when objects have been excavated from undocumented sites. These complications stem from the fact that existing legal systems and export laws are only effective if sites have been identified and recorded. It may be difficult to prove that export occurred after the relevant export laws took effect. Where cultural objects have been exported in violation of laws and regulations, export is often connected with clandestine excavation, wrongful possession by fraud, or outright theft. While theft and illegal export may co-exist, and have at times been given combined legal treatment, unlawful export may raise very different issues to those which arise from simple theft. It is fairly certain that where unlawful export of stolen objects is planned, the seller (thief,

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[31] Roodt 'Keeping Cultural Objects "in the Picture": Traditional Legal Strategies' 1995 *CILSA* 314.

possessor or legal owner) would try to conceal the site, forge export papers or use a false permit. Even if the excavation or removal itself did not offend against any law, export regulations may still be violated. The variables rarely recur in the same form. Grey areas abound. The owner is often the wrongdoer and not the victim, and normally the claimant state is not the legal owner before the wrong is committed. Both categories may be combined, for example, where foreign buyers obtain permits from occupying authorities and state officials indifferent to the heritage of those objects under their control. Cases involving the issuing of false permits illustrate the tenuous dividing line between theft and illegal export.[32] Other international law problems may arise: a government-in-exile may prohibit the transfer of cultural objects, raising the question whether third states must recognise these legislative acts.

Common law jurisdictions generally favour the original owner of a stolen object over a buyer who can show that his or her purchase was made in good faith, without the original owner being required to pay any compensation. Continental systems tend to favour the purchaser, and the short periods that govern prescriptive acquisition facilitate this. Incompatibility of legal systems plays a role in many transfers: under the common law, ownership cannot be transferred if the seller does not possess legal title. Furthermore, ordinary Western jurisprudential analysis and common law concepts often fail to explain and define adequately the right to cultural heritage of indigenous and aboriginal people. At the extreme, deliberate cultural genocide may conveniently reinforce a scheme of human genocide. Destruction of non-renewable resources that serve to make the past readily accessible is a dramatic denial of the interests of future generations. Cultural heritage reflects the social and historical conditions of the creation of indigenous communities and celebrates what binds people to the earth.

Civil suits often culminate in efforts to settle legal claims out of court and cause eventual

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[32] Lack of commitment towards the enforcement of export controls was demonstrated by the occupying power or entrenched ruling group when the 'Elgin' (or Parthenon) Marbles were removed. The same may be said of Chinese officials who remained blatantly inactive when the antiquities from Chinese Turkestan, scattered along the 'Old Silk Road', became coveted prizes in the international race for ancient Buddhist treasures. As Confucians who despised Buddhism, their prejudice allowed the damage to frescoes, sites and treasures by iconoclastic Moslems to proceed unchecked. Hopkirk *Foreign Devils on the Silk Road* (1980) 24, 31.

consensual return.[33] Claims related to statuary and other objects depicting a nation's identity are often more successful on a non-adversarial or extra-legal level (*e.g.* with recourse had to moral persuasion, professional responsibility or diplomacy). Nevertheless, the interdisciplinary thinking required by legal argument is a sound basis for the formulation of argument in negotiations and discussions of repatriation. The legal bases for negotiations are extremely important if 'cultural diplomacy' is to be properly conducted, considering the prediction that

> ... cultural diplomacy will come to dominate international relations far more than the old warhorses of economics and politics ...[34]

In a Western-style society, law is a very powerful moral argument. If used in the past to block arguments based on a different social structure, it can now be used to recognise and enforce justice and truth in property relations. The role of law remains a necessary one, and any policy to protect the cultural heritage may remain wholly ineffective if it cannot rely on the law.

xiv) Tourism

Tourism is one of the main reasons why protection and preservation efforts in respect of the cultural heritage have become important. It is recognised that a successful tourism programme requires historical substance and the promotion of culture.[35] Tourist attractions include places of scenic beauty and historical interest.

In many countries, tourism has replaced other sources of revenue. Art museums and trade in objects have accounted for a significant part in revenue from tourist promotions. General public interest and awareness in this finite and non-renewable resource has increased greatly in recent years. Preservation efforts may result in local employment opportunities and the generation of local revenue. Mass tourism has its negative side, of course. Conflicts between tourism and protection of the cultural heritage may be solved by national legislation to a certain degree. However, there will be instances where the interests of the environment and the protection of the cultural heritage will need to be weighed up.

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[33] A good example is the Quedlingburg bible returned to Germany in 1990. For more examples, see Palmer 1994 *Current Legal Problems* 223.

[34] Jenkins 'Opinion' 1993 *IJCP* 383, 385.

[35] Council of Europe Recommendation 1133 (1990) Parl Coll 29 September 1990.

xv) Scope of study

Cultural co-operation becomes essential as the need for peace and peaceful solutions intensifies. New conceptual tools are required for new challenges facing the world community, an important one of which is the urgent moral concerns associated with the issue of cultural restitution.

This study investigates aspects of legal rules governing cultural objects (their physical existence, intangible aspects and roles). Part I addresses the consequences of these rules in an international context. Part II addresses the need to protect objects, the social roles of cultural heritage and the imagination and creativity manifested in them in a South African context.

Individual chapters in Part I explore the following themes –

- *Chapter 1* deals with definitions of culture and cultural objects, the expansion of the definitions in use in international documents and selected national legal systems.
- *Chapter 2* deals with cultural rights in their national and international dimensions. International human rights documentation reflects the close relationship between human rights and the protection of cultural and historical wealth. Claims in respect of control of cultural objects touch upon aspects such as self-determination, self-government, collective rights of ownership and use, the right to preserve and develop culture, and religious rights.
- *Chapter 3* deals with international instruments and regional initiatives, designed to protect cultural heritage.
- *Chapter 4* deals with ownership values, since the right to culture may include ownership or different interests. Intellectual property rights (*e.g.* copyright and indigenous designs, medicinal knowledge, literature and folklore) may require recognition. This chapter also refers to economic, anthropological and psychological dimensions of cultural heritage protection.
- *Chapter 5* deals with physical threats of tangible forms: situations involving simple theft. These are the least complicated in terms of law and ethics: dispossession of cultural objects with the intention to deprive the owner permanently. The chapter covers cases and civil actions brought by owners and nations seeking the return of stolen property.
- *Chapter 6* deals with some of the legal problems that arise when objects are excavated and removed from undocumented sites and therefore also considers physical threats and tangible forms. The axiom of the non-application of foreign public law in the conflict of laws is illustrated.

Individual chapters in Part II explore the following themes in a South African context –

- *Chapter 7* deals with the apartheid order an old order statutory law, title and ownership laws.
- *Chapter 8* deals with the new order, as from the commencement of the interim period.
- *Chapter 9* deals with the new legislative reforms and the new system for heritage resources management, including the legal aspects of, *e.g.* exportation, public and private ownership, contracts, etc.
- *Chapter 10* deals with public international law options for South Africa and discusses the suitability and application of particular international agreements.
- *Chapter 11* deals with South African conflict of laws.
- *Chapter 12* contains an overview of Part I. It also compares the previous and the new dispensations and evaluates the progress to date against the benchmarks that may be applicable in a cultural state.

Since the protection of the underwater cultural heritage is important enough to warrant separate investigation and study, it is not covered in this thesis.

> Our biggest problem in cultural policy is not, I would suggest, lack of resources, lack of will, lack of commitment or even lack of policy co-ordination to date. It is rather ...[the] partial formulation and recognition of the policy object itself: culture.
>
> Colin Mercer in *Our Creative Diversity*, Report of the World Commission on Culture and Development, Unesco, (1996)

PART I

CHAPTER 1

CULTURE AND CULTURAL HERITAGE: DEFINITION

1. INTRODUCTION

Defining the term 'cultural objects' is not easily accomplished. To a large extent, this is due to the fluidity of the term 'culture'. As a potentially powerful mobilising force in conflict, culture has led to forced conversions, exclusion and war. As a descriptor of the human striving to create beauty, it is associated with civilisation, virtue, freedom and truth.

The concept of culture has enjoyed a triumphant ascent in the past few years. It had grown and expanded much like a linguistic weed[1], into 164 different uses by the middle of the 20th century. Few of the uses of the expression 'culture' converge and the term is used without definition. In recent decades, the definition of culture has become the subject of serious academic dispute.[2]

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[1] Strydom 'The International and Public Law Debate on Cultural Relativism and Cultural Identity: Origin and Implications' 1996 *SAYIL* 1 with further reference.

[2] Hartman *The Fateful Question of Culture* (1997). Hartman shows, in a masterly manner, the complexities of the word by exploring historical developments from the late 18th century onward. Also Beukes 'Verstaanbare Vraagstukke om 'n Verkleurmannetjiebegrip: Of die Vele Gesigte van "Kultuur"' 1994 (9) *SA Publiekreg Public Law* 137.

> The point is that the term bestows, like rights language run amok, a certain dignity, one that is based ... on a sense that a meaningful nucleus of life, a form of social existence, has emerged or is emerging.[3]

At a group level, the term is often used in a descriptive sense, as Hartman's words indicate.

Max Weber's famous definition develops the sentiment that equates 'culture' with meaning –

> Culture is something finite, excerpted by human thought from a senseless and boundless world history and invested with sense and meaning.[4]

These views, that preservation of forms of social existence that have little meaning to the outside world gives meaning to that particular group, indicate that culture plays to various levels: the universal and the particular. Neither Hartman's nor Weber's views presents the meaning which a particular group finds in its culture as a reason for the preservation of the group. Both indicate that culture can find a point of reference in the particular. Taken to its extreme, Weber's definition could regard culture as provider of meaning to all aspects of human life. However, an attempt at reconciling the universal with the particular with such broad a stroke, is likely to miss the mark.[5]

The main aim in this chapter is to place the category of cultural objects within the broad category of dynamic human culture. Identification of what belongs to cultural heritage and what does not, implies the ability to make a distinction between culture and non-culture. To be able to identify non-culture, a knowledge of the political and social context is required. We are able to appreciate beauty, truth and virtue, because we know the counter-concept. The antithesis of civilisation is to be found in destruction and corruption: the extreme case of non-culture may be what precipitates war.[6]

Those charged with the protection of the cultural heritage cannot treat culture and non-culture

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[3] Hartman (1997) 33-34.

[4] Weber *Gesammelte Werke zur Wissenschaftslehre* (quoted in Assmann & Assmann 'Kultur und Konflikt: Aspekte einer Theorie des unkommunikativen Handelns' in Assman & Harth (eds) *Kultur und Konflikt* (1990) 35).

[5] Strydom 1996 *SAYIL* 16-17.

[6] Huber in Häberle *Kulturstaatlichkeit und Kulturverfassungsrecht* (1982) 134.

with the same indifference. [7]

In the first part of this chapter, definitions of culture, including anthropological, sociological and religious perspectives, are considered. Notes are made on the relationship and cross-relationships between culture and ethnicity, culture and language, culture and nation. The role of culture of indigenous populations is referred to and the roles of the United Nations Educational, Scientific and Cultural Organisation (Unesco) and of regional organisations in Europe are described. The second part of this chapter focuses on definitions of cultural objects and cultural heritage in selected international materials and concepts used in selected national laws. The special nature of cultural objects, which began to take on familiar form by the early 19th century, is discussed. At the time, the British Parliament considered the purchase of the Earl of Elgin's collection of marbles from the Parthenon, and debated the propriety of collecting by ambassadors and the significance of a nation's cultural heritage.[8] The conditions under which the authorities in one nation may remove cultural objects from another nation or a subjected people became a main theme.

2. DEFINITION OF CULTURE

Some of the ambiguity inherent to 'culture' may be removed if it is considered in relationship to *e.g.* democracy, development or peace. It plays to many other levels. For example, since the 19th century, the term has acquired a normative sense at the individual level and a descriptive sense at the group level. Caws describes Matthew Arnold, Professor of Poetry at Oxford,[9] as the standard representative of the normative sense. [10]

2.1 Culture as a norm: the individual level

In a lecture entitled 'Culture and its Enemies', Matthew Arnold remarked –

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[7] *Ibid.* 131-137; also Van Wyk 'Kultuur, Staat, Reg – Kultuurstaatsreg?' 1991 *Stellenbosch Law Review* 180, 185.

[8] House of Commons 1816.

[9] Besides his poetry, Arnold is known for his vigorous and widely ranging polemical commentaries on culture, religion and society which made him one of the foremost critics of his day.

[10] Caws 'Identity: Cultural, Transcultural and Multicultural' in Goldberg (ed.) *Multiculturalism* (1994) 371.

> It is by making endless additions to itself, in the endless expansion of its powers, in endless growth in wisdom and beauty, that the spirit of the human race finds its ideal. To reach this ideal, culture is an indispensable aid, and that is the true value of culture.[11]

Arnold regarded culture as a study of perfection: both of harmonious perfection (seeing more than one side of a thing) and general perfection (as a general expansion of the human family). This gospel of perfection exists in 'becoming something' rather than in 'having something', in an inward condition of the mind and spirit, not in an outward set of circumstances. As such, this notion displays connotations of inner moral striving and external social progress. Culture becomes a noun of 'inner' process configuring the 'intellectual life' and the 'arts', and a noun of general process that configures whole ways of life. Arnold's conception[12] concerns the degree to which a person has attained intellectual, moral and artistic development through liberal education leading to self-development, as opposed to specialised training. This notion is similar to the definitions of culture contained in the Oxford dictionaries.[13]

The ambiguities of culture and its relation to development are manifold: is it an aspect of development, a means of development, or an end in itself? Perhaps all that is needed is to recognise that if the state were to suppress culture by means of legal norms or otherwise, it would impact negatively on human development. The same would be true for democracy and peace.

2.2 Culture as description: community level

2.2.1 Ethnicity

Race is a sociological category which, according to some, relies on genetics. Europeans tend to use genetics as a qualification for ethnicity as well. African and Arab societies have concepts of ethnic identity that are assimilative and for them, ethnicity relies on experience, identification and association.[14] Such association could be with a homogeneous group that fosters and transmits a tradition. The greater the accessibility and participation in the culture of such a group, the closer

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[11] Lecture delivered on 7 June 1867. See *M Arnold A Critical Edition of the Major Works* Allot & Super (eds) (1986) 347. This lecture also appeared as the introduction to his book *Culture and Anarchy* (1869).

[12] Hartman (1997) 209.

[13] The *Concise Oxford Dictionary* (1954) refers to 'improvement by (mental or physical) training; intellectual development'.

[14] Mazrui & Mazrui *The Power of Babel: Language and Governance in the African Experience* (1998) 30, 48.

the culture comes to representing universal culture.

In particular historical contexts, culture may be understood to include 'all meaningful expressions and symbolic formations by a community'.[15] As such, it describes a difference that reinforces identity, much like the anthropological sense of culture – as a body of beliefs, habits and products of a group that is geographically, linguistically and technologically remote – underlines ethnicity.

It is widely assumed that the spread of civil wars in the period after the cold war is to be blamed on ethnic conflict.[16] Ethnicity is perceived as a way of describing events and a way of explaining them. As such, it harbours potential to become synonymous with a determinist conception of culture. For example, it may be assumed that there is a common group psychology that sets population groups against each other and which influences or even dictates behaviour. However, an anthropological approach emphasises empirical investigation of social processes rather than psychological or biological motivations underlying group identities.[17] It would take serious issue with the view that certain ethnic groups are inescapably and primordially destructive towards those who do not share the same ethnic traits. This approach does not change the truth of the observation that if one group assumes state power, other cultural, ethnic or linguistic groups may be stripped of power or influence, or that this may happen in the name of building the state.

Contemporary theory expects the idea of culture to overcome collective differences and to describe difference at the same time. To achieve this, it may refer to the sum total of capabilities, habits, knowledge, values, actions and articulations acquired by men and women as members of society, to foster their development in harmony with that of the group or the society. Ethnnicity is another term that must be explained by the way it is used. 'Ethnic' is derived from the Greek words *ethnos* 'a people' and *ethnikos* 'a heathen'. By the mid-14th century, it was used in English

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[15] Degenaar 'Art and Culture in a Changing South Africa' 1993 (12) *SA Journal of Philosophy* 52. On definitions also Dlamini 'Culture, Education and Religion' in Van Wyk *et al* (eds) *Rights and Constitutionalism* (1994) 573-574 with further reference.

[16] *E.g.* Our Creative Diversity, *Report of the World Commission on Culture and Development* (1996) summ. 20; News Conference by W. Christopher (US Secretary of State) in February 1993 concerning the conflict in the former Yugoslavia; see US Department of State Dispatch, 4, 81.

[17] Allen & Eade 'Anthropological Approaches to Ethnicity and Conflict' 1997 *International Journal on Minority and Group Rights* 217.

to refer to pagan populations. By the mid-19th century, the word had taken on racial connotations and 'ethnicity' became associated with 'race'.

Contemporary anthropology generally rejects the view that an ethnic identity emanates from certain primary traits of a population. Other theories (*e.g.* instrumentalist or relationist theories), which enjoy greater currency, link corporate identity to social interaction in particular historical, political and economical contexts. Anthropological approaches to 'ethnicity' and sociological approaches to 'race' both share the idea that these are socially constructed phenomena.

A useful anthropological definition of 'culture' is that it embraces all that humanity, as a complex living entity, creates within an ethnical context in a process of self-determination or self-protection to adapt to a complex environment.[18] This pattern of life is transmitted from generation to generation and includes art, which for indigenous communities, serve as their recorded history, as depictions of their knowledge and beliefs and as their spiritual teachings. This pattern of life also includes religious responses that represent humanity's desire to survive in relation to God. The relationship between culture and religion is commented on under 2.3.

2.2.2 Culture and language

Being a principal factor enabling individuals to become fully functioning members of the group into which they are born, language plays a role in deciding where one ethnic group ends and another begins. Language is the most immediate exponent of a people. The definition of race is often linked to the idea of tribe, and tribe links up with linguistic criteria.[19] It is possible, also, to distinguish between so-called communalist (race bound) and extra-communalist languages which transcend racial boundaries.[20]

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[18] Coertze & Coertze *Verklarende Vakwoordeboek vir Antropologie en Argeologie* (1996) defines culture as:

> Alle skeppinge wat die mens as komplekse lewende wese binne etnieë in 'n proses van selfhandhawing in (aanpassing by) 'n komplekse omgewing tot stand bring. Dit hou in: kultivering van die mens self en van sy omgewing, asook die skepping van alle apparaat, metodes and tegnieke waarmee en waarvolgens kultivering plaasvind.

[19] Mazrui & Mazrui (1998) 20.

[20] *Ibid.* 18.

The history of language in Africa in the 20th century is characterised by far-reaching linguistic and cultural policies. Moreover, indigenous languages demand, and fail to get, more than they receive. Mazrui postulates that constitutionalism in Africa becomes foreign as a system partly because concepts such as 'civil liberties', 'independence of the judiciary', and 'due process' are never translated in indigenous languages and therefore never become accessible to ordinary people.[21] If the concepts are never explained, it is hardly surprising that they do not become part of the framework of reference of the speakers of those languages.

Franz Fanon's influential views on language, imperialism and liberation are well-known.[22] For those who are already alienated or separated from their individuality and culture, language is a reservoir of culture, a determiner of thought, world view and behaviour. In terms of this linguistic determinism, the acquisition of language may mean acquisition of a full range of cultural underpinnings. The potential power of language can only be realised, however, if language is understood for what it is: an instrument of communication and rational thought. Language reflects the beliefs and customs of people, but is not a key to enlightenment and civilisation as the 'alienated' or marginalised section of a society may be wont to believe.

Globalisation and the integration of economies and peoples are increasingly being accompanied by demands for recognition and protection of language and culture. A coherent policy can link language rights to territory if substantial numbers of people speak that language. However, where minorities and indigenous populations are present, language rights are not so easily recognised.

2.2.3 Indigenous populations and minorities

Protecting the cultural practices of all peoples includes specifically the practices of indigenous communities and minorities. There is no generally accepted definition of the term minority, partly since the definition may use national, regional or local numbers as a point of reference. It is particularly problematic to define indigenous status any differently to minority status. Nonetheless, for present purposes, a minority is understood as a group numerically inferior to the

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[21] *Ibid.* 7.

[22] *Ibid.* 53 ff on the legacy of Franz Fanon. Also *Mail & Guardian* 28 July - 3 August 2000, 22-23.

rest of the population of a state, in a non-dominant position, whose members – being nationals of the state – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and who show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.[23] The concept may apply also to the various population groups of a multinational state without a majority population. In multicultural states, therefore, the protection of minorities is linked to the accommodation of diversity.[24]

An indigenous group could be a subset of a minority group. Indigenous peoples may possess a societal culture, in the sense of a shared language and a territorial base, which offers access to meaningful ways of life in a variety of spheres, including the social, educational, religious and economic. Prior territorial occupancy relative to a more recently arrived population is an important aspect of the definition. The term 'national minorities' may also be used.[25]

Indigenous peoples' culture and cultural heritage has seldom been respected in the Western hemisphere. Both the liberal and socialist versions of the Western political tradition seem to neglect minority cultures. Liberal theory concentrates on freedom and equality within the majority culture, whose language is used in a variety of domains, public and private. Socialist hostility to minority rights may be explained in terms of its commitment to 'internationalism', and the view that cultural divisions are temporary obstacles to becoming citizens of the world.[26] Notions of individualism and internationalism aside, the view that, given time, modern states would become nation-states with a common language and national identity, (the 'State-Nation-Language' model of political communities) is firmly linked to 19th century assumptions about modernisation.[27]

The belief that a country's political and administrative functions must have their seat in a single

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[23] Capotorti *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities* (1991) 5-15.

[24] Henrard 'Language and the Administration of Justice: the International Framework' Paper read at *International Colloquium on Multilingualism, the Judicial Authority and Security Services* University of the Free State (23-24 May 2000).

[25] Kymlicka & Marín 'Liberalism and Minority Rights: An Interview' 1999 *Ratio Juris* 133, 138.

[26] Kymlicka (1995) 5.

entity and that rigidly uniform structures of administration, justice, tax, finance, education and culture are required to create a common nationhood is based on the 19th century notion of the nation-state. Nationalism also works on the principle of the congruence between culture and state power.

International experience suggests that compliance with the right to enjoy culture in community with others (discussed in chapter 2) is likely to depend on institutional aspects of culture and the institutions responsible for the preservation and transmission of culture. Since these institutional aspects may be lacking in the case of certain indigenous communities and minorities, protection tends to be focused on the cultural practices of the West. Tension is certain to arise between national and group culture where this situation is left to continue.

2.2.4 Communal practices and social roles

Sociologists make wide use of the concept 'culture' to provide a scientific explanation of human behaviour in all its manifestations. It is possible to use 'culture' as a noun and as its field of reference, a number of actions.

For the purpose of proper comprehension of human behaviour, Mazrui suggests that culture serves seven fundamental functions –

- helping to provide lenses of perception and cognition;
- providing motives for human behaviour;
- providing criteria of evaluation;
- providing a basis of identity;
- as a mode of communication;
- as a basis of stratification; and
- a particular function in the system of production and consumption.[28]

These functions may be regarded as representing the social and economic roles served by culture.

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[27] Kymlicka & Marín 'Liberalism and Minority Rights: An Interview' 1999 *Ratio Juris* 135-6.

[28] Mazrui *Cultural Forces in World Politics* (1990) 7-8.

The National Socialist concept of 'Kultur', which is aggressively segregationist rather than protective of local and indigenous cultures, indicates that the above list fails to mention the harmony-restoring function of culture.[29] One may ask if culture also has a role in assuaging the alienation brought on by industrialisation and specialisation.

The (social) field of reference of culture may be seen as focussed on action,[30] and communal practices may include, for example –

- the promotion and publication of literature;
- the promotion of the arts;
- the practice of customs and traditions;
- the conservation of historical objects; and
- the commemoration of events.

2.3 Religious or spiritual foundation of culture

Culture, Mazrui argues, may aid awareness. While C.S. Lewis' essays consider this proposition, other perspectives view culture as a serious obstacle to 'spiritual awareness' and the lack of prejudice that 'spirituality'[31] requires. Culture can be said to be all that does not come directly from God, but reveals much about a society's concept of God. T.S. Eliot once remarked that he cannot conceive of culture without a religious foundation.[32] From time to time even today, one of these concepts is described as a component of the other.

Arnold saw the coincidence between culture and religion in the character of perfection 'through growing and becoming'.[33] If Arnold's notion of perfection could be transposed to the public

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[29] Hartman refers to the perverted form of German idealism as 'identity philosophy'. See Hartman (1997) 127.

[30] Chaskalson (1998) 35-19.

[31] Spirituality is a wider concept than religion. A Christian definition may be: 'being intentional about the development of those convictions, attitudes and actions through which the Christ-following life is shaped and given personal expression within our everyday lives' in Hudson *Signposts to Spirituality* (1995) 15. Numerous definitions link 'spirituality' with 'awareness' or with an attempt to be in harmony with an unseen order of things.

[32] Eliot 'The Unity of European Culture' in *Notes Towards the Definition of Culture* (1949). If culture is the only means we have of realising the true nature of creation (except by means of special revelation), it can be regarded as the application (or the physical manifestation) of religious tradition.

[33] Allot and Super (eds) *M Arnold: A Critical Edition of the Major Works* (1986) 347.

sphere and the analogy closest to harmonious development of the self is taken to be ethnic solidarity, the (ideal, or cultured) person may become identified with the state in a way that may confirm state power as religion. At some level, National Socialism aspired towards complete unity and unanimity of all the members of society. National Socialism as a desire to attain complete harmony in constant self-identity is an obvious example of such a misapplication, in which the relationship between state and culture goes awry. In the same way, the proponents of apartheid wanted to secure artificial uniformity due to a fear that cultural diversity would ask too much of them.

Religions are political in urging as total an embodiment or as total a commitment as possible, and in so far as they discourage 'residual' or unbound spirituality. State religion, or the state presenting itself as a religion, causes the idea of a culture as a distinct and unified whole to move away from culture as an ethos that guarantees freedom of thought and individual imaginations in the context of society. Even the anti-religious society may continue to pledge allegiance to 'civil religion' or civil society, effectively replacing ethnic nationalism with civic nationalism.[34]

The role of Unesco in setting standards and co-ordinating in cultural matters is pertinent and deserves more detailed treatment.

2.4 Role of Unesco

UN agencies work with a very broad definition of culture, as including 'all that is inherited or transmitted through society' including language, literature, religion, art and science.[35] Unesco consists of a General Assembly, and Executive Council and a Secretary-General (the highest official of the organisation). The General Assembly may make recommendations and take decisions. [36] The constitution of Unesco entered into force on 4 November 1946. Article 1 states the aim of the organisation –

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[34] On the relationship state, law and church; see Häberle *Kulturstaatlichkeit und Kulturverfassungsrecht* (1982) 281 ff.

[35] Leiris *Race and Culture* [1951] 20-21; Capotorti (1991).

[36] For background on the establishment of Unesco, see Wyss (1992) 49 ff.

> ... to contribute to peace and security by promoting collaboration among nations through education, science and culture.

Unesco is charged with giving impetus to 'the spread of culture' and to maintain, increase and diffuse knowledge by assuring the conservation and protection of the world's inheritance of books, works of art and monuments of history and science, and recommending to the nations concerned the necessary international conventions. Political conflict over the competences contained in the constitution was inevitable since the constitution did not clearly indicate the limits of these competences. It took on the role of mediator between states and catalyst of the activities of NGOs.

The organisation dealt with culture and cultural co-operation whenever this was required by the sector with which a particular international instrument was concerned. This loose approach notwithstanding, Unesco set out to establish a single and universal world culture of peace and to preserve the integrity of all the particular cultures of the world.[37] Its first Director-General, J. Huxley, believed that the human mind evolved towards common values that exclude all social conflict. Strydom explains that this belief put certain obstacles in the way of the second ideal concerning the integrity of all cultures,[38] which caused Unesco to reject a number of ideas[39] –

- that cultures develop in stages along a single line;
- that any hierarchical distinction could be made between them; and
- that a commercial mass culture could support the cultural development of humanity.

Cultural policy is often used as a litmus test of civilised values. In Unesco's Final Report on the 1982 World Conference on Cultural Policies,[40] 'culture' is presented as denoting the 'distinctive and specific features and the ways of thinking and organising their lives of every individual and every community'. 'Cultural identity' was regarded as all-important and its preservation vital to

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[37] Strydom 1996 *SAYIL* 13.

[38] *Ibid.*

[39] *Recommendation on Participation by the People at Large in Cultural Life and Their Contribution to it* 26 November 1976 § 4(f); Unesco *General Report on World Conference on Cultural Policies* (1982) 8.

[40] This Conference took place in Mexico City between 26 July – 6 August 1982. Wyss describes the Declaration on Cultural Policies as a broad consensus on the status of culture and a necessary first step in a survey of state opinion on cultural policy. See Wyss (1992) 55 ff.

the maintenance of a 'unique and irreplaceable body of values'.[41]

Wyss notes that if regarded as *opinio iuris* on cultural matters, interstate measures that rely on the Declaration on Cultural Policies constitute circumstantial evidence of binding principles of action, relevant to public international law.[42]

Another noteworthy Unesco project is the World Languages Report, which is aimed at describing the linguistic diversity of the world and reflecting the current status and evolution of languages. Due to be published in 2001, the Report will offer recommendations for the safeguarding and promotion of the linguistic heritage of mankind.

2.5 Regional culture: the role of regional organisations

The Council of Europe was instrumental in passing the European Cultural Convention,[43] the instrument through which European states express their commitment to cultural co-operation. There are currently 47 states party to the Convention, five of which are not members of the Council. The number of member states has risen sharply since 1989 when the Berlin Wall fell. The European Cultural Convention affirms the existence of a 'European culture', which should be safeguarded and developed by means of a 'policy of common action'. The European cultural identity is therefore seen as both a reality and a process, each contracting party being required to take 'appropriate measures to safeguard and encourage the development of its national contribution to the common cultural heritage of Europe' (Article 1), in particular through the study of the languages, history and civilisation of the other Contracting Parties (Article 2) and 'the civilisation which is common to them all'.

Cultural co-operation, regarded as necessary to foster a positive attitude towards diversity and at the same time enhance cultural cohesion, is developed by means of an intensive programme of

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[41] In Strydom's analysis, Unesco took on the role of ultimate Redeemer, leading the world to the rediscovery of the meaning of culture and purportedly therefore also to culture as provider of meaning to all aspects of human life. He describes the attempt at reconciling the universal with the particular as flawed on account of the flaws of this basic philosophy. Strydom 1996 *SAYIL* 16-17.

[42] Wyss (1992) 55.

[43] 218 *UNTS* 139.

activities undertaken under the auspices of the Council for Cultural Co-operation (CDCC). The CDCC devises and implements the Council of Europe's educational and cultural programmes via the Cultural Fund, and is assisted by four specialised committees: Education, Higher Education and Research, Cultural Heritage and Culture.

The Council of Europe regularly reviews the cultural policies of its members in order to do a stock-take and to facilitate international comparisons. States not party to the Cultural Convention and not part of Europe may also submit co-operation requests and observer status has been granted to the US, Japan, Israel and Canada.

Since 1992, a cultural policy has been gradually introduced in the European Union. The Treaty on European Union[44] adds a separate title on culture to the treaty establishing the European Community. Title IX does not contain a definition as such[45] but article 128(3) binds the EC to foster co-operation with the Council of Europe and other international organisations competent in the sphere of culture. In terms of Article 128(4), the EC, when acting under the provisions of the Treaty on European Union, must take cultural aspects into account.

A common European identity based on cultural homogeneity may be idealistic and a fiction, but the background set out above shows that culture enjoys prominence in European life. Economic reasons have a primary role in this, but the political stake in progress made with the integration of Europe is also important.

The role of other regional organisations in defining culture will not be elaborated on further in this chapter.

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[44] Treaty on European Union (signed on 7 February 1992), entered into force on 1 November 1993; published in *OJ* 1992 C191.

[45] Article 128(2) states that the Community shall take action to co-operate, supporting and supplementing their action in the following areas –

- Improvement of the knowledge and dissemination of the culture and history of the European peoples;
- Conservation and safeguarding of cultural heritage of European significance;
- Non-commercial cultural exchanges; and
- Artistic and literary creation including in the audiovisual sector.

In as far as culture includes the identification and protection of objects with cultural significance, the relationship between tangible products of culture as articulations of humanity and human forms of life is relevant. Habermas states –

> In multicultural societies the coexistence of forms of life with equal rights means ensuring every citizen the opportunity to grow up within the world of a cultural heritage and to have his or her children grow up in it without suffering discrimination because of it.[46]

This implies the opportunity to confront every other culture, to perpetuate any other culture, to transform every other culture and to turn away from one's own or any other culture.[47]

Cultural identity is not to be confused with that which gives ultimate meaning to human life. Nonetheless, culture may be the provider of a basis of identity. To the extent that cultural identity serves as the primary focus of identification, being based on belonging and not on accomplishment, cultural objects distinguish a culture's expression and possess an identity-giving function. This proposition is considered further in chapter 4.

3. DEFINITION OF CULTURAL OBJECTS

For the purposes of this study, the terms 'cultural objects' and 'heritage objects' are understood to mean the physical remains of the past, man-made objects that are of archaeological, historical, pre-historical, artistic, scientific, literary or technical interest. Cultural heritage is a wider concept, which may include natural objects (often part of the immovable cultural heritage) and the intangible cultural heritage such as practice and preservation of myths and stories, oral history, tradition, ceremonies, folklore, language and legal systems, which depict the ways of life or culture of a community. These cannot be treated as rigidly distinct categories when discussing legal protection.

The phrase 'cultural property' was first used in a legal context, and coined, in the 1954 Hague

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[46] Habermas 'Struggles for Recognition in the Democratic Constitutional State' in Gutmann (ed.) *Multiculturalism* (1994) 131.

[47] *Ibid.* 132 ff.

Convention for the Protection of Cultural Property in the Event of Armed Conflict.[48] Before that, it was not an established concept in the Common Law, although it shared limited common traits with Civil Law concepts. The 1954 Hague Convention defines three different conceptual categories within the term 'cultural property' –

- immovable and movable items, which are of intrinsic artistic, historic, scientific or other cultural value;
- premises used for the housing of movable cultural property, such as museums, libraries and archives;
- 'centres containing monuments', such as important historic cities or archaeological zones.

Both the words 'property' and 'heritage' have been used to describe the relationship between an individual or group and an object of historical, archaeological or aesthetic value and importance. Subsequent chapters explain that these words have different meanings and say different things about the nature of that relationship. The term 'cultural objects' by itself, is unclear. Loosely defined, the term refers to artworks, artefacts and antiquities that form separate classes of objects that possess more than pecuniary value, or objects that are undeniably significant to the history of human expression. Rigid and systematic distinctions between artworks, artefacts and antiquities serve no purpose. Art constitutes one of the primary manifestations of culture: one the state has a particularly close relationship with.

No fixed definition of 'cultural objects' exists. Occasional examples of national legislative protection have classified petroglyphs, pictographs and totem poles as 'art'.[49] Artefacts and antiquities form part of the accumulated material heritage of humankind (archaeologists refer to the evidence of past civilisations as 'material culture'). The process, or achievements, of artistic and scientific creation constitute external aspects or manifestations of culture. The category includes archaeological, historical and ethnological objects: the material evidence of a certain stage of civilisation, and the vast body of artefacts yet to be discovered. Export controls and import legislation rarely distinguish between these classes.

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[48] 249 *UNTS* 240; also the 1985 European Convention on Offenses Relating to Cultural Property 25 *ILM* 44 (1986) (done 23 June 1985), not ratified by a single state as yet.

[49] British Columbia, the first province in Canada to enact heritage legislation, enacted this clause in the Historic Objects Preservation Act in 1925 (S.B.C. 1925.c.17) to protect petroglyphs, pictographs and totem poles as 'art'.

What follows represents a sample of definitions to be found in several international instruments. Three of them are open to global participation, namely –

- the 1970 Unesco Convention; and
- the 1972 World Cultural and Natural Heritage Convention;
- the 1995 Rome Convention.

Two of them are regional initiatives –

- the Commonwealth Scheme; and
- the European Union treaty (including secondary European legislation).

Among the efforts to define and see to the manifestation of the concept of cultural heritage are the first hesitant steps taken by the Parliamentary Assembly of the Parliament of Europe in Recommendation 1072 of 1988.[50] This Recommendation concerns the international protection of cultural property and the circulation of works of art. It is based on a concept of cultural heritage that is different from the concept of trade in other goods, but will not be analysed in detail here.

4. SELECTED INTERNATIONAL MATERIAL

Definition constitutes perhaps the thorniest issue in the area of cultural heritage. The archaeologist's definition of treasure changes; the techniques of archaeological investigation are not static;[51] and the working definitions developed in the negotiation stages of conventions tend to reflect the economic interests of the nations that support them.[52] It is little wonder then that definition often creates an impediment to international agreement.

4.1 1970 Unesco Convention

One of Unesco's principal functions is the preparation of conventions and recommendations

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[50] Article 27 of the Rules of Procedure of the Assembly provides that a recommendation is a proposal by the Assembly addressed to the Committee of Ministers, the implementation of which is within the province of governments. In general O'Keefe & Prott 1992 (1) *IJCP* 647.

[51] *Economist* 4 February 1995, 89.

[52] This was illustrated by the development in the deliberations on the 1995 Unidroit Convention (a more detailed discussion follows in chapter 3).

relating to culture as a category of human rights.

To define the elusive concept of cultural objects, Article 1 of the 1970 Unesco Convention recognises eleven broad categories of cultural property indicating the types of items that qualify for protection –

(a) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries;
(b) elements of artistic or historical monuments or archaeological sites, which have been dismembered;
(c) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals;
(d) objects of ethnological interest ... .

Categories also included are: original works of statuary art and sculpture in any material; 'objects of paleontological interest'; 'documents and publications of special interest'; 'postage, revenue and similar stamps'; 'archives'; 'articles of furniture more than one hundred years old'; 'property relating to history' as well as rare manuscripts and collections.

On the whole, Article 1 is rather broad and vague, as it relies on a subjective designation by each state of what should be protected, rather than on objective criteria for such protection. Designation may result from prior inclusion in some national inventory, yet very few countries have undertaken the complex and technical work of cataloguing cultural objects. A relatively small number of monuments have been marked with the Unesco emblem.

4.2 1972 World Cultural and Natural Heritage Convention

The 1972 Convention on the World Cultural and Natural Heritage[53] is the most widely adopted of all the conventions promoted by Unesco.

The World Cultural and Natural Heritage Convention refers to 'cultural heritage' as including buildings that are of outstanding universal value from the point of view of history, art or science owing to 'their place in the landscape'. It includes monuments, groups of buildings and sites in

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[53] South Africa ratified the Convention on 10 July 1997. The World Heritage Convention Act, 1999 is discussed in chapter 9.

the definition of cultural heritage in Article 1. The Convention requires member states, 'in so far as possible', to make an inventory of suitable sites and submit this to the World Heritage Committee (Article 11). In practice, this requirement is met by the furnishing of a 'tentative list' of sites the state may wish to nominate at some stage. Parties to the Convention that wish to do so may nominate sites considered suitable for inclusion on the list. The Guidelines require that, if it is a cultural site, it must be on the tentative list. It must also be situated on the territory of the state making the nomination.[54]

4.3 1995 Rome (Unidroit) Convention

The 1995 Rome Convention on the International Return of Stolen or Illegally Exported Cultural Objects[55] is a recent addition to the international set of rules tailored to the needs of regulating return. It entered into force at the beginning of 1996.

The 1995 Rome Convention defines cultural objects as those which, on religious or secular grounds, are of importance for archaeology, prehistory, history, literature, art or science and which belong to one of the categories listed in the Annex. The categories listed in the Annex correspond to the extended definition contained in Article 1 of the 1970 Unesco Convention.

Article 7(b) of the 1995 Rome Convention links protection to age, except in the case of objects used by existing groups. It states that its protections do not apply when 'the object was exported during the lifetime of the person who created it or within a period of fifty years following the death of that person', yet do apply 'where a cultural object was made by a member or members of a tribal or indigenous community for traditional or ritual use by that community and the object will be returned to that community' (Article 7 (2)).

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[54] O'Keefe 'Case Note' 1994 3 *IJCP* 259.

[55] Done 24 June 1995; 34 *ILM* 1322 (1995). In terms of Article 12, the Convention enters into force on the first day of the 6th month following the date of deposit of the 5th instrument of ratification, acceptance, approval or accession. Forerunners to the final text include Annex to Report Study LXX – Doc 48 February 1994, 4th Session of the Unidroit Committee of Governmental Experts on the International Protection of Cultural Property (Rome, 29 September-8 October 1993); see also Unidroit *Digest of Legal Activities of International Organisations and Other Institutions* (1990) sub 'cultural property'.

4.4 Commonwealth Scheme

The Commonwealth Scheme creates a framework for intra-Commonwealth legal relations and covers various strategies for recovery. This initiative was intended to deal with the many issues raised by a famous case, *Attorney-General v Ortiz*.[56]

The Commonwealth Scheme leaves the definition of the heritage covered to the country of export, but enjoins members to consider as part of the Scheme only heritage that is of national importance. The criteria for this standard are basically similar to the Waverley criteria developed by the Waverley Committee in 1952.[57] The guidelines correspond to the guidelines that inform UK export policy and are well-known in South Africa. The Waverley criteria requires answers to the following questions –

- Is the object so closely connected with [British] history and national life that its departure would be a misfortune?
- Is it of outstanding aesthetic importance?
- Is it of outstanding significance for the study of some particular branch of art, science, learning or history?

4.5 European Union Treaty and Secondary EU legislation

Article 128 of the Treaty on European Union [58] refers to the need to protect 'cultural heritage of European significance'.[59]

The EU adopted two instruments of importance as part of a process of preparation for the disappearance of border controls and the establishment of the free movement of goods within the region. The exercise of putting a check on smuggling of national treasures resulted in –

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[56] 1982 QB 349; reversed 1982 3 All ER 432 (CA); appeal dismissed 1983 2 All ER 93 (HL).

[57] *See* the Import, Export and Customs Powers (Defence) Act 1939 with ministerial announcement on the open general export licence, 7 July 1989.

[58] Treaty on European Union *OJ* 1992 C191.

[59] Title IX 'Culture' Article 128.

- Council Regulation (EEC) No. 3911/92 of 9 December 1992 on the export of cultural goods,[60] which subjects categories of goods to harmonised export controls and enforces source nation export controls at the Community's external borders.
- Council Directive (EEC) No. 93/7 of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a member state,[61] which subjects categories of goods to harmonised controls in respect of restitution and enforces source nation export controls within the EC.

The two instruments of secondary legislation complement each other: the Regulation is intended to regulate trade with third countries, while the Directive introduces a measure of co-operation between member states following the removal of internal border controls. The Regulation calls for Community-wide enforcement of national export controls by introducing an EC export licence for works destined for third countries. The Directive improves co-operation between national customs authorities and police forces in tracking down assets illegally exported from one member state to another. Already it is evident that very few relevant cases will arise under the Directive. Moreover, its scope is restricted.

Various terms are used by Community legislation to denote objects of cultural significance. Whereas Article 36 of the Treaty refers to 'national treasures', which can be wider and at the same time narrower than the Italian 'patrimonio artistico, storico e archeologico' (or artistic, historical and archaeological heritage), secondary legislation refers to 'cultural goods' (Regulation on export) or 'cultural objects' (in the Directive on return). These terms are not synonymous and need to be interpreted in the context of the legislation concerned.[62]

In the first Italian Art Treasures case, the Court of Justice pointed out that despite their uniqueness, works of art nearly always qualify as goods within the meaning of Article 9(1) EC, namely

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[60] *OJ* No. L I/395/1, 31 December 1992 (*OJ* No. L 395/1); entered into force on 30 March 1993.

[61] Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a member state *OJ* No. L 74/74, 27 March 1993 under 'Acts whose publication is not obligatory'. The Directive covers requests made for return since 1 January 1993, but member states are free to subject earlier requests to the provisions.

[62] Von Plehwe 'European Union and the Free Movement of Cultural Goods' 1995 *European Law Review* 431, 434.

> products having a monetary value (which), as such, may be the object of commercial transactions.[63]

The licence introduced by the Regulation, which is valid in all member states, applies only to certain classes of goods, referred to as 'cultural goods' (Article 1). These are listed in an Annex, and include products of archaeological excavations and archaeological finds more than 100 years old; elements of artistic, historical or religious monuments; and archaeological sites that have been dismembered, including furniture more than 100 years old.

The lists that appear in the 1970 Unesco and 1995 Rome Convention are not identical to the enumerative lists annexed to recent European Union secondary legislation. The lists that apply in the European Union Directive and Regulation –

- expressly cover religious monuments or sites and certain 'vintage' goods of clearly defined age;
- do not mention objects of ethnological interest;
- are confined to objects of a certain minimum age.

Defined minimum age limits are absent from the Rome (Unidroit) and Unesco Conventions.

There are differences of opinion as to what constitutes a national treasure and as such, what is not allowed to leave the country. It is up to each member state to establish its own list of prohibited exports. The Council's definition of cultural objects is wide and general.

Due regard must be given to as yet unharmonised national laws, including mandatory rules and the rules pertaining to the conflict of laws. Since the Treaty concept of 'national treasure' is open to the content ascribed to it by the member states, one of the main questions is whether a work of art needs to originate in a certain country or pass some form of 'most significant relationship' test in order to qualify as 'national'.

In general, each nation will apply its own 'closest connection' test in determining the value of an

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[63] Case 7/68, *Commission v Italy*, [1968] E.C.R. 633, 642 ('Italian Art Treaures').

object for its national cultural heritage, which, as a rule, will be based on territorial considerations, thereby avoiding complex problems of attribution.[64] In what follows, we turn to national examples and the terminology used for purposes of those definitions.

5. DEFINITIONS IN SELECTED NATIONAL LAWS

Many, but by no means all, of the objects that states feel constrained to protect are old and the majority of national laws define protected categories of objects by age. This view may be inadequate in as far as modern art may have substantial artistic or historical significance. Some countries protect classes of artefacts that are unique to their national histories and are generally items of considerable historic and artistic merit. They can be 'the centerpieces of active cultures and religions, illustrations of the changing patterns of aesthetics, anthropological records of previous societies, beautiful and desirable items which confer prestige on their owners, or commodities in the international art market'.[65]

In practice, there are generally three systems of definition in relation to cultural objects –

- the enumeration system, which mentions specifically each type of item that it proposes to protect;
- the categorisation system, whereby a very general description is given of what is to be protected;
- the classification system, according to which a specific object is only protected when a specific administrative decision is taken to protect that object.

Many countries have adopted combinations of these systems. The following national laws from Europe are selected for illustration –

- Germany, as an example of the categorisation system;
- Italy, as an example of a combined categorisation and classification system;
- the Netherlands, as an example of the enumeration system;
- the UK, as an example of the classification system, which offers piecemeal protection;

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[64] Von Plehwe 1995 *European Law Review* 434.

[65] Borodkin 'The Economics of Antiquities Looting and a Proposed Legal Alternative' 1995 *Columbia Law Review* 377.

- Turkey, which uses an extensive list in respect of some property but categorises other kinds of property; and
- Canada and Cyprus, as systems that rely on the combination of inventory and administrative order.

The populations in most of the European examples appear comparatively high on the Human Development Index (HDI).[66] Canada is a non-European example of a country using a classification system in combination with a control list. It represents a modern state with a high developmental level. Mozambique and Cyprus are notably different. Mozambique, *e.g.*, represents a system from the Southern African region with a particularly low developmental level. Turkey has a particularly long history of legislation in respect of cultural objects.

5.1 Germany

The German Law for the Protection of German Cultural Property against Exportation Act (*Gesetz zum Schutz deutchen Kulturgutes gegen Abwanderung vom 6 August 1955*) contains criteria that are very similar to the Waverley criteria. A free translation of § 1 reads that works of art and other cultural objects, including library resources, the export of which would amount to a significant loss for the cultural heritage of Germany, must be entered into a register of cultural objects of national significance in the country in which the object is found at the time at which this law becomes effective.[67] Following a decision by the federal states' ministers of culture in 1983, the law is also applied to property only recently imported into Germany if the artist is of international renown or the work of art is of particular importance for German art and/or the history of German art. Modern art is also included.[68]

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[66] The Human Development Index includes among its indicators: per capita income, life expectancy, educational attainment and wealth distribution. Alternative universal indicators are, as yet, unable to move away from ethnocentric models of development. A threat to diversity is inherent in the assumption that all societies must follow the same path in realising the goal of development.

[67] Paragraph 1 provides:

> 1. Kunstwerke und anderes Kulturgut – einschliesslich Bibliotheksgut – deren Abwanderung aus dem Geltensbereich dieses Gesetzes einen wesentlichen Verlust für den deutschen Kulturbesitz bedeuten wurde, werden im dem Land, in dem sie bei Inkrafttreten dieses Gesetzes befinden, in ein "Verzeichnis national wertvollen Kulturgutes" eingetragen.

[68] Kulturministerkonferenz, decision taken on 20 May 1993, *GMBL* 1983, 442; von Plehwe 1995 *European Law Review* 435.

The *Gezetz zur Umsetzung der Rechtlinie 93/7/EC des Rates über die Rückgabe von unrechtmässig aus dem Hoheitsgebiet eines Mitgliedstaates verbrachten Kulturgütern vom 15 Oktober 1998*[69] implements the EU Council Directive in Germany. According to § 1 in chapter 1, cultural objects are defined as all objects protected against export because they appear in the register of cultural objects of national significance or in the register of archival materials of national significance, or any object in respect of which an application has been lodged for entry into the register and the application has been made public.[70]

Both examples of German legislation provide a very general description of what is to be protected, and use a broad category when referring to cultural objects that qualify for protection.

5.2 Italy

Law No. 1089 of 1 June 1939 contains provisions on the guardianship of things of artistic and historic interest.[71] Translated, article 1 reads as follows –

> Things movable and immovable that represent artistic, historical, archaeological and ethnographic value are subject to this law, including:
> (a) things related to palaeontology, prehistory and primitive civilisations;

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[69] *Bundesgesetzblatt* 15.3162.

[70] Paragraph 1 reads:

> Geschützte Gegenstände
>
> 1. Kulturgut im Sinne dieses Abschnitts sind alle Gegenstände, die nach dem Gesetz zum Schutz deutschen Kulturgutes gegen Abwanderung durch Eintragung in das "Verzeichnis national wertvollen Kulturgutes" oder in das "Verzeichnis national wertvoller Archive" geschützt sind oder für die ein Eintragungsverfahren eingeleitet und die einleitung des Verfahrens öffentlich bekanntgemacht worden ist.

[71] L. no. 1089 1 June 1939 on Protection of Things of Artistic or Historical Interest, Article 1. This law succeeds the earlier regulation in the Law of 20 June 1090, no. 364; Law of 23 June 1912, no. 6888; Royal Decree of 30 January 1913, no. 363; Decree Law of 3 February 1918, no. 348; Decree of 22 November 1925, no. 2192.

> Capo I. Disposizioni generali, art.1:
>
> Sono sogette alla presente legge le cose, immobili e mobili, che presentano interesse artistico, storico, archeologico o etnografico, compresi:
>
> le cose che interessano la paleontologia, la preistoria e le primitive civiltà;
>
> le cose d'interesse numismatico;
>
> i manoscrtitti, gli autografi, i carteggi, i documenti notevoli, gli incunaboli, nonché i libri, le stampe e le incisioni aventi caraterre di rarità e di pregio.
>
> Vi sono pure compresi le ville, i parchi e i giardini che abbiano interesse artistico o storico.
>
> Non sono sogette alla disciplina della presente legge le opere di autori viventi o la cui esecuzione non risalga ad oltre cinquanta anni.

(b) things of numismatic interest;
(c) manuscripts, autographs, correspondence and important documents, incunabula and also books, prints and engravings having a characteristic rarity and value.

Villas, parks and gardens are also included if they have artistic or historical interest.
Not included in this law are works of living authors, or their works that were performed in the course of the last fifty years.

Exportation and importation instructions refer to objects of artistic, historic, archaeological, ethnographical, bibliographical, documentary or archival interest.[72] Exportation is forbidden when it will cause damage to the national historical and cultural patrimony. The competent public authority[73] defines the criteria. Objects covered by this Law cannot be exported if they have not been previously inventoried by the relevant Department.

A person wishing to export an object of cultural interest must obtain a permit. The exporter must declare and display the objects, and must declare the cash value of the objects. Any dispute regarding the cash value is decided by the Minister of National Education after consultation with the National Council for Education, Science and Arts.

Law No. 1089 was enacted largely with the intention to temper Mussolini's goodwill towards Nazis such as Goering, whose appetite for Renaissance paintings was well known.[74]

The Italian law gives a very general description or category of what qualifies to be protected, but combines this with the relevant moment of protection, namely when a specific administrative decision classifies an object as worthy of protection (combined system of definition).

It is a well-known fact that, in an effort to preserve the originals and protect them against theft and pollution, countless sculptures have been replaced with copies made of plastic materials.

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[72] L. no. 1089 1 June 1939 on Protection of Things of Artistic or Historical Interest, Article 35; Presidential Decree No. 1409 of 30 September 1963.

[73] This may include, among others, the Superintendent Office of Antiquities and Fine Arts; Superintendent Office of Libraries or Superintendent Office of Bibliography.

[74] Gattini 'The Fate of the Koenings Collection' 1997 *ICJP* 81, 88.

5.3 Netherlands

The Netherlands Conservation of Cultural Heritage Act[75] employs the term 'protected objects'. The Netherlands system is an example of the enumeration system, as it relies on a list of protected objects. This list does not include publicly owned material.

Article 13 of the New Civil Code[76] defines 'treasure' as an object of value that has been hidden for so long that the owner can no longer be found. The question arises to what extent the law of treasure trove applies to objects of artistic or cultural value. The Monuments Act, 1988[77] defines monuments as 'objects, manufactured at least fifty years ago, which are, because of their artistic, research or historical-cultural value, of general interest'. Article 43(1) provides that movable monuments found in the course of excavation, the owner of which cannot be found, are the property of the state. Unlike the Monuments Act, the Civil Code does not make a distinction based upon age. The Civil Code rule regarding treasure reforms the traditional regulation of treasure trove by imposing a link between the length of time for which an object has been hidden and the inability to identify the owner.[78]

5.4 United Kingdom

The UK system of definition has been selected as an example of the classification system. Legal protection of cultural objects applies in the event of export. An export licence is required for any item more than 50 years old which exceeds a certain value. Currently, this value is £ 40 000 for oil and tempera paintings, other than portraits, with a graded scale for other types of material.[79] The export licence of an outstanding heritage item may be withheld for a period to allow the public collections in Britain the opportunity to acquire the item at the current market price.

The UK system of protection is one that offers piecemeal protection, principally because

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[75] Wet tot Behoud van Cultuurbezit, Wet van 1 Februari 1984, *Staatsblad* 49.

[76] The Dutch Civil Code 1838 was replaced by a New Code on 1 January 1992.

[77] Monumentenwet, Wet van 23 December 1988, *Staatsblad* 638.

[78] Forder 'Report 2: New Treasure Trove Legislation in the Netherlands' 1992(1) *IJCP* 396.

[79] Import, Export and Customs Powers (Defence) Act 1939 with ministerial announcement on the open general export licence, 7 July 1989.

archaeological preservation and the acquisition of antiquarian finds have long been governed by the ancient English doctrine of treasure trove as a royal prerogative. Since it was widely recognised that the law of treasure trove is patently inadequate in terms of protecting the public interest in objects of archaeological or cultural significance, legal reform has resulted in a new Treasure Trove Act of 1996.[80] This law reform has done little to change the legal picture of protection of portable antiquities as one of piecemeal protection based on narrow classes of treasure.

The definition of treasure in section 1(1) of the Treasure Trove Act requires a proportion of precious metal. Treasure is defined as –

> (a) any object at least 300 years old when found which —
> (i) is not a coin but has metallic content of which at least 10 per cent by weight is precious metal;
> (ii) when found, is one of at least two coins in the same find which are at least 300 years old at the time and have that percentage of precious metal; or
> (iii) when found, is one of at least ten coins in the same find which are at least 300 years old at that time;
>
> (b) any object of at least 200 years old when found which belongs to a class designated under section 2(1) (*i.e.* designated by the Secretary of State by Statutory Instrument to be of outstanding historical, archaeological or cultural importance);
>
> (c) any object which would have been treasure trove if found before the commencement of section 4;
>
> (d) any object which, when found, is part of the same find as –
> (i) any object within paragraph (a), (b) or (c) found at the same time or earlier; or
> (ii) an object found earlier which would be within paragraph (a) or (b) if it had been found at the same time.

While the Act extends protection to objects associated with treasure (see sub-paragraph 1(1)(d) above), complete and coherent protection for portable antiquities is still not guaranteed. The determination whether an object will be preserved as part of the national cultural heritage and will be made available to archaeological and historical researchers rests with a coroner's inquisition. Non-metallic objects, objects of base metal, leather, glass, statuary etc. fail to receive the statutory protection reserved for metal objects, and the common law will apply to the issue of

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[80] Marston & Ross 'Treasure and Portable Antiquities in the 1990s Still Chained to the Ghosts of the Past: The Treasure Act 1996' 1997 *The Conveyancer & Property Lawyer* 273.

possession, ownership and reward.[81]

The ownership of treasure is governed by section 4 of the Act. The treasure vests in the Crown or any franchisee,[82] subject to prior interests and rights deriving from the time the treasure was left where it was found, and subject to any disclaimer under subsections 6(3) and (4). Where a museum is willing to acquire the object, an *ex gratia* reward will usually become payable.[83] At any time, the Secretary of State may disclaim the Crown's title to treasure.[84] After disclaimer the treasure will be deemed not to have vested in the Crown,[85] and may be delivered to any person in accordance with the Code of Practice. In all likelihood and subject to the resolution of any dispute, this means that the coroner would return the object to the finder. Section 11 of the Act requires the preparation, review and revision of a Code of Practice. The main provisions of the Act entered into force only after the Code was finalised, namely on 24 September 1997, and apply to items found after that date.

Statutory protection exists for sites that are scheduled within the Ancient Monuments and Archaeological Areas Act of 1979. Appropriate measures providing for a broader spectrum of objects is still being awaited. It is uncertain whether the UK Government will proceed on the basis of primary legislation or of a voluntary Code of Practice.

The statutory instrument that implements the European Union Directive in the UK entered into force on 2 March 1994.[86] The UK Return of Objects Regulations grant to every member state a

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[81] *Attorney-General of the Duchy of Lancaster v G.E. Overton (Farms) Ltd.* [1982] Ch. 277; *Parker v British Airways Board* [1982] 1 All ER 834. The ordinary rule in the case of objects found on land is that of 'finders keepers' unless the landowner exerts *de facto* control over things found on the premises and possessed a co-existent intention to control which is sufficiently manifested. In the case of articles found in land, the object is treated as realty and interference without licence renders the finder a trespasser.

[82] According to section 5 Treasure Trove Act, 1996, the franchisee is the person who was immediately before the commencement of section 4 (or apart from the Act, as successor in title, would have been) the franchisee of the Crown in right of treasure trove for the place where the treasure was found.

[83] Section 10 Treasure Trove Act, 1996.

[84] Section 6(3) Treasure Trove Act, 1996.

[85] Section 6(4)(a) Treasure Trove Act, 1996.

[86] The Return of Cultural Objects Regulations 1994, SI No. 501 of 1994. Discussed by Palmer 1994 *Current Legal Problems* 228 ff.

right of action to recover certain defined cultural objects that were unlawfully removed from its territory, provided that removal from the national territory of the member state has not been legalised at the time the proceedings are initiated. To fall within the ambit of the Directive, the object must simultaneously constitute –

(i) a national treasure of artistic, historic or archaeological value under national legislation in the context of Article 36 of the Treaty of Rome (Directive, Article 1(1)), and

(ii) a cultural object within one of the categories specified in the Schedule to the Directive.

In some cases the object must have a monetary value above certain financial thresholds. The obligation to return is confined to objects unlawfully removed from the territory of a member state on or after 1 January 1993.

5.5 Turkey

Turkey is very active in the Council of Europe and has a long history of legislation concerning cultural objects. The Turkish system was the first to realise and take advantage of the value of a serious emphasis on inventory systems as a means to protect the movable cultural heritage against illegal trafficking.[87] Atatürk encouraged the preparation of an inventory of ancient and historical monuments during the early 1930s.[88]

Turkey's current legislative framework includes an Antiquities Law introduced in 1983,[89] Article 6 of which describes the immovable property that is covered by the law for the purposes of protection in a long and comprehensive list. The Act extends its protection to cultural and natural heritage on land and under water. Article 3(a)(i) of the Antiquities Law defines the term 'cultural property' for the purposes of this law as –

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[87] O'Keefe and Prott *Vol. III* 156-159; 292-295; Unesco Recommendation for the Protection of the Movable Cultural Property (Paris 28 November 1978) Article 12(a).

[88] Blake 'The Protection of Turkey's Underwater Archaeological Heritage – Legislative Measures and Other Approaches' 1994 *IJCP* 273, 276 ff with further reference.

[89] Law Protecting Cultural and Natural Property, Kanun No. 2863 published in Regulations Concerning Cultural and Natural Property, The Republic of Turkey, Ministry of Culture (Ankara 1990) 1-21, hereinafter Law 2683. See Blake 1994 *IJCP* 273, 276 ff.

> [A]ll movable and immovable property above or underground or underwater that belongs to the prehistoric and historic periods and relates to science, culture, religion and the fine arts.

Article 23 defines the movable cultural and natural property as –

> (a) All kinds of cultural and natural property that belong to geological, prehistoric or historic periods, that have documentary significance in terms of geology, anthropology, prehistory, protohistory, archaeology, art history and ethnography ...[90]

Article 5 is particularly significant for litigation that requires proof of the content of Turkish law before foreign courts. It states that –

> All movable and immovable cultural and natural property that needs to be conserved and is found or is to be found on property belonging to the state, public institutions or private institutions and individuals is considered state property.

Article 11 deals with owners' rights and responsibilities. It states that 'cultural and natural property to be conserved cannot be acquired through possession' (and by implication, not through acquisitive prescription).

The reliance placed on a list of immovable property marks the Turkish system as an enumeration system, but the categorisation approach is used in respect of movable cultural and natural property.

5.6 Canada

To preserve significant examples of Canadian heritage in movable cultural property, Canada's Cultural Property Export and Import Act (CPEIA)[91] utilises a control list and a system of export permits. One of the purposes of the CPEIA is to ensure that significant Canadian artefacts, works of art and other items remain in Canada.

The Scheme of the CPEIA is fourfold –

- to establish the Canadian Cultural Property Export Review Board;
- to set up controls for the export of certain cultural property from Canada;

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[90] Translator and Commentator: Blake 1994 *IJCP* 277.

[91] R.S.C. 1985, c. C-51; see also Katz 'Penal Protection of Cultural Property: the Canadian Approach' 1993 *IJCP* 11.

- to institute tax advantages for owners of cultural property; and
- to implement the 1970 Unesco Convention by instituting export controls on illegally exported foreign cultural objects.

In order to monitor and, if necessary, restrict artefacts leaving the country, the CPEIA empowers the Governor in Council to create a Canadian Cultural Property Export Control List. Section 11(1) CPEIA employs criteria similar to the Waverley criteria.

Essentially, the control list forms the basis of the system. The criteria for inclusion in the list are set out in section 4 CPEIA. The control list may be comprised of objects or classes of objects which are situated in Canada, 'regardless of their place of origin or the nationality of their creator', deemed necessary to be controlled in order to preserve the national heritage of Canada. Section 4 provides also that aboriginal artefacts more than 50 years old and with a value of more than $ 500 may be included in the list. Section 2 (Group II) of the current list includes objects made by indigenous populations, of the territory that is now Canada, that have a fair market value in Canada of more than $ 2 000.[92]

An object that falls within the purview of the control list can be exported from Canada only if the person receives an export permit or a general permit under CPEIA. The permit officer is obliged to refer an application for an export permit in respect of an object that is included on the control list, to an expert examiner. The expert may advise against export if the object meets two criteria –

(a) the object is of outstanding significance by reason of its close association with Canadian history or national life, its aesthetic qualities or its value in the study of the arts or sciences; or

(b) the object is of such a degree of national importance that its loss to Canada would significantly diminish the national heritage.

An appeal lies to the Canadian Cultural Property Export Review Board. The Board comprises a chairperson and nine persons (maximum) appointed by the government.[93] If the Board supports

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[92] SOR/77-620.

[93] Section 18.2 provides that in addition to its chairperson and one other person representing the general public, the Board consists of up to four members who are art or museum professionals and up to an additional four members

the expert examiner's opinion that the object is of outstanding significance and meets the degree of national importance, then it may impose a delay period of up to six months to allow Canadian institutions and public authorities a chance to receive notification and an opportunity to purchase the object. In the absence of offers to purchase, the export permit must be issued.[94]

5.7 Cyprus

The system of definition in use in Cyprus relies on both an inventory and an administrative order.

The Antiquities Law of 1935 as amended[95] defines an 'ancient monument' as –

> (a) any object, building or site specified in the First or Second Schedule to this Law;
> (b) any other object, building or site in respect of which the Governor in Council has made an order under section 6 of this Law.

Section 6 deals with the declaration of objects, buildings or sites considered to be of public interest by reason of their historic, architectural, traditional, artistic or archaeological interest. The definition of 'ancient monument' includes 'any part of the adjoining land which may be required for the purpose of fencing, covering, or otherwise preserving the monument from damage, as also the means of access to such monument'.

'Antiquity' means any object, whether movable or immovable or a part of the soil, which has been constructed, shaped, inscribed, erected, excavated or otherwise produced or modified by human agency earlier than the year A.D. 1700, together with any part thereof which has been added, reconstructed or restored at a later date.

5.8 Mozambique

Among the fundamental principles guiding the state, the preamble of *Lei* no. 10/88[96] refers to the

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who are dealers or collectors. No aboriginal or Inuit has ever been appointed to the Board, presumably because of the way in which the qualifications and expertise criteria are applied. See Case Note by Paterson 'Valuing Art for Tax Purposes in Canada' 1997 *ICJP* 19, 110.

[94] Walker & Ostrove 'The Aboriginal Right to Cultural Property' 1995 *UBCLR* 23-24.

[95] Antiquities Law of 31 December 1935, Cap. 31 (Cyprus); Unesco *Collection of Legislative Texts Concerning the Protection of Movable Cultural Property* (1985).

[96] *Boletim Da República, Quinta-feira, 1 Serie-Número 51* of 22 December 1988.

responsibility of the state to promote culture and the national character. The preamble refers also to the constitutional obligation of the state to identify, register, preserve and evaluate tangible and intangible cultural assets.

The definition of cultural heritage, freely translated, is stated to be the totality of tangible and intangible assets created by the people of Mozambique or which became theirs by virtue of a long history, which are important on account of their significance for Mozambican culture.[97] Intangible cultural assets are defined as the essential elements of the collective memory of the people such as history, oral literature, traditions of peoples, rites and folklore, indigenous languages and also human inventions and all forms of artistic and literary creativity irrespective of the form in which they are manifested.[98] Tangible cultural assets are those movable and immovable assets that form part of the cultural heritage of Mozambique on account of their archaeological, historical, bibliographic, artistic or scientific value.[99] Natural areas of cultural significance situated in areas protected by law enjoy protection under this law.

Section 3(4) defines immovable cultural assets as including monuments, collections, caves or sites and natural formations and buildings of particular architectural interest. Under collections are included groups of buildings which, on account of their architecture, homogeneity or their place in the landscape, are important from an historical, artistic or scientific point of view. Natural formations refer, among others, to physical and biological formations that hold particular interest from an aesthetic or scientific point of view, such as those existing on Inhaca Island and the islands of Bazaruto.

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[97] Section 3(1) reads:

> É o conjunto de bens materiais e imateriais criados ou integrados pelo Povo moçambicano ao longo da história, com relevância para a definição da identitade cultural moçambicana. O património cultural é constituído por bens culturais imateriais e materiais.

[98] Section 3(2) reads:

> São os que constituem elementos essenciais da memória colectiva do povo, tais como história e a literatura oral, as tradições populares, os ritos e o folclore, as próprias línguas nacionais e ainda obras do engenho humano e todas as formas de criação artística e literária independentemente do suporte ou veículo por que se manifestem.

[99] Section 3(3) reads:

> São os bens imóveis e móveis que pelo seu valor arqueológico, histórico, bibliográfico, artístico e científico fazem parte do património cultural moçambicano. Os elementos naturais, sítios e paisagens protegidos por lei ou passíveis de tal protecção, em razão do seu valor cultural beneficiam das disposições da presente Lei.

According to section 3(5), movable cultural assets include the following categories –

(a) objects which, because of their rarity or singularity, are of scientific interest;

(b) archaeological, numismatic, philatelic and heraldic objects;

(c) antique manuscripts, rare editions etc. of historical, bibliographic and documentary interest;

(d) historical objects and documents related to economic, social and cultural services, institutions and organisations;

(e) ethnographic objects, utensils, tools, instruments, machines, weapons, typical dress etc.;

(f) sculpture, popular art, decorative art;

(g) films and sound recordings;

(h) documents and objects belonging to persons who played a role in the national liberation movement or other historical figures known for their role in the political, economic, social or cultural struggle.

The country relies on its natural heritage to attract tourists. Mozambique's legislation relies heavily on the definitions used in the 1972 World Cultural and Natural Heritage Convention and the 1985 Convention for the Protection of the Architectural Heritage of Europe. While the formal commitment to protect cultural heritage is convincing, it is highly doubtful whether group and national tensions have been solved. The level of poverty also impacts negatively on this commitment.

Mozambique has not sought restitution of any cultural object since independence.

6. REGIONAL CULTURAL HERITAGE

The UK and German law illustrate the relation between national cultural heritage and European cultural heritage. Moreover, they show that national identity can be respected and regional differences accommodated at the same time.

The notion of a regional cultural heritage reflects the need for greater unity among countries of a particular geographical area. Regional European organisations such as the Council of Europe and the European Communities concentrate on documenting essentially European heritage.

The cultural heritage activities of the Council of Europe within the framework of the European

Cultural Convention focus on two broad areas: monuments and sites, considered individually and as part of Europe's architectural heritage, and the archaeological heritage. The Council has implemented and broadened the concept of an integrated 'conservation and promotion of heritage' and has linked it to a regional planning strategy and the conditions governing the quality of life. More recently, statements broaden the concept to include elements of folk tradition and intangible heritage.

In the free trade context of the European Union, the reciprocal rights of action granted to all the Community member states in the courts of fellow members, reflect elements of the idea of a European cultural heritage.

Manipulative use of the concept of a European cultural heritage may effectively block the return of cultural objects to European states. The most famous example is the Parthenon Marbles in the British museum.

7. CONCLUSION

When used in an anthropological sense to indicate cultural achievement, 'culture' may refer to what is created, maintained and transplanted through mental labour, and thus to what human beings make in order to adapt to their environment. How the environment is viewed may reveal much about the God-concept of a nation or a group. It may connote an inward process, harmonious development or self-development, or even 'style'. It must be acknowledged that culture is a highly complex social phenomenon, particularly if seen as a strategy for self-protection and survival in a complex environment. Its field of reference may be seen as focussed on action and includes the promotion of literature and the arts or conservation of historical objects.

For purposes of legal discourse, 'culture' may be defined as an all-encompassing and all-determining concept, a 'network of representations'[100] – texts, images, talk, codes of behaviour, the narrative structures organising these, law and legal science: all that is created within an

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[100] Hartman (1997) 32 with reference to Frow & Morris (eds) *Australian Culture Studies* (1993).

ethnical context to ensure survival, adaptation and development.

Race and common family decent, common language, religion, class and caste are powerful factors in the self-selection of peoples into ethnic or cultural units. While the answer to the question whether differential treatment designed to ensure cultural survival indefinitely is legally justified, may be obvious, it is also obvious that the idea of culture may unify or differentiate. Whenever its meaning shifts to denote perfection, it becomes associated with integration, inclusion and purity. Absolute inclusiveness at the level of the group may engender conflict at the level of the nation. Through the development of their national cultures, states enrich the culture of humankind. However, the tension between national culture and group culture is illustrated by the historical lessons that ethnic solidarity has taught.

At the level of the nation and the international community, belief in one majority, one world view, one tradition and one truth would be to gloss over the identity-giving function of 'culture'. If this function of culture is denied, the term is denied one of its fundamental meanings, namely the traditional, intellectual and spiritual attributes of specific groups of people. If state power must give precedence to one culture, plurality of cultures cannot be appreciated and a democratic culture becomes unachievable.

Any definition of the concept 'culture' is at best a product of the culture and values of those making the definition. The expansion in the meanings of culture influences the definitions accorded to cultural objects and cultural heritage. The wider the contexts in which cultural objects are imbued with social functions, the greater the potential for conflicting interests.

Public international law cannot provide a single acceptable definition of cultural heritage and does not usually prescribe domestic definitions. The tendency is to refer to the significance of cultural heritage for humankind (in cases where the international character of great art for example, cannot be denied) but to respect the defining power of the domestic sphere. The destruction of Mayan stelae affects all who seek to understand the origins of human development, not only the state of Mexico or Guatemala. The random selection of conventions illustrates different methods of definition. European Community legislation denotes objects of cultural

significance as 'national treasures' while secondary legislation refers to 'cultural goods' (Regulation on export) or 'cultural objects' (in the Directive on return). The Commonwealth Scheme leaves the definition of the heritage covered by the Scheme to the country of export, but enjoins members to consider as part of the Scheme only heritage that is of national importance. The 1970 Unesco Convention contains its own list of objects, while the 1995 Rome Convention defines the term not only by means of lists attached to the Convention itself but also by means of a broad definition. The 1972 World Cultural and Natural Heritage Convention requires States Parties to compile inventories. The relative effectiveness of these methods is discussed in subsequent chapters.

The exploration of definitions in national laws shows that countries such as Mozambique have taken their cue from conventions and have added little to these. Mozambique's legislation relies on the definitions used in the 1972 World Cultural and Natural Heritage Convention and the 1985 Convention for the Protection of the Architectural Heritage of Europe. The systems of definition in relation to cultural objects utilised in national laws include the enumeration system, the categorisation system and the classification system according to which a specific object is only protected when a specific administrative decision is made to protect that object. In the UK, the importance of a legal determination that an object discovered is treasure trove is that it then becomes the property of the Crown and is likely to be retained in an appropriate museum. The law of treasure trove is still unsatisfactorily limited to finds of gold and silver that comply with section 1(1) of the Treasure Trove Act, 1996. Only these objects entail requirements of reporting, recording and study. The ranking of interests under the common law has not been replaced by the statutory reforms, so that the UK system still lacks flexibility.

The UK law illustrates the so-called classification system or 'passport approach', which leaves the decision for the moment of export. Canadian law illustrates the alternative, to draft an inventory or control list. Cypriot law combines an inventory with a provision that an administrative order may add to the list. With the exception of Turkey, the terms used are restrictive and specific. Turkish laws are comparatively progressive in their choice of terminology to denote cultural objects and in the broad-based manner in which they define 'cultural heritage'.

It has been said that cultural rights are affected by the same difficulties as the contested concept of 'culture', with the added uncertainty about the classification of the right to culture.[101] We turn our attention to this aspect in chapter 2.

[101] Beukes 'The International (Law) Dimension of Culture and Cultural Rights: Relevance for and Application in the "New" South Africa' 1995 *SAYIL* 127.

CHAPTER 2

CULTURAL RIGHTS AND NATIONAL LAW

1. INTRODUCTION

No study concerning the preservation of cultural heritage could ignore the basic law and the cultural background of the basic law.[1] Since culture often surfaces as part of the human rights debate if the context is a constitutional one, the place of cultural rights within that context is considered in this chapter.

Constitutional law examples are given as an introduction to a discussion on the nature of the right to culture and the potential clash between the right to culture and the right to equality.

National bills of rights aim to protect those values that societies consider as fundamental. International human rights documentation, regional documents and examples of national laws from across the world form part of the backdrop to a discussion of the right to culture. In order to know what needs to be done to preserve cultural rights, one must also take full account of the interface between international and domestic law. The chapter therefore contains an international background. In addition, the interpretation of municipal courts of the rights enshrined in a bill of rights is an important source of international human rights law. Court interpretations indicate how values which conflict intrinsically and refuse to fall into a pattern of harmony, can be reconciled.

In this chapter, the nature of the state is considered. One may start by asking how states approach the protection of their cultural heritage and how they practise their right to determine their culture. While the first part assesses the relation between culture and the state, the international part considers –

- a sample of comparative constitutional provisions;
- international human rights law (the right to culture);

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[1] Häberle *Kulturstaatlichkeit und Kulturverfassungsrecht* (1982) 21-24.

- regional human rights law;
- general international law criteria and mechanisms for return; and
- international law mechanisms for protection.

2. NATIONAL LAW CONTEXT

2.1 The nature of the state

In a constitutional state (*Rechtsstaat*) the government does not govern through the exercise of naked power, but through and with the aid of the law. Constitutional theory often distinguishes between the 'material' and the 'formal' constitutional state. In the formal sense, 'constitutional state' implies a constitution in the nature of a fundamental law, which guarantees the independence of the judiciary, protects fundamental human rights, maintains a division between the legislative, executive and judicial institutions of state and provides for procedures to give effect to these formal characteristics. The material constitutional state possesses all the features of the formal constitutional state but is imbued with abiding values that render law and its application meaningful and just. It creates space for values of freedom, equality and justice to guide the state to self-realisation and to promote the common weal of its people.

The descriptive characteristics of the modern constitutional state depict the '*Rechtsstaat*-in-rest'.[2] However, conflict, strife and corruption may 'set it into motion', so that the process of the constitutional state is more aptly characterised by normative conflict-resolution. Lawful and just solutions are arrived at by way of prescribed legal processes, not by way of the will of the majority. The authority of the democratic majority prevails only for as long as that authority is exercised within the confines of the law.

Socio-economic rights are considered particularly important in a welfare state. Successful social states and regional groupings with social charters exist across the world.[3] Economic and social upliftment is not necessarily in conflict with the concept of the constitutional state.

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[2] Wiechers 'Grondslae van die Moderne *Rechtsstaat*/Foundations of the Modern *Rechtsstaat*' *WA Joubert Commemorative Lecture* Unisa, 1998, 4.

[3] Compare the 1961 European Social Charter, 529 *UNTS* 89 (concluded 18 October 1961); entered into force 26 February 1965.

2.2 Taking cognisance of cultural values and cultural difference

Cultural values are an important facet of the liberty and autonomy of the individual. In a democracy, the protection of cultural values constitutes a 'proper public concern'.

On the vital issue of whether a constitutional democracy ought to notice cultural differences and extend preferential treatment on that basis, or to remain committed to equal treatment regardless of cultural membership, much could be gleaned from German legal scientists. Huber and Häberle have stimulated the academic debate widely, also in South Africa.[4] Originally, discussions of the historically German concept *kultuurstaat*/'cultural state' centred on the principle of the welfare state. Today it is reflected on as part of broad discussions.[5]

Authorities agree that '*kultuurstaat*' does not denote *a form* of state, but rather has to do with the ideal and ideological *contents* of a state model, all the branches of which operate subject to the laws and constitution of that state.[6] This model is characterised by the constitutional and other mechanisms that provide tolerant, common democratic culture.[7] The state functions as a cultural entity (*Kulturgebilde*) if –

- it respects the freedom and autonomy of culture and does not officially designate a culture;
- it involves itself in cultural life only by serving culture, *i.e.* it protects, cares for, promotes, transfers and carries it forward;
- it promotes culture through concretisation and not by means of propaganda;
- it has competence in matters of culture, is master thereof, becomes identical therewith, so that culture can be master of and provide content to the state.

Häberle subscribes to an open-ended conceptualisation of culture.[8] Culture is an all-determining concept, of which intangibles such as law and legal science form part. On their part, the

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[4] Häberle *Kulturstaatlichkeit und Kulturverfassungsrecht* (1982) 5

[5]. Häberle (1982) 5; Huber 'Zur Problematik des Kultuurstaats' in Häberle (1982).

[6] Van Wyk 1991 *Stell LR* 184-188; Kruger 1994 *Stell LR* 22.

[7] Huber in Häberle (1982) 122, 125-145.

[8] Häberle (1982) 30 ff.

constitution, legal science and legal theory bear a particular responsibility to protect, maintain and promote culture. If legal science takes too wide a view of 'culture'[9] it may degenerate into an umbrella concept devoid of meaning. On the other hand, defining the concept too narrowly may mean that the search for answers is no longer priority.

Häberle holds to the view that the culture mandate of the state works on various levels: the state level, the socio-public level and the private level –

- on the state level, the charge is to actively promote culture by means of competencies formally granted;
- on the socio-public level, the pluralist character of organisations such as churches and labour unions must render them culturally active in accordance with their self-conceptualisation;
- on the private level, the state must protect and support the freedom of the individual who acts to create culture and possibly also to approach self-actualisation in the process.[10]

Within this framework, he describes what the jurist must do and what the state must and may not do. Regarding 'state' and 'law' from the viewpoint of culture, the jurist is directed to use legal science and its normative system (as part of culture in a narrow sense) in a disciplined manner to create a framework in which –

- the culture of the body politic may develop;
- the cultural needs of individuals may be satisfied; and
- the battle concerning public commitment to the nation-building strategies of art and science can be waged.[11]

Protection is necessary, both against political encroachment on the autonomy of culture and against threats emanating from the community. Caring for cultural manifestations includes preservation efforts and efforts to keep single pieces and collections whole. Transfer is facilitated through the pace and structure of education, and ensuring that cultural heritage is accessible to all. Promotion is particularly necessary in relation to what is unknown and less well-known.

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[9] Van Wyk 1991 *Stell Law Review* 190 with further reference.

[10] *Ibid.* 189 ff.

[11] *Ibid.* 191, with reference to Huber.

The following section contains a sample of comparative constitutional provisions. The purpose is to indicate what countries, which display no obvious similarities and share no links, consider to be worthy of protection.

3. SAMPLE OF COMPARATIVE CONSTITUTIONAL PROVISIONS

Since a constitution is often a prominent component of common domain in a nation, a snapshot sample of comparative constitutional provisions and guarantees may prove useful. The choice is not entirely random. Canada is given the most detailed treatment. The Canadian Constitution is similar to the South African Constitution in important respects, and the earlier decisions of the constitutional court make frequent reference to Canadian cases and academic commentary. The Canadian Charter of Rights is closest in its language and structure to the South African bill of rights.[12] Canada also has Commonwealth links. Canadian lawyers are considering reforming the long-established (decentralised) federal system.

Countries such as Italy, Guatemala and Mozambique are given cursory treatment. Italy has been selected as an example of a civil law country with a wealth of treasures and experience with preservation since ancient times. Guatemala has been selected firstly as an example of a constitution that contains a policy to preserve a particular culture and secondly on account of state experience with suits to recover Mayan artefacts. Mozambique has been selected as an example from the Southern African region.

The US Constitution does not contain anything comparable to the above examples. One state constitution has been selected by way of illustration, namely the State of New York.

The relevant provisions of the South African constitution are covered in chapter 8.

3.1 Examples of constitutional protection of cultural heritage

The selection of samples serves to highlight the variety in the measures existing on all levels of government. Even a first and superficial reading reveals that some provisions are more likely to

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[12] Hogg 'Canadian Law in the Constitutional Court of South Africa' 1998 (13) *SAPR/PL* 1.

engender practical cultural sensitivity than others.

3.1.1 Canada

The 1982 Charter of Rights and Freedoms (Part I of the Canadian Constitution Act, 1982) defines and accentuates individual rights similar to those protected in other western democracies. Soon after its adoption the question arose as to how the schedule of rights was related to the claims for distinctness propounded by Québéçois and Canadian Aboriginal peoples or Inuit (so-called First Nation people).

Control of cultural objects is central to the struggle for cultural survival and self-government of Canadian Aboriginal peoples. Aboriginal peoples attempt to regain control over cultural heritage through self-government initiatives, political lobbying for legislative reform, recognition in modern land claims agreements, negotiations with museums and private collectors, and the development of international standards regarding cultural and intellectual property.[13] Essentially, they are lobbying for the right to exclude others in order to preserve their cultural integrity. They demand certain forms of autonomy in their self-government and the competence to adopt legislation deemed necessary for their survival.[14]

The notion of renewal of the Canadian federation has faced a number of setbacks in the last two decades. The Constitution Act of 1982[15] never gained political legitimacy in Quebec. The slant of the Charter has not met with the approval of the Quebec nationalist movement, which regards the duty to preserve, protect and promote their cultural identity as a collective duty. Quebec could not accommodate the Charter, since its procedural safeguards were regarded as alien to the 'distinct society' it regards itself to be within the nation as a whole.

Canadian constitutional writing differentiates between formal equality and material equality. The

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[13] See Macklem *et al Canadian Constitutional Law* (2ed.) (1997) 477 ff.

[14] On the implications of cultural survival policies, see Taylor 'The Politics of Recognition' in Gutmann (ed.) *Multiculturalism* (1994) 25, 51-60.

[15] Schedule B to Canada Act, 1982, Part I.

general equality provision[16] which seeks to ensure that ethnic minorities do not suffer discriminatory treatment, is regarded as ensuring formal equality. The state does not impose its own conviction of what constitutes the good life, but is committed to everyone equally. It places linguistic and cultural minorities on an equal footing with the majority. Substantial equality may result only when it is recognised that different situations cannot be treated in the same manner. Formal equality is bound to be present if the cultural institutions of the majority also serve the minority, but assimilation is likely to occur.

Language rights are constitutionally entrenched and protected in sections 16-20 of the Charter of Rights and Freedoms, Constitution Act, 1982. They are equivalent to the rights protected in Article 27 of the International Covenant on Civil and Political Rights of 1966 (ICCPR), except that they do not comply with the Covenant's standard regarding other minority languages and the education of the children of minorities out of public funds. Much has been written in Canada regarding the instrumental role that law can play to protect language in countries with significant cultural and linguistic diversity, to promote equality and democracy.

In the case of *Eldridge v British Columbia and Another (Attorney-General)*[17] the court examined how indirect language discrimination affects the right to health care. The appellants were deaf residents of British Columbia, who could not communicate with health care providers in the absence of state funded interpretation services. The court took the view that access to health services depended on the patient's ability to pay for an interpreter, and consequently, that the appellants did not enjoy equal benefit of the law. The court considered effective communication to be essential to proper medical care. The court held that the failure on the part of the state to provide interpretation would 'denude the equality provisions from any real meaning'.[18]

In *R v Beaulac*,[19] the issue was the right of an accused to freely assert which official language is his or her own language. The Canadian Supreme Court declined an application by the accused in

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[16] Section 15(1) Canadian Constitution Act, 1982.

[17] (1997) 3 Butterworths Human Rights Cases 137.

[18] At 631.

a murder trial, based on Article 530 of the Canadian Criminal Code, that the members of the jury should be proficient in both official languages. The court based its refusal on the fact that the accused was French-speaking and could understand English. On appeal, the application was granted, on the basis that –

> 'section 530(1) creates an absolute right of the accused to the equal access to designated courts in the official language that he or she considers to be his or her own. ... In my view this is a substantive right and not a procedural one that can be interfered with'.[20]

The Charter of Rights and Freedoms, Constitution Act, 1982, Item 27 provides –

> This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

Item 27 may serve to limit the scope of the other provisions of the Charter and thus ensure the protection or enhancement of cultural diversity. It may also be used to interpret the Charter as implicitly containing linguistic and cultural rights other than those mentioned.[21] While it seems to embody the notion of cultural survival, this provision has not made the Constitution Act more palatable to the Québéçois. In so far as the bill of rights failed to reflect and protect the collective needs of the Canadian society, it has become a source of conflict and division. To date, the ethnic minority's quest for self-determination has not been accommodated.

Section 35(1) of the Constitution Act, 1982, recognises and affirms existing aboriginal and treaty rights if they existed on the date the Constitution Act came into effect. Since aboriginal rights are not defined, Supreme Court rulings have had to do so.

The argument has been made that the fiduciary relationship between the Crown and Aboriginals imposes on the federal government a positive duty to act to prevent the loss of aboriginal cultural heritage. To date no court has imposed such a duty on the Crown.[22] The Canadian Constitution Act does not place a duty on the state to take positive measures in support of cultural diversity.

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[19] [1999] 1 S.C.R. 786.

[20] § 28.

[21] Dlamini in Van Wyk *et al* (eds) (1994) 578.

[22] Walker & Ostrove 'The Aboriginal Right to Cultural Property' 1995 *UBC Law Review* 13, 28.

3.1.2 Guatemala

Guatemala is made up of various ethnic groups, among which are native groups of Mayan descent. In terms of Article 66 of Constitution of the Republic of Guatemala, 31 May 1985, the state recognises, respects, and promotes the way of life, customs, traditions, forms of social organisation of its people, the wearing of Indian dress by men and women, their languages and dialects. Chapter II – 2, Articles 57-62 provide as follows –

> 57: Every person has the right to participate freely in the cultural and artistic life of the community as well as benefit from the nation's scientific and technological progress.
> 58: The right of individuals and communities to their cultural identity in keeping with their values, language and customs is recognised.
> 59: It is the primary obligation of the State to protect, promote and disseminate the national culture; to issue the laws and provisions that encourage its enrichment, restoration, preservation and recuperation; to promote and regulate its scientific research, as well as the creation and application of appropriate technology.
> 60: Paleontological, archaeological, historical, and artistic assets and values of the country form the nation's cultural heritage and are under the protection of the State. Their transfer, export, or alteration, except in cases determined by the law, is prohibited.
> 61: The archaeological sites, collections of monuments, and the Cultural Centre of Guatemala will receive the special attention of the State with the purpose of preserving its characteristics and defending its historic value and cultural assets. The Tikal National Park, the Archaeological Park of Quirigua, the Antigua Guatemala will be subject to a special conservation regime because they have been declared to be the legacy of mankind as well as those that will receive similar recognition.
> 62: The expression of national art, popular art, folklore, and native handicrafts and crafts must be the object of special protection by the State with the purpose of preserving their authenticity. The State will propitiate the opening of national and international markets for the free commercialisation of the work of artists and craftsmen, promoting their production and adequate technification.

The express reference to the protection of folklore is noteworthy and the 'free commercialisation' clause is unique in this context. The question of freedom to alienate cultural heritage and the details of the court cases before US courts are addressed in chapter 6.

3.1.3 Italy

The Constitution of the Republic of Italy (22 December 1947), Article 9, states –

> The Republic promotes the development of scholarship and scientific and technical research. It safeguards the natural beauties and the historical and artistic wealth of Italy.

3.1.4 Mozambique

On 2 November 1990 a new constitution of the People's Republic of Mozambique was unanimously approved by the People's Assembly. It ended one-party rule as well as 15 years of Marxist rule, and instituted a multi-party democracy. The rebel group, Renamo, rejected it.

The Constitution[23] provides in Part 1: Basic Principles, Chapter IV: Economic and Social Organisation, Article 35 –

1. The ownership of natural resources located in the soil and the subsoil, in interior and territorial waters, on the continental shelf, and in the exclusive economic zone is vested in the State.

2. The public domain of the State shall also include:
   a) the maritime zone;
   b) airspace;
   c) archaeological heritage;
   d) nature conservation zones;
   e) hydro-power resources;
   f) energy resources;
   g) other property and assets classified as such by law.

Article 53 states as follows –

1. The State shall promote the development of national culture and identity, and shall guarantee free expression of the traditions and values of Mozambican society.

2. The State shall promote the dissemination of Mozambican culture and shall take action to enable the Mozambican people to benefit from the cultural achievements of other peoples.

Part II 'Fundamental Rights, Duties and Freedoms' contains references to duties regardless of ethnic origin. This Part also refers to equality before the law in all spheres of political, economic, social and cultural affairs, and the right to freedom of scientific, technical, literary and artistic creativity. The limitation is contained in Chapter IV 'Guarantees of Rights and Freedoms', Article 96 –

1. Individual rights and freedoms shall be guaranteed by the State and shall be exercised within the framework of the Constitution and the law.

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[23] Blaustein & Flanz (eds) *Constitutions of the Countries of the World: A Series of Updated Texts, Constitutional Chronologies and Annotated Bibliographies* (1971-).

2. The exercise of individual rights and freedoms may only be limited where the public order or individual rights, freedoms and guarantees are endangered, or where force is used or threatened.

Chapter IX deals with local organs of the state. Article 188 reads –

> The executive organs shall, in their respective geographical area of authority, ensure that economic, cultural and social programmes and obligations of local interest are carried out, in accordance with the Constitution and the decision of the Assembly of the Republic, the Council of Ministers, and the State organs of corresponding or superior authority.

3.1.5 New York

State constitutions in the US contain sample provisions, *e.g.* that of the State of New York[24] provides –

> Article XIV Section 4: [T]he legislature shall ... provide for the acquisition of lands and waters ... outside the forest preserve counties, and the dedication of properties ... which because of their natural beauty, wilderness character, or geological, ecological or historical significance, shall be preserved and administered for the use and enjoyment of the people. Properties so dedicated shall constitute the state nature and historical preserve and they shall not be taken or otherwise disposed of except by law enacted by two successive regular sessions of the legislature ...

3.2 Choices faced by the state in discharging its culture mandate

The state, government, politics and public administration are expressions of culture.[25] In a state which considers itself committed to the principle of equal treatment, the 'difference dilemma' can be managed in one of two ways. The first possibility is that the state can remain neutral towards different conceptions of the good (but remain committed to ensuring that citizens deal fairly with each other and that the state deals equally with all), thereby showing commitment to universal law and standards. Another possibility is to advance specific conceptions of the good life and commit to the accommodation of different cultural communities.[26]

Cultural policy as a tool of a paternalistic state that aspires to make its citizens good is a notion that has lost all appeal in contemporary society.

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[24] 1894, N.Y. Laws Ann Const, adopted 4 November 1969 (McKinny, Supp. 1986).

[25] Venter 'The Protection of Cultural, Linguistic and Religious Rights' 1998 (13) *SAPR/PL* 439, 443.

[26] Davis *et al* (eds) *Fundamental Rights in the Constitution: Commentary & Cases* (1997) 283; Strydom 'The International and Public Law Debate on Cultural Relativism and Cultural Identity: Origin and Implications' 1996 *SAYIL* 1 ff.

> [S]tate cultural policies appear to be out of harmony with modern ideas about the role of government. Nonetheless they flourish. Obviously there is some very strong attraction to the idea of a ... people and a community bound together in some shared enterprise with shared values.[27]

These words by Sax indicate the need to strike a balance in discharging the culture mandate. Several conditions qualify the duty of the state. The state may not –

- identify with any one particular culture or become the dominant or primary channel for the expression and regulation of the cultural life;
- hide behind a wide 'umbrella' conception of culture that does not recognise plurality;
- let up in its search for answers to problems; or
- allow the use of governmental power as symbolic reinforcement of differences or past differences.

The laws issued by the state may not stifle the freedom and individuality and must not 'juridify' culture in an overpowering way, as this may easily inhibit the manifold forms of culture, diverse cultural identities and the spontaneity of culture.[28] Häberle regards the possibilities open to law to include –

- a constitutional guarantee of a sphere of freedom for the individual or the group;
- the establishment of structures for cultural participation, which, in turn, create and enhance routes of access for all to cultural heritage;
- pluralist advisory bodies for consideration and determination of financial support; and
- setting up a federal government.

Habermas holds to the view that the liberal system of rights accommodates cultural difference and no alternative model is needed, provided the autonomy of citizens of the nation is activated and basic rights are actualised.[29] Habermas furthermore suggests that, in order to reconcile human rights norms with cultural differences and cultural diversity, the state –

- must protect the integrity of the individual in the life contexts in which his or her identity is formed;

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[27] Sax 1990 *Michigan Law Review* 1142.

[28] Häberle (1982) 22; Van Wyk 1991 *Stell LR* 190.

[29] Habermas 'Struggles for Recognition in the Democratic Constitutional State' in Gutmann (ed.) *Multiculturalism* (1994) 116.

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- must create space for different cultural forms of life to advance reasons for their support and protection;
- must make it possible for cultural identities to continue; and
- must distinguish between two forms of integration:
    - on the sub-political level, the legal system must maintain its neutrality in relation to different cultural communities, and in this way accord the different life forms equal integrity;
    - on the political level, a common political culture must be based on equal citizenship.[30]

3.2.1 Preliminary conclusions

The above excerpts from national constitutions are not contextualised in social, economic and cultural terms. Nonetheless, they confirm that the striving for identity underlies the need for constitutional protection. 'National cultural patrimony' and 'national heritage' imply that cultural objects have a national character and that all peoples have a right to cultural properties that form an integral part of their heritage and identity. Constitutions also recognise the interest on the part of specific peoples in the material aspects of their own culture. These sentiments underlie the right to restitution and the right to restrict imports and exports (the subject of chapters 3 and 5 respectively).

None of the above examples suggest that collective interests such as cultural survival lack legitimacy. However, if the cultural survival of a particular grouping were to take precedence in a multicultural and multilingual environment, the right of such a distinct society to have collective goals and to be treated differently is certain to come into conflict with the ideal of uniform treatment.

National culture enhances a people's ability to understand their origins and development. However, today it is widely recognised that ethnocentrism is not conducive to peace and understanding. The drive for identity readily becomes a destructive demand for political or national harmony which, in its quest for political and national unity, may resort to integration through forced conversion, exclusion or the ultimate form of assimilation: genocide. In this form,

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[30] *Ibid.* 107, 113.

'cultural nationalism' may cause genocide to become a normative aspect of state policy.

There is considerable scope for states to give shape to the cultural characteristics in their societies, yet this planning process must take cognisance of aspects of public international law.

3.3 National law and treaties

National courts tend to operate within specific limits when giving effect to international law in their national jurisdictional sphere. General public international law does not define these limits or the relation between public international law and national law. International law requires that states ensure that their legislative and executive acts conform to international treaty law duties, and it does not permit states to rely on their national law to justify non-compliance with their international obligations.[31]

A treaty binds member states at two levels. It binds them at an international level, meaning that each member state must have an obligation to every other member state to ensure national implementation of the provisions of the treaty. It must also bind member states at a national level in accordance with the intention of the parties.

States may express their consent to be bound at the international level by a treaty in different ways. Some require no further action after having concluded an international agreement. Others may require executive approval (Head of State) and approval by means of an Act of Parliament; yet others may require only one or the other. Ratification may thus be defined as the international act whereby the parties show, on the international plane, that their states consent to be bound by the agreement.[32] Some kind of approval must be sought at the domestic level and the institution of ratification grants the required time-frame within which to seek this. Ratification may imply approval by an Act of Parliament, but is more generally understood in the sense of executive approval. In the UK, for example, ratification occurs only once the necessary domestic legislation is in place, but an Act of Parliament is not required.

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[31] Roodt 'National Law and Treaties: An Overview' 1987-88 *SAYIL* 72 with further reference.

[32] Article 2(1)(b) and 14 of the 1969 Vienna Convention on the Law of Treaties. For text, see App. I in Reuter *Introduction to the Law of Treaties* (1995).

The more well-known protective instruments designed to prevent the illicit smuggling of artefacts have not been ratified widely, or there is lack of implementation where ratification has occurred. Examples include: the Unesco Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, the Inter-American Convention on Protection of the Archaeological, Historical and Artistic Heritage of the American Republics[33] and the European Cultural Convention[34]

The treaty itself may make incorporation into national law an international obligation. Generally, 'transformation' of law emanating from the international law is necessary to render the law operative in the municipal sphere. Various theories have been developed to explain the basis of the application of international law in the municipal sphere, known, at the two extremes, as monism and dualism. The monist theory maintains that all municipal systems constitute a single legal structure whereas dualism proposes an *a priori* dichotomy of sources, content and relationships between international law and municipal law. Whether a dualist stance is adopted from the outset, or whether a monist position is tempered by a requirement of direct effect, the practical result appears to be similar. In each jurisdiction the domestic sphere ultimately controls the impact of international law. The theories of monism or dualism are no more than generalities providing the backdrop to the relation between municipal and international law. This often complex relation can be rendered simpler by means of model acts that demonstrate how to convert an international agreement into practically enforceable rights and duties.

Broad similarities exist in the ways in which international law is treated in the United Kingdom, Canada and India. In all these countries, treaties require implementing legislation to become part of domestic law. Treaty law can be overridden by express legislative rules. By contrast, the US approach closely resembles that of the Netherlands. Both take a monist approach to the relationship between domestic law and international law. Treaties are internally binding upon all branches of government, and by virtue of its constitutional provisions, 'self-executing' treaties

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[33] Adopted 16 June 1976; entered into force 30 June 1978; OAS Ser A/24(SEPF).

[34] 1954 European Cultural Convention 218 *UNTS* 139; *UN Doc.* E/CN.4/Sub.2/AC.4/1983/5, 13, which entered into force on 11 May 1955.

have direct effect in the Netherlands.

Despite its common law heritage, the US approach is that in principle, no need exists to transform an international agreement into binding municipal law. The US Constitution Supremacy Clause declares that –

> All Treaties shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

This clause was designed to minimise treaty violations by the US, by enabling US courts to enforce treaties at the behest of affected individuals without having to await authorisation from state or federal legislatures. Theoretically, it is only in highly exceptional cases that legislative elaboration should be required, but in reality, the impact of treaty law is significantly limited by the requirement that treaties must be 'self-executing' to have domestic effect.

US courts have attributed various meanings to the concept of self-executing treaty provisions. While a number of doctrines and theories have been developed, it is 'judicial enforceability' that renders a treaty self-executing. No legislative elaboration is considered necessary, provided that –

- the treaty-makers possess the constitutional powers to accomplish the objectives set out in the treaty; and
- it is the intention of the parties that the treaty be judicially enforceable, or the agreement imposes real obligations (as opposed to hortatory or programmatic provisions) of a type that can be directly enforced by the courts within the broader system of separation of powers, without legislative elaboration.

Essentially, the agreement itself will effect the objective to be accomplished. By virtue of the constitution, the courts of justice regard treaties as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision.

On the other hand, if treaty provisions 'address the legislature', or comprise programmes or aspirations only, then enforcement power is regarded as having been left to political branches. These provisions are generally regarded as non-self-executing. Whether the treaty imposes obligations on public authorities or on private individuals is a fundamental distinguishing factor, yet these two characteristics are likely to merge with each other at many points. It is generally

accepted that certain provisions of a treaty may be self-executing while others are not. When the treaty expressly stipulates the necessity of legislative or administrative execution, it cannot qualify as a self-executing treaty.[35]

The European Communities treaties rest on the assumption that they enjoy primacy within the national order. Various legislative instruments are available, by virtue of the treaties, to the Council and the Commission of the EC. In the Community legal order, the rank, internal effect of Community rules and the manner in which a national state fulfils its treaty obligations is not left to the constitutional arrangements of the national states, since these constitutional arrangements are valid only within the confines of national sovereignty. The treaties prescribe direct application within the national legal order, meaning that an individual may rely on a particular Community right in national courts.

It is to the international human rights context that we now turn our attention.

4. INTERNATIONAL CONTEXT

The close relationship between human rights and the protection of cultural heritage is reflected in international human rights documentation,[36] and has not gone unnoticed by contemporary authors.[37] However, tension is inherent at more than one level: between the collective and the individualistic in culture, and between the collective and national in culture. If an object concerned is tied up with the identity of a particular group, (as the Taranaki panels were tied to the Maoris in New Zealand and the Afo-a-Kom was part of the Kom people in the Kameroon),

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[35] In general, see Jacobs & Roberts (eds) *The Effect of Treaties in Domestic Law* (1987)148 ff.

[36] The right of all peoples to cultural properties that form an integral part of their heritage and identity is proclaimed in Article 27 Universal Declaration of Human Rights 10 December1948 *UN Doc* A/Res. 217 (III); Article 1 1966 Declaration of Principles on International Cultural Co-operation, Unesco, 14th Session *UN Doc.* A/CONF.32/4; Preamble 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict; Article 30 Recommendation on International Principles applicable to Archaeological Excavations (5 December 1956); Article 6 European Convention on the Protection of the Archaeological Heritage (6 May 1969).

[37] Engstler *Die Territoriale Bindung von Kulturgutern im Rahmen des Völkerrechts* (1964) 197; Walter *Rückführung von Kulturgut im internationalen Recht* (1988) 46-84; Warren 'Perspectives of the Victims: Case Studies' in Messenger (ed.) *The Ethics of Collecting Cultural Property* (1998) 8-9; Reichelt 1985 *Uniform Law Review* 47, 129; Verheul 'Foreign Export Prohibitions: Cultural Treasures and Minerals' 1984 (31) *NILR* 420 423. Also Thomason 'Rolling Back History: The United Nations General Assembly and the Right to Cultural Property' 1990 (22) *Case Western Reserve Journal of International Law* 47.

alienation and subsequent requests for return by the state (as opposed to the particular community) may raise vexing questions.

The right to culture is both an individual and a collective right (the right to culture as a peoples' right is discussed later in this chapter), and the concomitant duty rests on the state and the international community. Socio-anthropological methodology relies on 'cultural relativism' which tends to see human rights as relative to particular cultures and societies. Clearly there is a tension between relativism and the sense of universal human rights that accrue to an individual on account of his or her being human.[38] A relativist approach to human rights protection may put culture beyond normative evaluation since what has come about historically is by definition the norm: the 'is' constitutes the 'ought'. A 'human rights are universal' approach would appeal to dignity as a universal value and would screen out cultural practices that fall short of the universal standard.

Both the universal and the relative views hold potential pitfalls. If the universalist view presupposes a single culture whose customs and beliefs trump all others, it is reprehensible; if the relativist deteriorates to the extreme of an uncritical acceptance of any practice merely because it forms part of local custom which is the sole yardstick of what is morally defensible,[39] it is too radical. A balance between these extremes must guide any evaluation of policies to preserve a particular culture.

More specific categories exist within the broader framework of human rights: individual guarantees, group rights and minority rights. The perennial question is how to reconcile group rights (for instance, language rights, rights of special representation in the political institutions of the larger society, veto rights, guaranteed representation or the right of self-government) with the equality of civil and political rights of every citizen.

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[38] Beukes 1995 *SAYIL* 137 with further reference; Strydom 'The International and Public Law Debate on Cultural Relativism and Cultural Identity: Origin and Implications' 1996 *SAYIL* 12, 18.

[39] Strydom regards the overriding importance relativists ascribe to culture and cultural identity as the principal discrediting factor of relativism; see Strydom 1996 *SAYIL* 1 ff.

4.1 Individual guarantees

International instruments contain the universal rules and norms dealing with the protection of fundamental human rights. Conventions and manifestos confirm that cultural rights are universally recognised. While cultural practices often need to be observed in the context of the group, ultimately, it is the individual who must practice the culture. Nevertheless, culture is often viewed as a group right or collective right, or both an individual and a group right.[40]

The UN Charter and the Universal Declaration of Human Rights of 1948 (UDHR) both focussed on human rights for individuals, not on group protection for minorities. The UDHR, Article 27, reads –

> (1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
> (2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

The American Declaration of the Rights and Duties of Man,[41] adopted in 1948, closely resembles the provisions of the International Bill of Rights. At the time of its adoption, the UDHR was conceived as a first stage in the development of an International Bill of Rights, to be followed by covenants in which the member states would bind themselves to respect the rights and freedoms concerned and by supervisory machinery.

Another human rights instrument which clearly articulates individual rights, is the International Convention on the Elimination of All Forms of Racial Discrimination.[42] States Parties are expected to recognise the right of every person to equality before the law as regards cultural rights.

International protections can be substantively broader than those existing under local law.

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[40] Dlamini Van Wyk *et al* (eds) (1994) 580; Kymlicka *Liberalism, Community and Culture* (1989) 165.

[41] Signed 2 May 1948; Res XXX, Final Act, 9th International Conference of American States, Bogota, Columbia, 30 March-2 May, 1948, 38; OAS Off. Rec. OEA/Ser.L/ v/II23 doc.21/Rev. 6.

[42] Concluded 7 March 1966; GA Res 2142 (XXI) *UN Doc.* A/6484.

4.2 Group guarantees

Whereas certain group rights restrict individual rights, others supplement individual rights. Internal restrictions (*e.g.* a group claiming a right against its own members) may threaten individual rights and are widely opposed in Western democracies, but external protections may prevent –

- the use of governmental power to restrict the liberty of members of groups; or
- the protection of cultural minorities to serve as a justification for infringing the liberties of members of the group.[43]

The international human rights law discussion that follows briefly considers certain international materials, to illustrate the group dimension of culture. These instruments state the responsibility on the part of the state for the protection of the right to culture –

- International Covenant on Civil and Political Rights of 1966 (ICCPR);[44]
- International Covenant on Social, Economic and Cultural Rights of 1966 (ICESCR);[45] and
- The Unesco catalogue of rights, which encompasses the rights found in the UDHR and the ICESCR.

Note that none of these instruments set out to protect cultural heritage as such.

When the UN General Assembly decided that two separate human rights treatises should be drafted, cultural rights were lumped together with social and economic rights. Different state obligations attach to the two sets of rights.

In the International Covenant on Social, Economic and Cultural Rights of 1966 (ICESCR), the following is stated in Article 15 –

> (1) The States Parties to the present Covenant recognise the right of everyone –
> (a) To take part in cultural life;

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[43] Kymlicka & Marín 'Liberalism and Minority Rights: An Interview' 1999 *Ratio Juris* 137; also Kymlicka (1995) 14.

[44] Adopted 16 December 1966; 999 *UNTS* 171; entered into force 23 March 1976; UNGA Res 2200A(xxi) GAOR 21st Session. Supp no. 16, 52 (1966). South Africa signed the Convention on 20 August 1994 and ratified it on 10 December 1998.

[45] Concluded 16 December 1966; 993 *UNTS* 3; entered into force 3 January 1976.

(b) To enjoy the benefits of scientific progress and its applications;
(c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

(2) The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.

(3) The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.

(4) The States Parties to the present Covenant recognise the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.

Clearly, Article 15 ICESCR represents different kinds of cultural rights. The ICESCR, similar to the UDHR, accommodates culture in a narrow sense, restricting it to 'meaningful expressions and symbolic formations by a community'.[46]

The catalogue of cultural rights catered for by Unesco comprises a more extensive list, which includes the right to the protection of national and international cultural property among a number of other rights, namely –

- the right to participate in cultural life;
- the right to cultural identity;
- the right to creativity;
- the right to benefit from the protection of the moral and material interests resulting from any literary or artistic production; and
- the right to international cultural co-operation.[47]

The various rights contemplated in the catalogue point to the multi-facetted nature of culture, and limit the vulnerability of the group to the decisions of the larger society. While notably broader in scope than the UDHR and the ICESCR, the Unesco catalogue still says nothing conclusive about the content of the right to culture in particular instances, nor does it refer to the norm of cultural

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[46] Beukes 1995 *SAYIL* 134.

[47] *Ibid.* 134 n31.

integrity.[48] Also, it is not clear from the catalogue whether the right to culture and the protection of cultural heritage are synonymous.

4.3 Minority protection

The rights of ethnic, religious and linguistic minorities have become a pressing concern of international law amidst conflict and instability brought on by ethnic nationalism, self-determination struggles, and the collapse of a number of nation states. International law provides certain guarantees designed to protect minority identity. Minority rights form a subset of human rights which is not general in application, but limited to a particular category of persons. Claims for minority rights may be described in terms of the language of group rights and may be based on provisions that give a collective dimension to rights.

Since the right to culture constitutes one of the ways in which to protect and shield a minority from the power of the state, various regional and international instruments provide for the protection of the right to culture. Those selected for discussion are –

- ILO Convention on Indigenous and Tribal Populations of 1957;[49]
- Convention concerning Indigenous and Tribal Peoples in Independent Countries of 1989;[50]
- UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities of 1992;[51]
- Vienna Declaration and Programme of Action emanating from the World Conference on Human Rights of 1993;[52]
- Draft UN Declaration on the Rights of Indigenous Peoples of 1994;[53] and
- Statute of the International Criminal Court of 1998.[54]

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[48] Sources for this right include the UN Charter; Article II of the Convention on the Prevention and Punishment of the Crime of Genocide (Dec. 9 1949) 78 *UNTS* 277; the International Covenant on Civil and Political Rights, Rights 999 *UNTS* 171 Article 27; Declaration of the Principles of International Cultural Co-operation, Unesco, 14th Sess 92, Article I, *UN Doc.* A/CONF.32/4.

[49] Concluded 26 June 1957; 328 *UNTS* 247.

[50] Concluded 27 June 1989; 28 *ILM* 1382 (1989).

[51] GA Res 47/125 (1992).

[52] Adopted 25 June 1993; 32 *ILM* 1661 (1993).

[53] Adopted 6 August 1994; 34 *ILM* 541 (1995).

[54] The Statute of the International Criminal Court was adopted by the UN Diplomatic Conference of

Minority rights were clearly acknowledged in Article 27 of the International Covenant on Civil and Political Rights of 1966 (ICCPR).[55] Article 27 provides for persons who belong to ethnic, religious, or linguistic minorities not to be denied the right, in community with other members of their group, to enjoy their own culture, profess and practice their own religion or to use their own language. Article 27 constitutes the only expression of the right to minority identity in modern human rights conventions intended for universal application,[56] yet does not express the right to culture very strongly.

International minority rights protection distinguishes two categories of legal provision: measures aimed at securing equal treatment for minorities, and measures aimed at protecting minority identity. Kymlicka advocates minority rights as a legitimate aid for oppressed or disadvantaged minorities to preserve their culture against use by a majority of their superior numbers and wealth to monopolise existing resources and institutions.[57] He has in mind the first category when he expresses support for group or minority rights that prevent domination or oppression by one group over another. The second category owes its existence to the recognition that an absence of discrimination will not create equality but that active promotion is called for. External protections (group rights) may help not only to protect the viability of national cultures but may actually promote individual freedom if the justification for cultural protection derives from the promotion of individual well-being. It is important, however, never to allow protection of cultural minorities to justify infringement of the liberties of group members.[58]

4.3.1 The Convention on Indigenous and Tribal Populations

Debates before international *fora* such as the ILO seem to recognise the psychological benefit of being part of an indigenous group.

Plenipotentiaries on the Establishment of an International Criminal Court. For text, see Doc. A/CONF. 183/9; also www.un.org/law/icc/statute/romefra.htm.

[55] Discussed under § 3.1.

[56] Chaskalson *Constitutional Law in South Africa* 1998 Rev Service 35-9.

[57] Kymlicka & Marín 'Liberalism and Minority Rights: An Interview' 1999 *Ratio Juris* 133, 136.

[58] *Ibid.* 139.

The ILO Convention on Indigenous and Tribal Populations of 1957, now largely overtaken by more recent documents emanating from the ILO, contributed to an awareness of the necessity to protect the cultural practices of all peoples, not only those of the West. The 1957 Convention aimed to promote systematic planning and action in the interest of social, economic and cultural rights of indigenous peoples in independent countries. The Convention applies to tribal peoples whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations. It also applies to peoples who are descendants from the populations that inhabited the country or region at the time of conquest or colonisation or the establishment of present state boundaries.

4.3.2 United Nations Declaration on Minorities

The 1992 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities supplements and develops Article 27 ICCPR further. The Preamble makes it clear that the Declaration is 'inspired by' Article 27 ICCPR, as opposed to being 'based on' that Article. Article 1 states that –

1. States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity;
2. States shall adopt appropriate legislative and other measures to achieve those ends.

The intention underlying Article 27 ICCPR was probably not that members of minorities had a right to demand that the state should adopt additional positive measures to realise minority rights. Adoption of legal measures in the form of an enacted catalogue of rights seemed to suffice.

The 1992 Declaration affirms individual rights of persons belonging to minorities and addresses the content of state obligations to respect and maintain minority identity. Since the rights exist only when a minority is able to maintain its culture, language or religion, the Declaration refers to both categories of protection.[59] It refers to their right to be protected against genocide and forced assimilation and it recognises the principle of non-discrimination against minorities, but also

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[59] Chaskalson (1998) 35-11.

protects minority identity by making it incumbent upon states to create conditions for protection. Such additional measures include not only the removal of legal obstacles to cultural development, but also measures that will enable children to function both as members of their own cultural or linguistic group and as members of the wider community.

The 1994 general comment of the Human Rights Committee contains further hints as to the kind of action states are supposed to take in pursuance of their obligations assumed in terms of Article 27 ICCPR. State Parties must take positive measures of protection against the (legislative, judicial or administrative) acts of the State party itself, and against the acts of other persons within the State party.[60] Legal protection and participatory decision-making by minorities, provided for in Article 2, are necessary and laudable. However, effective protection of identity and the survival and continued development of the cultural, religious and social identity of minorities place even more complex demands on states than those presented by political participation.[61]

The realisation that a catalogue of rights may not offer sufficient levels of security in a multicultural state is reflected in the terms of the Declaration.

In the case of aboriginal groups, the state is obliged to protect the association of these groups with their traditional territories. A related area of interest for indigenous peoples is control over the exploitation of natural resources located on their traditional lands. These groups view their relationship with the land as central to their collective identity and well-being.[62]

A declaration may have wide normative influence if regarded as circumstantial evidence of binding principles of action. When the influence or impact of the declaration is considered, several factors are relevant. This particular Declaration was debated until consensus was reached (not synonymous with unanimity). The content and the mandatory nature of the language used

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[60] Report of the Human Rights Committee *Vol. I.* GAOR 49th session. Suppl no. 40 (A45/40) 108.

[61] Strydom 'Minority Rights Protection: Implementing International Standards' 1998 (14) *SAJHR* 373, 376, 384.

[62] *E.g.* Johnston 'Native Rights as Collective Rights' in Kymlicka (1995) 179, 193.

are as important as the voting pattern, its form and implementation procedures. The Declaration standardises guidelines for state conduct through the expectation that states will act in accordance with the intention expressed.

4.3.3 Vienna Declaration

According to the Vienna Declaration of the World Conference on Human Rights, the UN Commission on Human Rights is called upon to examine ways and means to effectively promote and protect effectively the rights of persons belonging to minorities as set out in the 1992 Declaration on the Rights of Persons belonging to National, Ethnic, Religious and Linguistic Minorities. The Centre for Human Rights is called upon to provide, at the request of Governments, qualified expertise on minority issues and human rights and to assist with the prevention and resolution of disputes.

Effective implementation of human rights instruments has since become the *leitmotiv* in a number of expert reports on the importance of state protection for all groups.

4.3.4 Draft Declaration on the Rights of Indigenous Peoples

The Draft UN Declaration on the Rights of Indigenous Peoples,[63] focuses on indigenous societies as holders of rights and spells out the rights associated with culture.

The Draft states that indigenous peoples have the collective and individual right not to be subject to ethnocide and cultural genocide. Article 12 states that indigenous peoples have the right to practice and revitalise their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, as well as the right to restitution of cultural, intellectual, religious and spiritual property taken without their free and informed consent or in violation of their laws, traditions and customs. Article 13 states that indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies, the right to maintain, protect, and have access in privacy to their religious and cultural sites, the right to use and control of ceremonial objects and

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[63] *Supra*. The Draft, which emanated from the Unesco Commission on Human Rights, was adopted by the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities on 26 August 1994, res 1994/45, annex.

the right to repatriation of human remains.

The Draft breaks new ground in recognising group rights for indigenous peoples, who remain threatened by dispossession of land, forced assimilation and disregard for their political and social institutions. However, it does not represent a fully integrated framework for protection yet.

4.3.5 Statute of the International Criminal Court

The General Assembly of the UN decided in 1996 that a diplomatic conference of plenipotentiaries had to be held in 1998 to finalise and adopt a convention on the establishment of an international criminal court.[64] The Security Council established the International Tribunal by adopting Resolution 827, with the stated purpose of bringing to justice persons responsible for serious violations of international humanitarian law in the former Yugoslavia.

According to Article 7(1)(h) of the Rome Statute of the International Criminal Court,[65] persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognised as impermissible under international law qualifies as a crime against humanity when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack. Article 7(2)(g) defines persecution as the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.

Article 8(2) deals with war crimes, and includes intentional directing of attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives.

The Treaty has been signed by 96 states to date, but is not yet in force.

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[64] A/Res/51/207 (16 January 1997).

[65] Rome Statute of the International Criminal Court *UN Doc.* A/CONF.183.9 (17 July 1998).

4.4 Regional human rights law

The European Convention for the Protection of Human Rights and Fundamental Freedoms[66] represents a comprehensive and effective system for the protection of human rights. Yet, neither the European Convention on Human Rights nor the European Social Charter and Revised Charter[67] makes reference to culture. The oversight in the regional instruments led to a draft protocol to the European Convention, comprising nine articles. It provides for individual guarantees: that the individual has the right to express and protect his or her cultural traditions and values; to use the language of his or her choice; to access the cultural heritage of mankind; and to identify with the cultural community of his or her choice.[68]

The regional human rights law discussion that follows briefly considers the following materials –

- the Framework Convention for the Protection of National Minorities;[69]
- the European Charter for Regional or Minority Languages; [70] and
- the African Charter of Human and Peoples' Rights (Banjul Charter).[71]

Regional human rights law gives an indication of the claims that exist. The European instruments indicate that it is mainly the state, or states tied together by regional interests, that bear the obligations in respect of cultural rights. Although the recognition of the importance of language rights as human rights is steadily increasing, particularly in the field of minority rights, there is not much by way of actual current human rights standards.

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[66] 213 *UNTS* 221; signed in Rome on 4 November 1950 and entered into force on 3 September 1953.

[67] 529 *UNTS* 89 (concluded on 18 October 1961, Turin); European Social Charter (Revised) 36 *ILM* 31 (1997).

[68] The draft was prepared by a panel of specialists acting on the recommendations of a colloquium held in Friburg during 1991 titled 'Cultural Rights: An Underdeveloped Category of Human Rights'; see Beukes 1995 *SAYIL* 136 for further reference.

[69] 34 *ILM* 351 (1995); done 1 February 1995; entered into force 1 February 1998.

[70] Adopted by the Committee of Ministers in June 1992; entered into force on 1 March 1998.

[71] Adopted by the 18th Assembly of the Heads of State and Government of the OAU on 27 June 1981 at Nairobi, Kenya; entered into force on 21 October 1986. For text, see: Hamalengwa, Flinterman & Dankwa (eds) *The International Law of Human Rights in Africa* (1988) 5. Ratified by South Africa on 9 July 1996.

4.4.1 Framework Convention for the Protection of National Minorities

The Framework Convention for the Protection of National Minorities is the first ever legally binding multilateral instrument devoted to the protection of national minorities. Among others, it contains principles on –

- non-discrimination and protection of effective equality;
- promotion and preservation of culture, religion, language and traditions;
- media access;
- education;
- participation in economic, cultural and social life; and
- prohibition of forced assimilation.

States Parties commit themselves to ensure the right of every person to defend him- or herself in a language understood by him or her, if necessary with the free assistance of an interpreter. The States Parties are to undertake programmes, which the Committee of Ministers will monitor with the assistance of an advisory committee through a mechanism of periodic reports.

A Framework Convention is by nature open-ended and sets out only the key legal parameters regarding the scope of conventional obligations to be settled later.

4.4.2 European Charter for Regional and Minority Languages

The European Charter for Regional and Minority Languages[72] supports the values of interculturalism and multilingualism. It does not create rights for linguistic groups or their individual members, but is aimed at protecting indigenous languages.

Article 2(2) of the European Charter for Regional and Minority Languages states that the adoption of special measures in favour of regional or minority languages aimed at promoting equality between the users of these languages and the rest of the population, or which take due account of their specific conditions, is not considered to be an act of discrimination against the users of more widely-used languages. Among its objectives and principles, Article 7 states that

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[72] *ETS* No. 148, signed 5 November 1992.

the Parties must base their policies, legislation and practice on –

- the recognition of the regional or minority languages as an expression of cultural wealth;
- the respect of the geographical area of each regional or minority language in order to ensure that existing or new administrative divisions do not constitute an obstacle to the promotion of the regional or minority language in question;
- the need for resolute action to promote regional or minority languages in order to safeguard them; and
- the provision of appropriate forms and means for the teaching and study of regional or minority languages at all appropriate stages.

Article 2(1) states the following –

> The Parties undertake to eliminate, if they have not yet done so, any unjustified distinction, exclusion, restriction or preference relating to the use of a regional or minority language and intended to discourage or endanger the maintenance or development of it (*sic*).

Where the number of users of minority languages are such as to justify special measures, the Charter spells out the details of language use –

- in all the stages of education;
- in different kinds of court proceedings;
- for administrative authorities and public services;
- for local and regional authorities; and
- in the media to the extent that radio and television carry out a public service mission.

With regard to cultural activities and facilities, competent public authorities must, *e.g.*, encourage types of expression and initiative specific to regional or minority languages and foster the different means of access to works produced in these languages. With regard to economic and social activities, the Parties undertake to eliminate from their legislation any provision prohibiting or limiting without justifiable reasons the use of regional or minority languages in documents relating to economic or social life, and to prohibit the insertion in internal regulations of companies and private documents of clauses excluding or restricting the use of regional or minority languages at least between users of the same language.

Criticism against the Charter include the fact that it does not grant any rights to the speakers of

certain minority languages, nor to certain linguistic groups. The margin of discretion states enjoy in selecting the obligations that bind them, is wide, and the structure of the Charter is flexible in the extreme.[73] Any real contribution to a stronger and more effective accommodation of linguistic diversity is therefore doubtful.

The enforcement mechanism of both the Framework Convention and the European Charter is a Committee of Experts appointed by the Committee of Ministers, who must examine country reports and report to the Committee of Ministers.[74]

4.4.3 Language initiatives in Africa

The Organisation of African Unity (OAU) adopted a Language Plan of Action for Africa during its 22nd session from 28-30 July 1986. Among others, the Plan encourages member states to adopt a language policy and to adopt African languages as languages of instruction in education.

During the Intergovernmental Conference of Ministers on Language Policies in Africa,[75] the Harare Declaration was adopted. This Declaration recognises that very few African countries have clear and comprehensive language policies and that fewer have enshrined the stipulations of such policies in their constitutions. To improve the situation, its vision for Africa is to construe development –

> in terms of a culturally valued way of living together ... within a broader context of justice, fairness and equity for all, respect for linguistic rights as human rights, including those of minorities.

4.4.4 Banjul Charter

The idea of a Regional Commission on Human Rights for Africa was considered at a seminar in Cairo in September 1969. In June 1981, the members of the OAU drew up the Africa Charter of Human and Peoples' Rights. The Banjul Charter established the African Commission as an organ

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[73] Henrard 'Language and the Administration of Justice: the International Framework' Paper read at *International Colloquium on Multilingualism, the Judicial Authority and Security Services* University of the Free State (23-24 May 2000) 12, 14.

[74] Articles 16 and 17.

[75] Organised by Unesco; held from 17-19 March 1997.

of the OAU in Article 30, Part II, Chapter 1, which has competence in interstate disputes. The Commission was established in 1987. A meeting of government experts negotiated a Draft Protocol on the Establishment of an African Court on Human and People's Rights in 1995, considered by meetings of legal experts in 1997. The Protocol is now open for ratification.[76]

The Banjul Charter contains a number of firsts. As a regional human rights instrument, it constitutes the first instrument to –

- refer to the dual nature of culture: both its individual and collective dimensions;
- assign obligations to the state and to the beneficiary of human rights, both individually and in the context of a group.

Article 17 repeats article 27 of the UDHR, and provides –

> (2) Every individual may freely take part in the cultural life of his community.

The collective dimension of culture is captured in the notion of community life. The anthropological meaning of 'culture' as a traditional way of life is often extended to cover lifestyle: lifestyle of a community, be it national or ethnic.[77]

Article 17 of the Banjul Charter states –

> (3) The promotion and protection of morals and traditional values recognised by the community shall be the duty of the State.

The Charter assigns obligations to the state. However, this provision illustrates the many problems that beset the notion of cultural rights as human rights. As Beukes points out, it is not clear how the state must go about the promotion and protection of morals and values, nor whether 'community' refers to the particularly vulnerable, or to all communities.[78] Identifying for example the right of cultural survival as both an individual and group right may say something about the

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[76] Stemmet 'A Future African Court for Human and Peoples' Rights and Domestic Human Rights Norms' 1998 (23) *SAYIL* 233; in general Mbaya 'African Charter on Human and Peoples' Rights' in *Encyclopedia of Public International Law Vol. 8* (1985) 1.

[77] Hartman (1997) 31; Degenaar 'Art and Culture in a Changing South Africa' 1993 (12) *SA Journal of Philosophy* 51. Chapter 1 refers to the popularity of this perspective.

[78] Beukes 1995 *SAYIL* 132.

existence and nature of the right to cultural integrity, but does not spell out the criteria and procedures that the state must use in making decisions about preferential treatment or the safeguarding of peace.

Considering the part played by society in attaining and holding cultural rights, Beukes observes that a link between the right to culture and socio-economic rights (rights with a heavy tilt towards the group) advances the argument that culture has a greater affinity with society as a whole.[79]

In terms of Article 29(7) of the Charter, the beneficiary of human rights, both individually and in the context of a group, has the duty –

> ... to preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well-being of society.

While these concepts may have authority as social obligations or in guiding spiritual development, they do not translate easily into concrete and clear legal duties.

Article 22 contains the collective dimension: the right of all people to the economic, social and cultural development with due regard to their freedom and identity, as well as the equal enjoyment of the common heritage of mankind.

4.5 The right to culture: responsibilities of the state

International and comparative human rights provisions, regional provisions and national charters indicate that various countries recognise a constitutional right to culture, provide for the protection of the culture of vulnerable groups, or provide for cultural pluralism. Discrimination based on ethnic features is generally proscribed.

A perennial question is what the content of this protection is: whether it is sufficient for the state to illustrate tolerance in respect of culture or whether the state is required to develop programmes in support of, *e.g.* schools, libraries and museums. Does the state need to do more than

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[79] *Ibid.*

acknowledge the general importance of cultural diversity, and back such diversity in positive ways? A particular group may indeed need positive support from the state to preserve their existence as a distinct cultural group and to resist the pressure to abandon their group life or to deny that they have a bond with their cultural or linguistic community. However, those who regard group rights as a dangerous phenomenon believe that the fact that a group may practice a particular culture does not in itself mean that the group has a right to culture.[80]

The precise content of cultural rights is difficult to formulate. None of the above lists, including that of Unesco, represents an analytically integrated framework of rights to culture. A comprehensive rights framework will need to reflect at least the following –

- the three levels (state, social and private) of the culture mandate of the state;
- the recent expansion of cultural rights from the individual to peoples;
- the right to education regarding their own culture and in their own language;
- the right to participate in cultural life, communication and information;
- collective rights such as –
    - the right to preserve a culture;
    - the right to develop a culture;
    - the right to national recognition of a culture; and
    - the right of a people to their own artistic, historical and cultural wealth.[81]

According to a more robust non-discrimination model – which provides for public measures to protect and promote cultural identity – the most comprehensive of frameworks may still be unable to ensure that a culture survives or is able to obtain national recognition without additional measures being taken.

4.6 The right to culture as a peoples' right

Indigenous peoples' archaeological monuments and artefacts have seldom been respected in the western hemisphere, and modern development poses new threats. The more well-known

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[80] Hartney 'Some Confusions Concerning Collective Rights' in Kymlicka (1995) 202.

[81] Strati *The Protection of the Underwater Cultural Heritage: An Emerging Objective of the Contemporary Law of the Sea* (1995) 357.

protective instruments designed to prevent the illicit smuggling of artefacts (such as the Unesco Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, the Inter-American Convention on Protection of the Archaeological, Historical and Artistic Heritage of the American Republics[82] and the European Cultural Convention[83]) refer to the protection of states against takings and illegal trade by individuals and groups. None of them refer to protection of individuals and groups against takings by the state.[84] None of them foresee a situation in which the state is the entity depriving a group within its borders of its traditional culture.

The proposed American Declaration on the Rights of Indigenous Peoples[85] couches the right in the following terms –

> Article XXI.
> (1) The states recognize the right of indigenous peoples to decide democratically what values, objectives, priorities and strategies will govern and steer their development course, even where they are different from those adopted by the national government or by other segments of society. Indigenous peoples shall be entitled to obtain on a non-discriminatory basis appropriate means for their own development according to their preferences and values, and to contribute by their own means, as distinct societies, to national development and international cooperation.
> (2) Unless exceptional circumstances so warrant in the public interest, the states shall take necessary measures to ensure that decisions regarding any plan, program or proposal affecting the rights or living conditions of indigenous peoples are not made without the free and informed consent and participation of those peoples, that their preferences are recognized and that no such plan, program or proposal that could have harmful effects on those peoples is adopted.
> (3) Indigenous peoples have the right to restitution or compensation no less favourable than the standards of international law, for any loss which, despite the foregoing precautions, the execution of those plans or proposals may have caused them; and measures taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

The declaration is appropriate in as far as history teaches that development assistance must be integrated into the cultural framework of the developing country (including its law as an

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[82] Adopted 16 June 1976; entered into force 30 June 1978; OAS Ser A/24(SEPF).

[83] *ETS* No. 18; reproduced in UN Doc. E/CN.4/Sub.2/AC.4/1983/5, 13.

[84] Shelton 'International Protection of Indigenous Peoples' Culture and Cultural Property' in Thompson (ed.) *The Rights of Indigenous Peoples in International Law* (1987) 47, 50.

identifiable expression of its culture(s)) before external assistance yields results.

The right of a people to their own artistic, historical and cultural wealth refers to the right to assert the primacy of a spiritual claim over a commercial one. The right to culture entails the right to be different. It implies a level of cultural tolerance that makes peaceful co-existence possible.[86] A nurturing community life and cultural practices are essential to every individual. Häberle stated that human dignity depends on a 'cultural minimum', and there is enough evidence that cultural identity is a necessary component of human dignity.[87] Groups are free to protect their own way of life in the way they choose. International law must, at the same time, allow people the opportunity to do away with universally objectionable features. It cannot allow the right to culture to be used to protect group interests at the expense of human dignity.

5. CONCLUSION

This chapter considered the nature of the state in broad terms. Achieving the delicate balance of a culturally sensitive state is an important objective that ought to form part of the constitutional debate of every state. This involves reconciling human rights norms with cultural difference, and managing the complex relation between culture and the state. The state cannot afford to remain distant from the cultural life of society if the need for societal survival requires that it takes positive measures of support. Yet, the state can not afford giving national recognition and support to selected communities only.

Random constitutional law examples illustrate the notion that cultural objects have a national character. Yet states may also rely on the right of all peoples to cultural properties that form an integral part of their heritage and identity. The interest on the part of specific peoples in the material aspects of their own culture is reflected in constitutional documentation. Many ethnocultural conflicts cannot be resolved simply by ensuring respect for basic individual rights. Minority groups seek greater recognition and accommodation of their cultural differences.

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[85] Approved by the Inter-American Commission on Human Rights on 26 February 1997 at its 1333rd session, 95th regular session.

[86] Dlamini in Van Wyk *et al* (eds) (1994) 575.

[87] *Ibid.* with further reference.

Various regional and international instruments protect the right to culture with a view to circumventing cultural intolerance and concomitant conflict. The general consensus is that there ought to be general protection of cultural diversity without derogating from the principle of non-discrimination. Recent developments also indicate that general protection may include special additional measures to foster and protect diversity. The European Charter for Regional and Minority Languages states that the adoption of special measures, which take due account of specific conditions applicable to use of minority languages, is not considered to be an act of discrimination against the users of more widely-used languages. A number of instruments underscore the trend to link respect for equality with the obligation on the part of the state to promote diversity. Recent achievements in respect of the recognition of minority rights include also the noteworthy UN Declaration on Minorities.

One of the general issues affecting multicultural societies is the relationship between individual and group rights. The right to culture is considered to be both an individual right and a collective right. As individuals, all have the same right to dignity. As people, groups have the right to distinguish themselves culturally. Potentially, a clash may occur between the right to culture and the right to equality. Courts must prevent the use of the right to culture to protect group interests at the expense of equality and human dignity, yet they must also guard against denying the right to culture where its recognition could add a significant developmental impetus.

One may ask whether the 'rights culture' is the appropriate one for the preservation of cultural heritage Chapter 4 returns to the issue of the usefulness of the language of rights to the protection of cultural heritage.

CHAPTER 3

INTERNATIONAL REGULATION OF CULTURAL OBJECTS

1. INTRODUCTION

International and comparative literature on the protection of cultural heritage often contemplates questions such as: how does the distinction between universal content and specific national features of a culture impact on the question of restitution? Where should objects be returned to, whose heritage is shared by more than one country?

Return has a physical dimension and the international conventions on the issue relate to physical care and protection. The question of rights or claims is highly relevant, since it must be established who has the right to take care of a cultural object. Minorities may require more protection, if the thesis holds true that they depend on their cultural heritage for survival. It was indicated in chapter 2 that traditional legal mechanisms are often inadequate to protect minority cultural rights and cultural integrity rights.

A public international law discussion developed in respect of the return of cultural objects, primarily on account of the removal of cultural objects from their source states by colonising states. Today, a web of international arrangements has been and is being developed to counter unlawful trade in items of cultural heritage and map out legal means of recovery.[1] Protection, ownership and freedom of movement of works of art are the subject of various conventions and proposals. The mechanisms available for the return of significant items of cultural heritage show clearly that international law is becoming more integrated on the issue of smuggling, for example. States have a common interest in improving their export control regimes.

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[1] Among the international controls in respect of the trade in and protection of cultural objects are: the Hague Convention respecting the Laws and Customs of War on Land (18 October 1907) *UKTS* 9 (1910); the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and Protocol (14 May 1954) 249 *UNTS* 215, 249 *UNTS* 358; the 1970 Unesco Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (14 November 1970) 823 *UNTS* 231 and the Convention for the Protection of the World Cultural and Natural Heritage (16 November 1972) 1972 *UNJYB* 89.

Recent international initiatives cover illegal export and of late, tend to focus on particular types of object.[2]

This chapter considers international law criteria and mechanisms for return and investigates to what extent the right to culture, the right to self-determination and the right to development can assist in the formulation of criteria and procedures for return. Older schemes that offer little policy guidance, will be given only cursory treatment. The alternatives selected for discussion broadly co-incide with the choice in chapter 1, but the discussion will be of greater depth.[3] These are –

- Protocols to the 1949 and 1980 Geneva Conventions;
- the 1970 Unesco Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property;
- the 1972 Convention on the World Cultural and Natural Heritage;
- the 1995 Rome Convention;
- the Commonwealth Scheme, devised by Commonwealth governments for the return of unlawfully exported items classified as such by the state concerned; and
- initiatives taken by the museum profession.

The broad definitions of cultural property in the Unesco Convention derived from the sense of belonging or emotional connection in terms of which almost anything that is an expression of culture can be considered that culture's property.[4] All of these Conventions are based on a combination of territorial considerations and nationality. Article 4 of the Unesco Convention, for example, allows for multiple claims to cultural heritage.

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[2] 1995 Rome Convention. Even the staunch internationalist Merryman reflects on object and context-oriented concerns, stressing the importance of professional documentation and the study of an object in its context. See Merryman 'The Nation and the Object' 1994 3 *IJCP* 61.

[3] See Roodt 'International Regulation of Cultural Objects: The Options Facing South Africa' 1997 (12) *SA Publiekreg/Public Law* 99.

[4] Shapiro 'Repatriation: A Modest Proposal' 1998 (31) *International Law and Politics* 95, 97.

2. INTERNATIONAL SCHEMES

2.1 Older conventions

For the greater part of the last two centuries the notion of cultural property developed along with the necessity of protection in times of armed conflict. The most noteworthy documents include the Vienna Congress of 1815,[5] the Lieber Code[6] and the Brussels Conference of 1874.[7] The 1899 Hague Conference was the first formal international treaty providing protection for cultural property. The 1907 Hague Conference was more substantial, resulting in the adoption of a series of conventions with appended regulations.[8] The 1907 Convention proved particularly ineffective during WWI, partly due on the one hand, to claims of military necessity and on the other hand, to new technologies for destruction. WWI prompted reconsideration and examination of the issues. The Rörich Pact[9] embodied the profound understanding of the inviolable link between, and unity of: peace, creativity, art, culture and the universe. Based on the principle of the universality of cultural objects it considers cultural treasures as belonging to all states and all states as having an equal obligation to protect them in all territories of the High Contracting Parties. The protection of objects does not depend on their particular 'state allegiance'.[10]

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[5] It required the restitution of works of art removed during the Napoleonic wars to their countries of origin and it recognised the special nature of cultural property.

[6] The Lieber Code 1863 (Instructions for the government of Armies of the United States in the Field), General Orders No. 100, War Department, Adjt. General's Office, Washington, 24 April 1863; For text, see Hartigan *Lieber's Code and the Law of War* (1983), 45 ff. The Lieber Code was the first Code to identify cultural property with, and distinguish it from, public property. It was developed to regulate the conduct of the Union forces in enemy territory during the American Civil War. Order 34 provides that museums of the fine arts or of a scientific character are not to be considered public property, but may be taxed or used when the public service may require it. Orders 35 and 36 provide that classical works of art, libraries, scientific collections, or precious instruments (such as astronomical telescopes) should be protected but may be removed for the benefit of the hostile nation until eventual ownership can be determined by the ensuing treaty of peace.

[7] The influence of the Declaration of Brussels of 1874 on the Hague Convention on Laws and Customs of War on Land of 1907 is evident from the undertaking that the property of institutions dedicated to educators, the arts and sciences, even when state property, must be treated as private property.

[8] Regulations of the Hague annexed to the IVth Hague Convention respecting the Laws and Customs of War on Land (18 October 1907) *UKTS* 9 (1910). See Toman *The Protection of Cultural Property in the Event of Armed Conflict* (1996).

[9] The Roerich Pact became the Treaty of Washington in 1935. 1935 Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments 167 *LNTS* 289.

[10] Alexandrov *International Legal Protection of Cultural Property* (1979) 93.

By 1936, there was much evidence of breaches of the principles of the 1907 Hague Convention during the Spanish Civil War. It also became evident that a Second World War was inescapable.

In the post war period, several major developments in international humanitarian law saw the light. The 1949 Geneva Conventions, initiated by the Red Cross, counted among these.[11] As chapter 1 indicates, the primary contributor to the establishment of a body of international cultural property law has been Unesco. The organisation's efforts since WWII led to the signing of the 1954 Hague Convention for the Protection of Cultural Property.[12] This new Convention was the first to deal exclusively with the protection of cultural property, and extended the protection of cultural property beyond the traditional definition of 'war' into all armed conflicts, including internal armed conflicts such as civil wars, 'liberation' wars and armed independence campaigns.

The 1954 Convention agrees on the universal value of cultural heritage and confirms the duty of the public authorities to provide for its protection. It does not specifically distinguish between cultural objects of purely local interest and those of truly international importance. It does not have anything to do with the trade in art. The concern it expresses for the safety of objects of signatory nations does not translate into common property. Nonetheless, it became a charter for 'cultural internationalism':[13] the idea that humanity, as opposed to nations, is the primary stakeholder in cultural heritage. In one area only did it fail to follow through on this idea. It incorporated 'military necessity' as a justification for the destruction of cultural objects.

Recent conflicts in the Gulf and Yugoslavia have again highlighted the 1954 Hague Convention. Among the 77 states that have ratified the text, only a few countries have taken significant steps

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[11] *E.g.* Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 *UNTS* 287; entered into force 21 October 1950.

[12] The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (14 May 1954) 249 *UNTS* 215 and the 1954 Protocol on Restitution thereto. See in general Clément 'Some Recent Practical Experience with the Implementation of the 1954 Hague Convention' 1994 *IJCP* 11.

[13] Merryman 'Two Ways of Thinking About Cultural Property' 1986 *AJIL* 831, 842; also Coggins 'A Licit International Traffic in Ancient Art: Let There be Light!' 1995 *ICJP* 61, 64-65.

to implement it in times of peace, for example by making holdings accessible to scholars and the general public. The required levels of specialisation and financial resources are lacking in most cases. Few states have concerned themselves with the improved implementation of the Convention. Not even the Croatian-Serbian conflicts in erstwhile Yugoslavia[14] motivated European countries to show much interest in improved international standards in the field.

The Convention's lack of effectiveness in these situations has been laid at the door of its failure to provide rights of protective entry and intervention to states not party to the conflict, similar to the rights enjoyed by the Red Cross in humanitarian missions.[15] Such rights are considered essential, since the warring states may refuse to recognise their protective duties under the Convention, or may not be members to the treaty at all. Its lack of effectiveness has also meant that it is revised fairly regularly. The most recent revision occurred at a diplomatic conference held in Vienna in May 1998, when a Second Protocol was adopted.[16] This Protocol supplements the 1954 Convention in that cultural property of the greatest importance for humanity can be placed under enhanced protection provided it is adequately protected by domestic law and not used for military purposes or to shield military sites. Enhanced protection is granted from the moment the property is entered on the List of Cultural Property Under Enhanced Protection. Thus is the special protection regime of the Convention rendered more relevant.

Jurisdiction and responsibility became major concerns for states following the Gulf and Yugoslav conflicts. The UN Security Council initiated formal procedures leading to the establishment of an international war crimes tribunal to investigate and act on alleged grave breaches and other violations of international humanitarian law, including destruction of cultural and religious

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[14] Specific threats were made to showpieces of the European heritage such as Dubrovnik. Attempts were made to destroy the very history of Croatia, *e.g.* as embodied in the finest of Balkan gardens at Trsteno. See *Sunday Times Lifestyle*, 11 April 1999, 10.

[15] Vernon 'Common Cultural Property: the Search for Rights of Protective Intervention' 1994 *Case Western Reserve Journal of International Law* 435, 460. Note that the Convention does contain the roots of this idea: its permits armed guards, protective removal and Unesco interference.

[16] Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 26 March 1999. This Protocol was open for signature until 31 December 1999, and is now open for accession.

property.[17] Test cases concerning 'cultural war crimes' are highly likely in relation to the former Yugoslavia, but it remains to be seen if these will have any impact on the increasingly common deliberate targeting and destruction of cultural objects and monuments during internal and international conflicts.

2.2 Protocols to the Geneva Conventions

In 1977, an International Conference called by the International Committee of the Red Cross, widened the ambit of the 1949 Conventions in two additional protocols. The first related to international armed conflicts and the second to non-international armed conflicts and serious civil disturbances.[18] As is the case with Protocol I, the Protocol Relating to the Victims of Non-International Armed Conflicts (Protocol II)[19] contains pertinent protections in respect of cultural objects and places of worship. Article 53 prohibits acts of hostility directed against historic monuments, works of art or places of worship that constitute the cultural or spiritual heritage of peoples; using such objects in support of the military effort and making such objects the object of reprisals. A further Geneva Convention on prohibition or restrictions on the use of certain conventional weapons that may be deemed to be excessively injurious or to have indiscriminate effects (Conventional Weapons Convention) was approved in October 1980. The second Protocol to the 1980 Convention prohibits the use of booby-traps on cultural property.[20]

The 1954 Hague Convention was the precursor to the notion that there is a duty to protect cultural treasures in times of peace as well as in times of war. International instruments concerned with *peacetime* protection and usage of cultural objects started to appear in the 1960s. These documents combined the ideal of mutual understanding with the desire to promote the cultural identity of nations.[21] We now turn our attention to these documents.

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[17] Resolution 808 of 22 February 1993. Boylan 'The Legal Background to Protection of Cultural Heritage' *Expert Report 5* (1999) 7; www.unesco.org/webworld/archives/sro_citra/ER5.html.

[18] Boylan *Expert Report 5* 6.

[19] 1125 *UNTS* 609; entered into force 7 December 1978.

[20] Boylan *Expert Report 5* 7.

[21] These are listed in Briat & Freedberg (eds) *International Art Trade and Law* (1991) 75.

2.3 1970 Unesco Convention

A noteworthy treaty in the civil area is the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.[22] The 1970 Unesco Convention treats all international trade in illegally exported objects as illicit, *i.e.* it allows national law to characterise the transaction. It had a belated and limited ratification and still awaits implementation by those states that regard transit as beneficial to local interests (notably the UK, France, Germany, Japan and Scandinavian countries). For a long time, the US and Canada were the only significant importers of cultural objects that became parties to the 1970 Unesco Convention. Now, Australia is a market state party, Switzerland has added its support and New Zealand is in the process of joining. At present, 81 states are parties to the Unesco Convention. 12 of these are Commonwealth states. The UK government has refused to subscribe to this Convention. Among the reasons forwarded, are the need to enact legislation, resource implications and the interference with private property rights. Private property considerations have always constituted a major obstacle to international efforts in this sphere.

The 1970 Unesco Convention contains two kinds of provisions: a list of national measures which the States Parties to the Convention are requested to adopt, and several provisions dealing with international co-operation. Many sections remain rhetorical to this day. The two most important provisions are –

- the establishment of a system of export certificates; and
- specific procedures at diplomatic level for requests for the return of cultural objects taken up in inventories and stolen from museums and similar institutions.

Usually, import restrictions are implemented in the wake of a bilateral treaty or executive agreement. The 1970 Unesco Convention contains its own provision for such a restriction, which prohibits the importation of cultural objects stolen from the documented inventory of museums or religious or secular public monuments and exported susequent to their being stolen. Article 9 creates a mechanism for signatories' applications to the executive branch to prohibit the import of

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[22] (4 November 1970) 823 *UNTS* 231.

archaeological and ethnological material.[23]

However, the force of these provisions is weakened by a number of factors –

- the lack of well-developed enforcement systems in developing countries;
- the lack of capacity to adapt national legal frameworks to conventional law in developing countries;
- the prospective application of the provisions; and
- the limited scope of the Convention.

The Convention covers a small class of cases: Article 7(b) refers to 'property stolen from a museum or a religious or secular public monument or similar institution ... provided that such property is properly documented as appertaining to the inventory of that institution'. While these are the very objects likely to be essential to the 'national estate', Article 7 fails to come to grips with the realities of comparative law and the conflicts of law, and in particular it contains no international agreement on matters such as the *bona fide* purchaser (found in the civil law systems of many of the market and transit states). The regulations concerning restitution thus appear to be inadequate in practice as it remains virtually impossible to enforce the restitution of stolen objects.

The General Assembly[24] has recommended that member states adopt or strengthen the necessary protective legislation with regard to their own heritage and that of other peoples. It has also requested member states to study the possibility of including in permits for excavations, a clause requiring archaeologists and palaeontologists to provide the national authorities with photographic documentation of each object brought to light during the excavations immediately after its discovery. Inventories of museum collections should include not only the items on display, but also those in storage. Photographs of each item should be included.

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[23] See in general Church 'Evaluating the Effectiveness of Foreign Laws on National Ownership of Cultural Property in US Courts' 1992 *Columbia Journal of Transnational Law* 179, 214, 223; Church 'Evolving US Case Law on Cultural Property Disputes' 1993 *IJCP* 47, 56; Warren 'Perspectives of the Victims: Case Studies' in Messenger (ed.) *The Ethics of Collecting Cultural Property* (1989) 17 ff.

[24] Return or Restitution of Cultural Property to the Countries of Origin A/Res/48/15 of 2 November 1993.

2.4 1972 World Cultural and Natural Heritage Convention

The 1972 Convention on the World Cultural and Natural Heritage[25] recognises the duty of the international community to co-operate to conserve a heritage that is of outstanding and universal value. It establishes a World Heritage List of cultural and natural sites of outstanding universal value and an Intergovernmental Committee for the Protection of the Cultural and Natural Heritage of Outstanding Universal Value.[26] Two initiatives, a List of World Heritage in Danger and a World Heritage Fund contribute to furthering the aims of the Convention.

However, the duty of ensuring protection lies primarily with the state in whose territory the heritage site or object is situated (Article 4). Moreover, there are no sea sites on the World Heritage List. Although such sites are not excluded from nomination for inclusion, two requirements of the World Heritage Convention hinder their inclusion: the site would have to be one of outstanding universal value, and it would have to be situated within the territory of States Parties.

2.5 1995 Rome (Unidroit) Convention

International co-operation within the framework of Unidroit stands out among the various attempts made in international forums to curb the illicit traffic in cultural property resulting from theft or breach of domestic export laws. It created a new opportunity for overcoming the failure of earlier initiatives.[27] Many of the shortcomings of the 1970 Unesco Convention and its forerunners have been alleviated. Among these are such private law issues as the *bona fide* purchaser rule in civil law countries. It does not prescribe how a country should organise its own national protective legislation. However, implementation requires that states respect each other's legislation, which considerably improves upon a situation where such respect is not accorded.

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[25] Convention for the Protection of the World Cultural and Natural Heritage (16 November 1972) *UNYB* 89; entered into force on 17 December 1975.

[26] O'Keefe 'Mauritius Scheme for the Protection of the Material Cultural Heritage' 1994 *IJCP* 259.

[27] Such as the Draft Convention for a Uniform Law on the Acquisition in Good Faith of Corporeal Movables (LUAB Rome (1974)). The LUAB constitutes the only concerted effort to date to define a uniform standard of good faith purchase, but failed to have any effect. It was not limited solely to cultural heritage.

The 1995 Rome Convention aims to limit physical damage to monuments and archaeological sites, to minimize dismemberment of sculptures, dispersion of frescoes, division of triptychs, to prevent disturbance of the stratigraphy or the break-up of a collection or the loss of documentation. It is committed to ensuring the return of objects still used by living cultures or traditional communities, or which are invaluable to the spiritual life of an existing culture.[28]

The 1995 Rome Convention accepts unlawful export as illicit. Article 3.2 provides that, for the purposes of the Convention, an object that has been unlawfully excavated, or lawfully excavated and unlawfully retained, shall be considered stolen. Thus, excavation counts as theft, and the right of action is not limited to states. The 1995 Rome Convention requires the possessor to return stolen property.

A compensation arrangement was a significant element of the trade-offs leading to agreement. The possessor or acquirer will not receive compensation unless it can be proven that he or she acted with due diligence. Article 4.1 requires that 'the possessor neither knew nor ought reasonably to have known that the object was stolen'. The owner does not need to buy back his or her property, but the requesting state may need to offer the possessor compensation.

A number of factors are suggested as tests for diligence under Article 4.4. All the circumstances of the acquisition require consideration, including the character of the parties, the price paid, whether the possessor consulted any reasonably accessible register of stolen cultural objects, and any other relevant information a reasonable person could have obtained under the circumstances. Not only does the Convention provide an objective standard of diligence, but it also creates one statute of limitations for the resolution of claims. Since the acquirer is no longer shielded by the rule protecting the *bona fide* purchaser, objects stolen from owners in common law jurisdictions

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[28] Merryman 'A Licit International Traffic in Cultural Objects' *Licit Trade in Works of Art* (1994) 23; Paterson 'The Legal Dynamics of Cultural Property Export Controls: *Ortiz* Revisited' 1995 *UBCLR* 241, 255-256. Merryman regards all objects made to be used in religious or ceremonial rites as 'returnable objects', and has elaborated on the factors that allow identification of 'culturally immovable objects'. One of these is that the objects would again be used in religious or ceremonial ways. 'Culturally movable objects' are those that are movable without threatening the object and context related values of preservation, information and access. Paterson emphasises the distinction between objects with religious significance and objects with significance to a whole tribe.

can now be retrieved from civil law countries. However, the lack of registers of stolen objects continues to create difficulties for purchasers.[29] The more radical common law alternative of allowing the purchaser to institute action only against the seller, would have ensured a double benefit: avoiding inhibitory compensation costs on the part of a requesting state while at the same time forcing purchasers to exercise a high standard of care.

A revolutionary provision in the 1995 Rome Convention enables national courts to increase their significance and effectiveness in the settlement of disputes over cultural objects. The Convention addresses the issue of definition of appropriate standards against which to evaluate foreign export control laws in order to decide if they should be enforced outside the territory of the source state.

Article 5 delineates the circumstances under which a competent court or other authority in a requested state would be compelled to order the return of a cultural object. The circumstances under which the authority of the *situs* courts to deny return would be limited, and would include outstanding cultural importance for the requesting state (the source state must establish this).

In this way, the 1995 Rome Convention tries to establish a standard for the critical issue of enforceability, and concentrates on the requesting state and its law regulating export or governing excavation. Return is not simply considered to be a right belonging to the place of cultural or

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[29] Data banks that may serve as a basis for pre-empting illicit export and for checking on the provenance of artworks include:

- the *International Art Loss Register* (in the place of the former International Foundation for Art Research);
- Interpol's automatic search facility which produces images of artworks;
- the *FBI National Stolen Arts File*;
- the *International Registry of Antiques and Fine Art* in New York;
- the *Canadian Heritage Information Network;*
- *Thesaurus* (an independent information service);
- *Trace Magazine*, based in Plymouth, England;
- the *Yearbook of Stolen Art.*

These databases are available to dispossessed owners wishing to provide notice of wrongdoing. While some may be accessed through the internet, not all of them are accessible to the public. Provenance may be checked in other ways: background search, document authenticity and export certificate checks, insurance protection, auction house catalogues, ethical standards adopted by the dealers' association, experts and letters to cultural administrations.

territorial origin.

As stated, the principle is not that of automatic return of illegally exported cultural objects. Article 5 is innovative, expecting courts to decide on more than the question of legality or illegality of a removal. The Convention does not refer to foreign mandatory rules (foreign public law claims), and does not contain any blanket provision on the application of foreign rules of direct application. Instead, it refers to the rules of the place where the object is located.[30] Facing a request from a state for restitution, a court in a signatory state may no longer argue that the object concerned has exceptional status under the foreign law and not under its own law. One possible explanation may be that an unwilling defendant might have too wide a scope for delaying proceedings by introducing arguments based on a variety of different laws.

2.6 Commonwealth Scheme

The Commonwealth is actively committed to the cause of protecting cultural heritage. In November 1993 the Law Ministers of the Commonwealth agreed to a Scheme for the Protection of the Material Cultural Heritage (also known as the Mauritius Scheme). Generally speaking, a state may be more inclined to restrict imports of cultural material at the request of another, when both parties stand to gain from such an agreement. An import prohibition scheme proved to be the most popular possibility raised by the 1984 Consultative Document on the Commonwealth Scheme for the Protection of the Material Cultural Heritage[31] (the other options having been a 'conflicts scheme' and a 'claim of title scheme'). The overwhelming support received for an import prohibition scheme may be attributed to the relative ease of its introduction and the fact that it does not exacerbate the problem of human and financial resources and law for

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[30] It not only introduces the court of the place where the object is located as a special new ground of jurisdiction in respect of stolen or illegally exported cultural objects adding it to other grounds existing under national or international law, but the chapter on general provisions also provides (in Article 8.3) that:

> [r]esort may be had to the provisional, including protective, measures available under the law of the contracting state where the object is located even when the claim for restitution or return of the object is brought before the courts or other competent authorities of another contracting state.

[31] See the criticism of Prott & O'Keefe *Law and the Cultural Heritage Vol. 3: Movement* (1989) 588, 606, 625; and the update by O'Keefe 'Protection of the Material Cultural Heritage: the Commonwealth Scheme' 1995 *ICLQ* 147, 153.

Commonwealth courts.[32]

The Scheme refers to 'country of location', which is the country where a cultural object is located at the time the country of export invokes the Scheme's provisions for return. This phrase is likely to be more precise than 'state of origin' (or *situs*). The country of location prohibits the import of items covered by the Scheme that were exported without a permit as required by the country of export. The idea is not that the country of location would enforce the laws of the latter; rather, it would be enforcing its own laws. The laws of the country of export merely provide the operative event that brings the laws of the country of location into play.

A country that wishes to add its weight to the Scheme would have to restrict its export controls to heritage that is of *real national importance*. These are the only items that would justify the time and expense of preparing a request for return.

The importance of the item is determined by the following criteria –

- the close association of the item with the history or life of the country;
- the aesthetic qualities of the item;
- the value of the item in the study of the arts and sciences;
- the rarity of the item;
- the spiritual or emotional association of the item with the people of the country or any group or section thereof; and
- the archaeological significance of the item.

As adopted by law ministers, the Scheme is directed against unlawful export. Members of the Commonwealth are required to do two things to make the simplified procedure for return work –

- designate a central authority for the making and receiving of requests for return of cultural heritage; and
- notify the Commonwealth Secretariat thereof.

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[32] O'Keefe 1995 *ICLQ* 153.

When a request is received, it has to be determined whether an item is covered by the Scheme, and whether the item is covered by an export permit or a validation certificate. If the answer to the second question is no, return has to be ordered subject to compensation to the innocent purchaser who has valid title. The country of location must do what it can to ensure return and take appropriate steps in accordance with its laws to secure or safeguard the item against removal from its territory and destruction. Member countries need to have laws in place that give adequate protection and make it a criminal offence to breach the export prohibition and to import an item that had been exported unlawfully. More precise legal or administrative means ensuring return are not specified by the Scheme.

The Scheme allows the authorities in the country of location two options as to what action to take upon a request for the return of an item covered thereby.[33] First, they may give notice to the holder of the item that, unless court proceedings are instituted within a stipulated period, the item will be returned to the country of export. If the holder fails to take action to confirm his or her lawful ownership, the authorities have to seize and return the item. The central authority in the country of export is then required to hold it for 12 months. Anyone believing that they have an interest may institute proceedings in that country to determine questions of title and compensation. If no one institutes proceedings, the central authority may deal with the item in accordance with the law of the country of export.

Under the second option, the authorities of the country of location may institute proceedings 'with a view to securing an order for the return of the item to the country of export' or they may advise the country of export to institute such proceedings. The authorities may take this route when they want the legitimacy of the export to be established judicially, or when they regard the holder as an innocent purchaser for value who had conducted a diligent search into the provenance of the item. If the holder is *bona fide*, the court may make return conditional upon payment of fair and reasonable compensation. Costs incurred by the country of location may be charged to the country of export. If they are extraordinarily high, the two countries are advised to

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[33] Set out by O'Keefe 1995 *ICLQ* 155 ff.

consult each other.

It is up to individual Commonwealth countries to pass any legislation necessary to bring the principles of the Scheme into operation. The Commonwealth Scheme is part of a web of the international set of rules tailored to the needs of regulated return. It does not derogate from future and existing means of recovery of items of cultural heritage, nor does it upset the status of existing owners. The Scheme and the 1970 Unesco Convention are complementary and compatible, so long as some of the articles of the Unesco Convention are not interpreted in a dismissive fashion.[34] The Scheme provides procedures for recovery, lacking in the Unesco Convention, and it complements the 1995 Rome Convention.

2.7 Initiatives by museum profession

It is significant that only five member states of the Council of Europe have endorsed the 1970 Unesco Convention. As a consequence, the museum profession has had to make an effort to clarify its position. Two statements on the ethics of acquisition have resulted. The fullest statement is contained in the International Council of Museums' Code of Professional Ethics.[35]

3. REGIONAL LEVEL

Intimate cultural and historical links between countries of a particular geographical area may lead them to manifest the need for greater unity in the region. The Organisation of American States (OAS) is a case in point. The OAS adopted the Convention of San Salvador (Convention on the Protection of the Archaeological, Historical and Artistic Heritage of the American Nations).[36] This Convention encourages registration of collections, registration of transactions of sale and purchase and prohibition of imports without appropriate authorisation. Article 6 declares as

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[34] O'Keefe 1995 *ICLQ* 159-160 challenges Bator's interpretation of the Unesco Convention. Bator 'An Essay on the International Trade in Art' 1982 *Stanford LR* 275.

[35] ICOM 1987; See Appendix to ICC 87-91. The Museums Association Code of Practice for Museum Authorities is the subject of an extensive discussion by Palmer 1994 *Current Legal Problems* 226, 240 ff.

[36] Unanimously adopted by the General Assembly of the OAS by Resolution 210 (VI-0/76) on 16 June 1976.

imprescriptable actions taken by a state to reclaim items belonging to it.[37]

In Europe, the bulk of activities are orchestrated by the Council of Europe. The Council started in 1954 with the European Cultural Convention, referred to previously.[38] Cultural heritage affairs were originally dealt with as part of environmental co-operation, but have been handed over to the Council for Cultural Co-operation established under the Council of Europe (CDCC) and its Cultural Heritage Committee. Article 5 provides that each contracting party shall regard the objects of European cultural value placed under its control as integrated parts of the common cultural heritage of Europe. Recommendations and Conventions on the archaeological and architectural heritage followed. The European Convention on Offences relating to Cultural Property[39] recognises, in its Preamble, the common responsibility of European States and affirms their solidarity in the commitment to protect the European cultural heritage. This Convention is particularly interesting for its commitment to the reciprocal enforcement of mandatory rules of contracting parties (discussed in chapter 6).

The revised European Convention on the Protection of the Archaeological Heritage[40] was signed by 20 member states of the Council of Europe. It is designed to overcome defects in the original 1975 Convention, to strengthen European co-operation in this area and to respond to the evolution of archaeological practice throughout Europe during the last two to three decades. The 1985 European Convention stresses that responsibility for the protection of the archaeological heritage should rest not only with the state directly concerned, but with all European countries.[41] This Convention gave new impetus to the vision of the Council of Europe to protect the architectural heritage, which includes broad town planning, technology and exchange of

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[37] Guatemalan law declares certain artefacts (*e.g.* fixed monumental stela from a Mayan ruin in the jungle) to be the property of the state and certain national parks to be the legacy of mankind. Guatemala signed an executive agreement with the US in 1984 (Agreement between the US and the Republic of Guatemala for the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties of 21 May 1984), ratified the Unesco Convention in 1985 and has also ratified the Convention of San Salvador.

[38] 218 *UNTS* 139.

[39] Convention of 23 June 1985, *ETS* No. 113-4, reprinted 25 *ILM* 44 (1986).

[40] Goyder 'Free Movement of Cultural Goods and European Community Law Part V' 1994(3) *IJCP* 125.

[41] Done 3 October 1985; *ETS* No. 143; 25 *ILM* 380 (1986); in general Wyss (1992) 102-105.

expertise.

While the notion of restitution or return of cultural objects is not contradicted by anything, Resolution 808 (1983) on the Return of Works of Art,[42] adopted by the Parliamentary Assembly of the Council of Europe, is not very clear on this aspect. It distinguishes between claims for the return of cultural objects within the European cultural area, and claims for the return of property from outside this area. Member governments are asked for their full co-operation on a bilateral basis, 'and where appropriate through the mechanisms provided by Unesco' for the return of certain items to countries outside the European area.

The Treaty of Rome, Article 36, recognises the right of members to limit the transit of certain cultural objects.[43] The Preamble of the Treaty on European Union[44] contains the resolve of the contracting parties –

> [t]o mark a new stage in the process of European integration undertaken with the establishment of the European Communities ... creating an ever closer union among the peoples of Europe ...

Article 3 EC (P) includes as one of the objectives of the Community action 'a contribution to education and training equality and to the flowering of the cultures of the Member States'. Article 92, Section 3(d) contains an obligation to –

> aid to promote culture and heritage conservation, where such aid does not affect trading conditions and competition in the Community to an extent that it is contrary to the common interest.

The Treaty on European Union adds a separate chapter on culture to the treaty establishing the EC and refers to the need to protect 'cultural heritage of European significance'.[45] The Council is called upon to adopt incentive measures to achieve the objective, but harmonisation of law pertaining to culture has been excluded. Thus, allowance has been made for the development of a European cultural policy, while leaving room for member states to define their objectives and

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[42] Council of Europe, Texts adopted by the Assembly, 35th ordinary session (second part) 1983, §§ 9 and 11.

[43] Treaty of Rome, Treaty establishing the European Economic Community (concluded 25 March 1957) 298 *UNTS* 11.

[44] Treaty on European Union *OJ* 1992 C191.

[45] Title IX 'Culture' Article 128.

pursue policies aimed at the preservation of their national cultures. The establishment of a legal basis for culture signifies that Community action with regard to culture will be of a permanent nature and become an acknowledged branch of Community activity.

A high number of works of art go missing in Europe every year. In order to curb smuggling of national treasures, the various national treasure laws and other types of export restriction on cultural heritage were reconsidered. European legislation has been passed at supranational EC level, laying down procedures for requests for return of the most important cultural treasures and the most valuable objects.[46] Two instruments are paving the way for the disappearance of border controls and the establishment of the free movement of goods within the region. They call for Community-wide enforcement of national export controls by introducing an EC export licence for works destined for third countries, and improves co-operation between national customs authorities and police forces in tracking down assets illegally exported from one member state to another.

Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a member state,[47] subjects categories of goods to harmonised controls in respect of restitution and enforces source nation export controls within the EC. The Directive calls for Community-wide enforcement of national export controls. The aim is mutual recognition of the relevant national laws. Recognition of one another's laws is intended only in respect of limited categories of objects. Enforcement of other members' laws must be compatible with Article 36 of the Rome Treaty.[48] Member states have a reciprocal right of action in the courts of fellow members. The court that is addressed cannot refuse to enforce the public laws of another member state. The statutory right of action in the EC Directive, meant to supplement

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[46] See articles 1, 5 and annex of Council Directive (EEC) 93/7 of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a member state *OJ* No. L 74/74, 27.3.93 under 'Acts whose publication is not obligatory'.

[47] The Directive covers requests made for return since 1.1.1993, but member states are free to subject earlier requests to the provisions.

[48] The Treaty of Rome recognises the right of members to limit the transit of certain cultural objects (*i.e.* national treasures) in Article 36. The Treaty on European Union refers to the need to protect 'cultural heritage of European significance'. The Council is called upon to adopt incentives to achieve the objective, but harmonisation of law pertaining to culture has been excluded.

those restitutionary rights of action that arise from ordinary private ownership of a cultural object, is conferred only on member states. The Directive represents an advance that may not have been achieved without the counterbalance of the compensation provisions, but its main thrust is not against objects stolen from owners. Rather, it is designed to apply to objects unlawfully exported by owners. Private owners of objects that have been stolen or illegally exported have to follow the ordinary procedures under the Treaty of Rome. Article 9 of Directive 93/7/EEC provides for an order for compensation, such as is deemed 'fair according to the circumstances of the case'. Article 9 limits the duty to compensate to cases where the court is satisfied that the possessor exercised due care and attention in acquiring a national treasure. A successful claimant state may have to compensate the current possessor, bear the expenses incurred in preserving the object concerned and in implementing a court order for the return of the object concerned. The duty to compensate applies regardless of the possibility that ordinary rules of the conflict of laws may grant the requesting member state an enduring title unimpaired by later transactions.

The Directive gives a measure of recognition to laws of source countries, by providing that ownership of the cultural object after return 'shall be governed by that law of the requesting Member State'.

The developments within the EU have been branded as regressive by commentators who regard these as a missed opportunity to include object-oriented values and to limit overreaching national retentionist policies.[49]

As indicated in chapter 1, there are differences of opinion as to what constitutes a national treasure and is therefore not allowed to leave a country. It is for each member state to establish its own list of prohibited exports.[50]

In Africa, the Arusha Workshop on Measures against Illicit Traffic in Cultural Property, held on 24-30 October 1993, was the first of its kind. 21 African countries participated. The meeting

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[49] Merryman 'The Nation and the Object' 1994 *IJCP* 61, 71-72.

[50] *Ibid.* 71.

noted that African nations are being deprived of the knowledge of their past by the removal of symbols of their identity. The main thrusts of the action plan agreed upon,[51] include –

- compilation of inventories;
- ratification of the 1970 Unesco Convention;
- collaboration with police and customs services; and
- promotion of awareness of the importance of cultural heritage.

As part of an Africom inititative, a handbook of standards has been published for the documentation of museum collections in Africa.[52] Much work remains to be done to build capacity to document museum collections, amongst other things.

4. PROTECTING THE RIGHT TO CULTURE AND TO CULTURAL INTEGRITY

Historically, in African and Asian states in particular, the pillaging of cultural relics was directly ascribable to colonial policy and the strategy of cultural appropriation. The cultural heritage issue became central to the struggle for independence. Cultural property was closely associated with readjustment of damages that occurred in the past including the controversial question of the adjudication of 'rightful ownership' of objects acquired from former colonies. The right to be a cultural pirate and exploit the cultural and economic resources of the colony belonged to the 'possessor'.[53]

Possible justifications for piracy included introduction of education and strategies of modern development that enabled emerging markets to define their place in the modern world.[54] Attempts have been made to justify takings on the grounds of safe-keeping. Yet these justifications do not solve the problem of how to stop future depredations, or of what the law regarding restitution of these objects should be, considering that traditional legal mechanisms often fail to protect

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[51] See Clément 'Conference Reports' 1995 *ICJP* 167.

[52] Africom is the International Council of Museum's programme for Africa. See *International Council of Museums Handbook of Standards* (1996). The book explains the role of inventories and the standards for and documentation of collections.

[53] Aniakor 'Cultural Objects as History and National Patrimony: A Moral Challenge' in: The American Society of International Law *ASIL Proceedings of the 89th Annual Meeting*, 5-8 April 1995, 433.

[54] Aniakor (1995) 437.

minority rights to cultural integrity.[55]

When the political struggle eased off in many parts of Africa, 'development' and 'modernisation' became the economic motto. However, political instability, tribal and ethnic conflicts, religious, social and cultural factors, famine and poverty stood in the way of progress towards these goals. The right to development and the duty to co-operate for development seem to constitute the two sides of a coin. Theorists have asked whether political aspiration could hold back economic growth and have feared that notions of development may facilitate economic, cultural and environmental degradation in the name of progress.[56] The converse is also potentially true: social and cultural heritage (*e.g.* the tribal system or indigenous tenure) may retard development.[57]

Together with preservation of cultural heritage, the integration of the cultural dimension of development featured as a key area among the objectives of the World Decade for Cultural Development (1988-1997).[58] The World Commission on Culture and Development has underlined that culture ought to be understood as the basis of development and that the notion of cultural policy has to be broadened accordingly.[59] An Action Plan on Cultural Policies for Development was adopted by Unesco at an intergovernmental conference on Cultural Policies for Development.[60]

The only development that would be acceptable to the subjects of development would confirm the possibility of cultural diversity and the valuing of local knowledge. There is growing

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[55] Radin 'The Right to Development as a Mechanism for Group Autonomy: Protection of Tibetan Cultural Rights' 1993 *Washington Law Review* 695-714; Mansell & Scott 'Why Bother About the Right to Development?' 1994 (21) *Journal of Law and Society* 171.

[56] Mansell & Scott 1994 (21) *Journal of Law and Society* 180.

[57] Oosthuizen 'Africa's Social and Cultural Heritage in a New Era' 1987 *Africa Insight* 107; Maritz 'Africa's Social and Cultural Heritage in a New Era' 1987 *Africa Insight* 120.

[58] Unesco, Report by the Director-General on the World Decade for Cultural Development, Executive Board, 124 EX/18, 5 May 1986, 8; 23/C Resolution 11.10; Resolution 41/187; Unesco, Final Report of the Intergovernmental Committee of the World Decade for Cultural Development, Second Regular Session, 5-9 February 1990 CC/MD/12 Annex III-B, 7.

[59] World Commission on Culture and Development *Our Creative Diversity*. Report to Unesco (1996) summary.

[60] Stockholm, Sweden, on 30 March – 2 April 1998. Reproduced in 1998 (32) *Copyright Bulletin* 63.

consensus that only development assistance that takes account of the cultural framework of the developing country and its law, will lead to positive developmental results. Systematic analysis based on case studies is now required to translate theories into policy actions. The relation between culture and development is referred to in the South African context in chapter 9.

4.1 The right to self-determination

Article 1 of the International Covenant on Economic, Social and Cultural Rights[61] states –

> 1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Under modern international law, the right to self-determination[62] presumes the continuous consent of the governed in the form of representative democratic government. The right had a long history but eventually became part of the terrain of decolonisation, when the Declaration of the Granting of Independence to Colonial Countries and Peoples was adopted by the UN in 1960.[63]

The right is an essential prerequisite for the existence of individual human rights and therefore the establishment of internal conditions for the enjoyment of all human rights constitutes an important objective of the right. The right to self-determination may demand external autonomy (through the right to freely determine political status) as peoples may form their own sovereign states. This implies a risk of secession by peoples from alien, foreign and colonial rulers. However, the principle does no seem to include a general right of groups to secede from the states of which they form part. In its internal sense, the right is a right of groups within an existing sovereign state to a degree of autonomy and to their own economic, social and cultural development. Where an open and free democracy exists in which the principles of democratic

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[61] 1966 Covenant on Economic, Social and Cultural Rights 993 *UNTS* 3; The ICCPR and ICESCR share an identically worded Article 1 on the right of all peoples to self-determination.

[62] For treaty formulations, see Article 55 UN Charter; Chapter XI UN Charter; Article 76(b) of the Charter; Declaration on the Granting of Independence to Colonial Countries and Peoples GA Res 1514 (XV) *UN Doc.* A/1514 (14 December 1960); Article 20 of the 1981 Africa Charter of Human and Peoples' Rights OAU Doc/CAB/LEG/67/3/Rev. 5; 21 *ILM* 59 (1982).

[63] *Supra.*

governance (popular participation and representation in government; respect for fundamental human rights such as equality; the rule of law) prevail, the right to self-determination is subservient to the principle of territorial integrity and the group has no right to a sovereign state of their own.[64]

Ethnic and cultural minorities within independent pluralistic states may freely determine, pursue and develop their culture, traditions, religion and language without external interference. In the sphere of culture, the right to self-determination presupposes an original civilisation that has to be preserved and developed.[65] Group autonomy over development that fosters free, fair and open participation in the democratic process, is the ideal. It is regrettable that development processes seldom foster such autonomy.

The traditional notion was that only colonial peoples enjoy the right to self-determination. The 1993 UN World Congress on Human Rights held in Vienna, did not change the supposition that the right to seek independence or secede from the state concerned belongs to dependent and colonial peoples and not to cultural and religious minorities. Today, views of the international community fluctuate and there are competing understandings. Individuals within minority groups have been demanding the same rights as a people – to enjoy their culture, to profess and practice their religion and to use their own language. The principle may yet develop in the direction of a continuing process of internal, democratic self-government which protects the interests of minorities within existing states.[66] The UN ought to formulate a policy on self-determination to clearly state who is entitled to pursue the right and what are the criteria for such an assessment.

According to Strati, in fulfilment of their search for cultural identity and self-determination, states ought to be able to recover the most significant items of their patrimony. She stresses that those objects that reveal the cultural identity of the people who created them should be returned. Not

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[64] Viejobueno 'Self-determination v Territorial Integrity: The Falklands/Malvinas Dispute with Reference to Recent Cases in the United Nations' 1990/1991(16) *SAYIL* 1 ff. In general Alexander & Friedlander (eds) *Self-determination: National, Regional and Global Dimensions* (1980); Thürer 'Self-determination' in *Encyclopedia of Public International Law Vol. 8* (1985).

[65] Strati (1995) 356.

[66] Thürer in *Encyclopedia of Public International Law Vol. 8* (1985) 475.

every discovered object of foreign origin qualifies.[67] Her view implies that objects themselves need to be ranked according to their importance, with regard to values.[68]

4.2 The right to development as a basis for protection of the right to cultural integrity

The right to development was coined in 1972 by M'Baye.[69] The UN Commission on Human Rights conducted the first formal discussion on development as a basic principal right in 1977. The international community quickly supported its recognition. Resolutions and studies followed, and the right was incorporated in the Banjul Charter of 1981. In 1986 the UN adopted the Declaration on the Right to Development with 146 votes to 1, and 8 abstentions.

Many contrasting perceptions of human rights influence the perception of the right to development.[70] Authorities agree that the right to development is a collective right. Its subjects and beneficiaries may be listed as –

- states and developing nations, exercising this right against other states and the international community;
- groups or communities of individuals and peoples, including indigenous peoples and minorities working for common goals in a spirit of solidarity; and
- individuals as central participants.

On the question of who ought to be entitled to the right of self-determination and development, Strati sees both the people who constitute a state and those who have not yet attained statehood as qualifying to be subjects.[71] Yet, how will individuals be able to realise their right to development if they have no state, or the state's right is impeded? She qualifies her view by adding that the right to follow a policy designed to preserve a culture (right to self-determination) is most complete when the people is sovereign. Peace and reconciliation are prerequisites for the exercise

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[67] Strati (1995) 358.

[68] Chapter 6 refers to theories that develop this idea in further detail.

[69] 'Le Droit au Développement comme un Droit de l'Homme' 1972 (5) *Revue des Droits de l'Homme* 505.

[70] *Cf e.g.* Alston 'The Shortcomings of a "Garfield the Cat" Approach to the Right to Development' 1985 *California Western International Law Journal* 510; Brietzke 'Consorting With the Chameleon, or Realizing the Right to Development' 1985 *California Western International Law Journal* 560; Donelly 'In Search of the Unicorn: The Jurisprudence and Politics of the Right to Development' 1985 *California Western International Law Journal* 473.

[71] Strati (1995) 357.

and realisation of the right. Moreover, the exercise of the right requires a delicate balance between factors such as economic growth, social justice, democracy and environmental protection.

The right to development appears to capture one of the elements of the right to self-determination, namely internal self-determination. If applied to the internal dimension, the right allows minority groups autonomy over the economic, social, political and cultural development necessary to the survival of their distinct cultures. If the state in which a minority group lives is a democratic state, the group must exercise its right in relation to the state authority itself and it has no right to secession.[72] Theoretically, the right to development may afford protection to cultural objects if cultural integrity happens to be the desire or claim of the particular culture concerned. In practice, an indigenous culture that wishes to institute action for cultural objects that belong to it, may stand little chance if it cannot participate in a government freely chosen by the people of that state, and the state practices discrimination. A marginalised minority may be entitled to the right to internal self-determination, yet its action may be doomed for reasons such as poverty.

Subtle forces are threatening the cultural rights of Tibetans, and planning is needed to secure the protection of the cultural integrity of the Tibetan people. Resettlement of the Han, expansion of tourism and visions of economic growth and development may all contribute to the people's demise. China denies that Tibetans have an international law claim under the right to self-determination. The world community treated the 1951 invasion as an illegal aggression, but the UN chose at first not to condemn China's actions. After dissolution of the Dalai Lama's government, his flight into exile and evidence regarding human rights abuses, the General Assembly passed resolutions denouncing China's actions. The international community did not demand, however, the restoration of Tibetan independence. Radin theorises for instance that group autonomy over development (the right to development) can potentially secure protection of the cultural integrity rights of the Tibetan people.

Cultural self-determination by states is gaining in importance for minority groups qualifying for

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[72] Radin 1993 *Washington Law Review* 696.

protection. Clearly, the right to development has implications for the tension between collective (national) and group or individual heritage. Groups must define and accept the obligations inherent in the right. Once the tension between national and group heritage is solved, the right to development may encourage national controls in an international context.

It is clear from the above that the right has a role not only in interstate relations, but also in relationships between a state and its peoples. A state can only guarantee its citizens their right to development if that state's right to development is not impeded. While the state is the administrator of the right, the state's right to pursue development is contingent upon its observance of its duties to its people.[73]

The right to development is useful only as a yardstick for the internal policies of both the 'developed' and the 'underdeveloped' world. The content of the right differs according to the cultural context of those who participate in their own development. If the group defines it thus, its comparative poverty may become an argument against national retentive action. However, the poverty of a particular group or its low median income levels may also mean that its dependency on its cultural symbols and objects is more acute and a higher expectation exists that the state and the international community will assist it to retain its heritage.

5. CONCLUSION

Halting the deterioration of the situation in which many countries' cultural and artistic objects find themselves, requires efforts which are synchronised with foreign and international law. At present, developments at the domestic level in source states indicate that national protection still predominates. Strong regional initiatives exist, particularly in Europe. In Africa, the idea of the 'African renaissance' is supposed to re-ignite African cultural consciousness.

International conventions focus on cultural rights: some provide individual guarantees; others, group and minority guarantees. The issue of where the right to protection of cultural heritage fits in has arisen, but remains to be settled. The Draft Declaration on the Rights of Indigenous

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[73] *Ibid.*

Peoples is noteworthy in so far as it spells out the rights associated with culture. Whereas recognition of language rights as human rights is increasing, actual human rights standards are yet to be developed.

The level of illicit traffic and trade exposes the harsh reality that international efforts have not been adequate. International initiatives are as adequate as the strength of the number of supporting states allows them to be. Moreover, changes in the law do not have retroactive effect. The rule is that a judicial fact must be examined and judged in the light of the law as it was at the time the fact arose; not of the law at the time when a dispute in respect of that fact arises. This is also true of international agreements.

CHAPTER 4

THE ROLES OF CULTURAL OBJECTS : IDEOLOGY AND DISCOURSE

1. INTRODUCTION

The question: 'Who owns cultural property?' raises important philosophical issues about property and the past.[1] The emerging concept of cultural heritage is one wherein ownership is seen in relative, not absolute terms, owing to the realisation of the relativity and interconnectedness thereof. The question couches the debate in a property straightjacket, glossing over the social, economic and symbolic roles that cultural objects play in society.

Since a rights framework must search, at least, for the most appropriate owner, the first part of this chapter (*sub* § 2.) gives an overview of the main streams of thinking on property rights. Its focus is on title and different ideologies and discourses relevant to property. Different conceptions of intellectual property rights are an intrinsic part of this discussion, since one of the useful definitions of culture is that it refers to the cultivation of ideas and the formal products of those ideas. All the major trading nations of the world have laws to protect intellectual property rights. Intellectual property rights are a well-established category of commercial rights, and their legal protection have become the object of a specialised field of law.

If a dispute concerning a cultural object is conceived simply in terms of property rights, the theoretical framework of reference is bound to be one of property, ownership and rights.[2] This framework would be satisfactory if cultural heritage were simply what a nation's laws define as heritage, or what legislation were to qualify as 'owned', or what legislation requires export approval for. However, restitution or repatriation[3] claims show that there is more to cultural

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[1] *E.g.* Gattini 'The Fate of the Koenigs Collection: Public and Private International Law Aspects' 1995 *ICJP* 81.

[2] Warren 'Perspectives of the Victims: Case Studies' in Messenger (ed.) *The Ethics of Collecting Cultural Property* (1989) 2.

[3] Choice of term may connote a specific political stance. For example, 'cultural patrimony' or 'repatriation' may imply that an artefact is of such significance to a particular civilisation as to be an inalienable birthright of its descendants.

heritage than the legal questions around property rights (*sub* § 3.).

Issues of repatriation have more in common with legal concepts in the area of personal injury law than with traditional concepts of property law. The repatriation issue appears to be less about who 'owns' a culture's heritage than about to whom a culture's heritage 'belongs'.[4] Repatriation is the claim to cultural objects as a culture's property. In essence, it is a claim to cultural patrimony, the loss of which may be an emotionally charged matter. The issue of whom cultural heritage belongs to as a matter of emotional connection and personal identity, may take priority over whom it belongs to by virtue of property rights and ownership. This explains in part why repatriation claims tend to survive against the odds, from generation to generation. They are rarely considered adequately dealt with through legal means such as prescription or statutes of limitation and are largely extra-legal by nature.[5]

Claims made by countries of origin, in favour of restitution or in favour of retention, may rely on arguments other than the cultural patrimony argument, namely –

- that the cultural materials inside its territory or crafted by its nationals belongs to the country of origin; or
- that a country of origin is deeply concerned over decontextualisation, which destroys scholarly or educational value and aesthetic integrity.

The ownership debate can accommodate a variety of positions –

- 'Some specific group' owns the past (nations, indigenous peoples, scholars, collectors) since that group embodies the cultural values manifested in the past;
- 'Everyone owns the past', since the past is the common heritage of all; or
- 'The past belongs to no-one'.

The first of these 'categories' implies clear concomitant duties. In an anthropomorphic world, each person is a whole world. Each person's world includes the 'other'. Each person's duty is to protect the truth and the rights of the other, but not to the extent of becoming consumed by the

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[4] Shapiro 'Repatriation: A Modest Proposal' 1998 *International Law and Politics* 99.

[5] *Ibid.* 100.

'other'. A rights framework must search, at least, for the most appropriate owner so that his, her or its rights can be protected.

The legal notion of things belonging to 'everyone, and to no one in particular', appears in Roman law (albeit not as a general understanding of the legal status of cultural objects) and renders certain objects sacred and unavailable for purchase and sale. This 'category' in the above-mentioned 'rights framework' implies concomitant duties that are less clearly defined than the duties belonging to the first category, for responsibility is diffused. The perspective that the past belongs to no-one can arise where national and international protection meet or overlap.

The current international interest in free movement (*sub* § 4.) focuses on cultural objects that are not stolen, but that cannot be moved in terms of restrictions placed on them by national legislation, typically legislation prohibiting or restricting export. Export control legislation commonly restricts the movement of all but the most recently created privately held objects. Export licences may be granted on proper application. Few states compensate individuals for significant loss of value due to export restrictions.[6]

Various ideologies and discourses relevant to export restrictions are discussed below. The approaches at the extremes of the spectrum, inalienability as opposed to free trade, are introduced. One of the most pertinent questions is a carefully crafted one: should the rule belonging to traditional international law that a nation has no obligation to enforce another nation's restrictions on the export of privately held cultural objects, be changed?[7]

It is possible to reconcile the free trade perspective with a number of perspectives, including the universalist and the humanity ownership perspective –

- that the past is susceptible to ownership (*i.e.* that the past belongs to everyone or to an individual who has the power to decide what to do with an object belonging to them); or
- that the past is not susceptible to ownership (*i.e.* that the past belongs to no one in particular).

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[6] Merryman 'The Free International Movement of Cultural Property' 1998 *International Law and Politics* 1, 5 with further reference.

[7] Merryman 1998 *International Law and Politics* 1, 14.

It is more difficult, however, to reconcile the free trade perspective with the theory that cultural objects are the exclusive right or entitlement of a specific nation or group. The proponents of free trade argue that the object should come to rest where it would be best looked after (*sub* § 3.). But should anyone be able to buy and sell any object just because its maker does not posses adequate tools for its protection? If to do so would imply that a people may be deprived of its own means of subsistence, the answer is no.[8]

The free trade perspective holds serious implications for law-making. As a non-legal factor, it must be addressed since the social and economic environment of rules may influence the level of obedience or adherence to rules. Domestic enforcement of export control legislation is notoriously ineffective. The effect given by authorities of one nation to another nation's restrictions on the export of cultural objects and the recognition and enforcement of judgments rendered by foreign courts, fall squarely within the ambit of the conflict of laws. This aspect will be covered in chapter 6.

Once the property concept is dealt with, the discussion is structured around the following points –

- Relationship between common heritage, heritage belonging to the nation of origin, national heritage, national versus cultural identity;
- Source nation discourse: restitution claims;
- International free trade discourse: a utilitarian approach;
- Failures of the market view;
- Object-oriented values: preservation and integrity;
- Inalienability;
- Implications and shortcomings of inalienability; and
- A *via media*: non-export of most valuable items.

2. DIFFERENCES IN THE CONCEPTION OF PROPERTY

The Western, postmodern and indigenous discourses on property represent different views of

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[8] See Article 1 of the ICCPR and ICESCR. Also the Declaration on the Granting of Independence to Colonial Countries and Peoples *supra*.

title. The invocation of a property right entails the proprietor's control over a thing, the object of property, against the rest of the world, which is thereby excluded from general use. The root of the term is 'proprius', meaning one's own.

Generally, political philosophy impacts most powerfully on concrete reality through the redefining or redistribution of property.

When the destiny of the Sagas from Iceland's Golden Age had to be decided in *Arnamagnaean Institute v Ministry of Education*[9] the role played by classification as private or public property became clearer. If the Icelandic Manuscripts were public property, the Danish government would have had the right to deal with them as it wished; were they private property, the government could only appropriate them in the 'public interest' and subject to compensation. In the *Medici* case,[10] the claim of the Italian state was recognised only in so far as it had a bearing on the documents, which were publicly owned.

Deciding which object is public property and which is private property may become a very complicated matter, and may effectively disregard the cultural or commercial value of the object itself. Pinning the degree of protection to the mast of legal classification may become extremely problematic in the cultural heritage context. This is borne out in the realm of intellectual property rights, where the western distinction between real and personal rights often prevents indigenous intellectual property rights from being protected.

2.1 Western theory

The Western concept of property connotes control by the owner, expressed by his or her ability to alienate, exploit, destroy, licence the use or exploitation of the object or site in question by others, or exclude others from using or enjoying it.[11] Grotius, for example, based his view of property

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[9] *The Arnamagnaean Foundation v Ministry of Education* 1966 UfR 22; 1971 UfR 299 (Denmark).

[10] *King of Italy and the Italian Government v Marquis Cosimo de Medici Tornaquinci and Christies* 1918 34 TLR 623.

[11] Prott & O'Keefe '"Cultural Heritage" or "Cultural Property"?' 1992 (1) *IJCP* 307-319 310; Allott 'Mare Nostrum: A New International Law of the Sea' 1992 (86) *American Journal of International Law* 771-772.

relations upon the power of disposal ascribed to an owner of property and focused on property as a 'subjective' right.[12]

Ownership and rights are deeply involved with power.[13] Property defines the borders of control over things and marks the degree of social, economical, political or legal power. For example, the works of the pandectist Windscheid describe ownership in terms of an abstract and elastic right that is absolute in principle, although it can accommodate temporary restrictions.[14]

By viewing ownership in relative terms, it may be possible to achieve a balance between private rights and public interests and responsibilities. Certain theoretical constructions support the idea that individual property rights are limited or circumscribed by the context and the interests of society. In accordance with the Dutch functionalist theory and the German idea of 'kleineres Eigentum', for example, absolute rights are restricted to a small sphere of personal property while other kinds of property may be subjected to more fundamental restrictions.[15]

In postmodern writing, pragmatism is a central focus of legal theory. The pragmatic approach is an 'essentially' ad hoc approach that emphasises that legal rules depend on the surrounding social context as much as on the acts of legislatures and other authoritative entities, including courts. Pragmatism tries to give a moderate response to critical legal studies and the question of the proper scope of legal theory. Radin and Schnably are among the authorities known for work in this tradition.[16] A number of debates in property theory are the order of the day[17] and it is not the

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[12] Van der Walt 'Marginal Notes on Powerful(l) Legends: Critical Perspectives on Property Theory' 1995 (58) *THRHR* 396, 405.

[13] *Ibid.* 406.

[14] *Lehrbuch des Pandektenrechts* (8 ed.) Kipp 199 *Vol. I* book 3 § 167 (756-7) on rights as individual spheres of absolute autonomy and exclusive power. In terms of this perspective, property is a subjective right. The traditional property legend is that of the absolute autonomy of the individual property holder to dispose of property.

[15] For more detail, see Van der Walt 'Unity and Pluralism in Property Theory – A Review of Property Theories and Debates in Recent Literature: Part I' 1995 (1) *TSAR* 15, 25 ff.

[16] Radin 'The liberal Conception of Property: Cross Currents in the Jurisprudence of Takings' 1988 (88) *Columbia Law Review* 1667 ff; Schnably 'Property and Pragmatism: A Critique of Radin's Theory of Property and Personhood' 1993 *Stanford Law Review* 347.

[17] See Van der Walt 1995 *TSAR* 1; Van der Walt 'Subject and Society in Property Theory – a Review of Property Theories and Debates in Recent Literature: part ii' 1995 (2) *TSAR* 322.

intention to discuss these contemporary debates. Only a few prominent scholars are mentioned here to highlight some aspects of theoretical construction. Since Radin's model on the extended sphere of non-interference with one's person ('property for personhood') has been influential and incorporates cultural objects, it is canvassed below in greater detail.

The great contemporary political thinkers such as Locke, Hegel and Kant have not said much about intellectual property rights,[18] which cover the field of patents, trade marks, copyright, designs, etc.

2.2 Property rights of indigenous peoples

All the settled British colonies, such as Canada, the US and New Zealand, had indigenous inhabitants with their own systems of land law and land ownership recognised by the common law. The customary tribal law includes title in, for example, sacred objects. Common law notions of property have deprived Aboriginal and First Nation peoples of much of the art, artefacts and sacred sites that defined their cultures. Exceptions are rare.

2.2.1 Canadian law

The Canadian Cultural Property Import and Export Act, 1985, is seriously flawed, as the view of title taken by First Nation customary tribal law plays no role when legal title is examined for the purpose of granting an export permit. The minimum requirements for export do not provide for an investigation into the validity of transfers of title over time, nor are native groups allowed to veto an export decision. The decision to grant permission for export or sale ought to take account of the customary law view of the capacity of a putative transferor to convey title. Generally, the consent of the steward of the object would be a requirement. To purchase an artefact from an unauthorised individual would mean that the purchaser receives no title as the vendor can confer none.[19]

From time to time, Canadian authorities argue strongly in favour of a comprehensive and

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[18] See Drahos in WIPO (1999) 33.

[19] Walker & Ostrove 'The Aboriginal Right to Cultural Property' 1995 *UBCLR* 25.

principled response to the issues of title and ownership of aboriginal artefacts and the delineation of circumstances under which sale is permissible.[20] Yet this does not seem to be having any impact.

2.2.2 Australian law

Determining the foundation of Australia's land law as *res nullius*[21] provided justification for the idea that, upon settlement, Australia's lands became the property of the King of England. In 1992, recognition was given, at the property law level, to the land rights and indigenous relationships with land of Australian Aboriginal people. The *Mabo* judgments[22] emphasise the significance of international law and scope was given for an indigenous human rights perspective that goes beyond recognition of native title.[23] The Native Title Act, 1993, was adopted in the wake of the *Mabo* judgments but the political debate changed significantly during 1996, when the Labour government was defeated. An amendment was passed in 1998 in terms of which immunisation against native title claims became possible, through the upgrading of pastoral leases. Upgrading of these leases to confer exclusive possession could extinguish the common and statutory claims of Aboriginals, but compensation is payable.

In the *Wik* case,[24] the Australian High Court decided that titles of pastoral lessees and native title holders could co-exist. This judgment contains controversial statements, yet indicates that the property rights of different groups can receive balanced treatment in practice.

In Australia, the *Mabo* and *Wik* decisions have meant that a debate on land rights, underpinned by human rights considerations, is possible for the first time. Whatever the outcome, the co-existence of interests in land implies respect for diversity and does not imply priority, as suggested by exclusive possession. A relative view of ownership, that individual property rights

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[20] *Ibid.* 15 ff.

[21] *Cooper v Stuart* [1989] 14 App Cas 286; *Milirrpum v Nabalco* (1971) 17 FLR 141.

[22] *Mabo v Queensland* [1992] 175 CLR 1; *Mabo v State of Queensland [No. 2]* (1992) 66 *ALJR* 408. Also relevant is *The Wik Peoples v Queensland* [1996] 71 ALJR 173.

[23] See *e.g.* Hocking & Hocking 'Australian Aboriginal Property Rights as Issues of Indigenous Sovereignty and Ownership' 1999 *Ratio Juris* 196.

are limited or circumscribed by the context and the interests of society, makes it possible for interests to co-exist.

It seems clear that the existing power relations influence the form of such co-existence.

2.3 Intellectual property rights

Intellectual property rights is a generic term used to refer to a group of legal regimes, each of which, to different degrees, confers rights of ownership in a particular subject matter.[25] The object of intellectual property is non-physical or intangible. It is possible to own the abstract object without owning a particular physical manifestation of the abstract object. Intellectual property rights may be asserted in respect of an abstract product of the human intellect, whereby a person or a company can prevent others from conduct that would give them an unfair trade advantage.

2.3.1 Intellectual property rights in the West

Individual intellectual property statutes provide definitions of the subject matter of their application. It is a striking feature of intellectual property that its subject matter continues to expand. Intellectual property rights are part of a complex regime of bilateral, regional and multilateral treaties that has been evolving since the 19th century.

2.3.2 Indigenous intellectual property rights

Indigenous peoples taking part in the Office of the United Nations High Commissioner for Human Rights (OHCHR) meetings regularly point out that their forms of expression are researched and exploited by others and that they are frequently denied financial benefit.

Indigenous groups struggle to change the existing intellectual property dispensation because they want intellectual property to function as a mechanism by means of which to protect their way of

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[24] *Supra.*

[25] Drahos 'The Universality of Intellectual Property Rights: Origins and Development' in WIPO *Intellectual Property and Human Rights* A Panel Discussion to commemorate the 50th Anniversary of the Universal Declaration of Human Rights, Geneva, 9 November 1998, 13.

life.

2.3.3 Intellectual property rights and human rights

A particular relationship exists between intellectual property rights and human rights: intellectual property rights serve and are guided by humanist values. On the challenge for policy-makers around the world to define efficient property rights in information, Drahos stated at a Conference organised jointly by WIPO and the UN High Commissioner for Human Rights to celebrate the 50th Anniversary of the UDHR –

> Linking intellectual property to human rights discourse is a crucial step in the project of articulating theories and policies that will guide us in the adjustment of existing intellectual property rights and the creation of new ones. Human rights in its present state of development offers us at least a common vocabulary with which to begin this project, even if, for the time being, not a common language.[26]

Western intellectual property rights protect the classical categories of the arts, such as musical performance, writings or visual art, but do not afford protection to traditional categories such as images, symbols and oral arts. The technical and complex nature of western intellectual property law also does not offer many opportunities for efficient property rights in information. It is therefore incumbent upon policy-makers to create and identify those opportunities. At the other end, human rights instruments are drafted at the level of principle, and the precise content of rights is often difficult to formulate. Legislatures across the world need to tap into intellectual property expertise to overcome this difficulty.

2.3.4 Copyright

Copyright is the right to exploit information and in so doing, to exclude others from using this information. The term refers to those common law systems that characterise the exclusive rights of authors in economic terms, *e.g.* the right to reproduce a work, publish a work, or adapt it. The protection of an author's literary, scientific, dramatic, musical, choreographic or artistic work is at issue. The rights with regard to his or her work are protected for a specific period of time. In order to qualify for protection, national laws generally require that the work must be original in the sense of being the result of the creator's own effort, or original expression of an idea in a

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[26] *Ibid.* 33.

tangible medium.[27]

In civil law systems, the rights of authors are regarded as being about the protection of the authorial personality, and as such, the right to be acknowledged as the author of the work and the right to control alterations to the work are the main rights protected.[28]

Express constitutional guarantees of copyright are relatively rare in the developed world.

2.3.5 Categories of cultural property in indigenous law

Control over the representation of cultural objects is an area that is being developed by case law in countries such as Australia. Australian Aboriginals generally include within the broad scope of 'intellectual property', issues such as –

- creation and use of cultural material;
- sacred items and human remains;
- designs, imagery and styles of painting;
- control of languages;
- bio-diversity and environmental management; and
- knowledge of plants and animals.

In all likelihood, designs in traditional styles will qualify for protection under the existing Anglo-Australian legal framework. This framework may be able to accommodate, or may be amended to accommodate, certain indigenous intellectual property principles.[29] However, enlarging the existing intellectual property protection holds less appeal for some commentators than the drafting of population-specific legislation that gives *sui generis* protection.[30]

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[27] *E.g.* Tier 'The Sudan's Copyright and Neighbouring Rights Protection Act 1996: An Evaluation' 1998 (32) *Copyright Bulletin* 4.

[28] Drahos in WIPO Intellectual Property and Human Rights (1998) 13-14.

[29] For example, it may be possible to make room for cultural harm in the assessment of damages.

[30] Puri 'Preservation and Conservation of the Expressions of Folklore' 1998 (32) *Copyright Bulletin* 25; Shyllon 'Conservation, Preservation and the Legal Protection of Folklore in Africa: A General Survey' 1998 (32) *Copyright Bulletin* 45; Wright 'Aboriginal Cultural Heritage in Australia' 1995 *UBCLR Special Issue* 45; Massey & Stephens 'Intellectual Property Rights, The Law and Indigenous Peoples' Art' 1998 (32) *Copyright Bulletin* 49.

Copyright in indigenous designs, medicinal knowledge and literature entails that such works may not be copied to any substantial extent. However, the indigenous discourse and range of rules governing ownership and use of images are not always in harmony with the eurocentric and postmodern discourse. Indeed, fundamental discrepancies between indigenous intellectual property rights and copyright exist. For example, indigenous intellectual property of the Aboriginals is concerned with the knowledge held and used by them as an indigenous people with a cultural distinctiveness that manifests in all aspects of indigenous identity and lifestyle. It centres on value and belief systems, community identifications and social functioning. Indigenous intellectual property creates socialised rights as it is about types and styles, processes and substance: the integrity and the authority of a culture. In contrast, copyright centres on cultural creation and investment. It is concerned with individual works and it creates individualised rights.

2.3.6 Oral tradition or folklore

From time to time, peoples of developing countries have demanded the establishment of legal rights not only in written, noted, printed and published material. Most states in Africa reached independence with inherited copyright legislation, which did not provide for the mainly oral traditions of Africa. African developing countries started to provide expressly for the protection of folklore in their copyright laws in the 1970s.[31] Many of these countries have acceded to the Bangui Agreement of the African Intellectual Property Organisation concluded in 1977.[32] The Bangui Agreement provides that works of folklore belong to the national heritage.

Shyllon[33] argues that, in their haste to stress folklore as an important aspect of African cultural identity, African countries put the legal protection of folklore ahead of conservation (or documentation) and preservation (protecting traditions and the transmitters of those traditions).

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[31] Section 2 of the Copyright Act of Malawi, 1987, states that folklore means 'all literary, dramatic, musical and artistic works belonging to the cultural heritage of Malawi'.

[32] Cazenave 'The African Intellectual Property Organisation (OAPI) from Libreville to Bangui' 1989 *Industrial Property* 291 with further ref.

[33] Shyllon 1998 (32) *Copyright Bulletin* 37.

The right to adapt folklore is particularly controversial and Nigeria is one of the few African states that extends express protection to folklore.[34]

The appropriation of the last vestige of cultural identity, the traditional heritage of intangible expression (oral tradition), bears on land rights as well. Archaeologists and ethnographers seek and use oral narratives to define rights to land and sea and to settle conflicts concerning resources.[35]

The individual nature of the rights, the duration of the rights, the originality requirement and the economic focus of the remedies pose obstacles to copyright protection of folklore.

2.3.7 Suppression, co-existence or enhanced protection?

The challenges of harmonisation of these diverse systems include the following –

- how present intellectual property systems can protect the collective ownership of rights;
- how present intellectual property systems can recognise knowledge that is continuously evolving; and
- how to quantify the spiritual dimension of indigenous knowledge.

Choice of one discourse may lead to suppression of the rights granted under another.[36] Worse than suppression, are acts of appropriation or plagiarism that could rob designs of their cultural significance and sacredness. However, more than one discourse may co-exist, as pointed out above, and a particular discourse may offer useful strategies for protection too. To protect their cultural values, native Americans of the US and Canada now require formal requests from those wishing to enter Indian reserves to study their way of life. A signed contract sets out what may and may not be recorded.

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[34] Nigerian Copyright Act of 1988 *Official Gazette of the Federal Republic of Nigeria, Vol. 75*, No. 84, 20 December 1988.

[35] Calliston 'Appropriation of Aboriginal Oral Traditions' 1995 *UBCLR* 165.

[36] *E.g. Yumbulbul v Reserve Bank of Australia* (1991) 21 IPR 481; *Milpurrurru v Indofurn Pty Ltd* (1995) 30 IPR 209. *Mabo v State of Queensland [No. 2]* (1992) 66 *ALJR* 408 provided the impetus for the recognition of rights of indigenous peoples. In general McDonald 'Copyright and Intellectual Property Concerns of Australia's Indigenous People' 1997 (73) *Copyright World* 15; Puri 1998 (32) *Copyright Bulletin* 5.

The tribe may also insist on owning the copyright. The Canadian Museum of Civilisation in Ottawa, Canada is developing agreements that cover the development of commercial products by contemporary aboriginal artists, both reproductions and new products under a licencing agreement. The museum has also established a training programme for graduates who will return to their own communities to develop museums.

Regional markets are generally edging towards deregulation, and trade with local and indigenous communities is growing. The need for reciprocal protection of copyright in Europe and other regions is clear so as to extend protection to other countries, as if the author is a national of that country. The European Union (EU) takes the view that there are both economic and cultural aspects to copyright. The former relates to the author's right to derive a financial advantage from the economic exploitation of his or her work. The latter relates to the promotion of intellectual and artistic creation. The last decade has therefore seen increased levels of protection within the EU.

The General Agreement on Tariffs and Trade (GATT) provides the multilateral perspective. The Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations was signed under GATT auspices.[37] If the expectation that the WTO will link together trade, intellectual property rights, sustainable development and the environment in a way that recognises indigenous and traditional knowledge and the practices of local and indigenous communities proves too ambitious, the soft law emerging in the field is certain to shape international law. The interest of indigenous peoples in intellectual property rights protection is linked to self-determination. Accepting the necessity of protection means more than extending the letter of copyright law to include work by indigenous people. Respect for different cultures demands that indigenous cultures retain the final say over the destinations of objects that they have created – even if they are no longer legal owners and these owners would prefer to sell the objects.

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[37] The Final Act was signed on 15 April 1994 and incorporates an Agreement establishing the World Trade Organisation (WTO) and the 1994 Agreement on Trade Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods (the TRIPS Agreement). TRIPS was made binding on all WTO members.

An important attempt to reconcile the various discourses is the Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Action, adopted under aegis of Unesco and WIPO (World Intellectual Property Organization) in 1985. The Model Law has not gained wide acceptance among the countries of the world, however. Farley observes that existing intellectual property rights are suited to protect those groups who want to participate in and control the marketing of their arts and crafts. However, the intellectual property regime does not serve those who want to preclude the use of their imagery well. The underlying logic of intellectual property laws is to facilitate the dissemination of ideas and cannot prevent the re-use and circulation of indigenous images.[38] Forcing indigenous practices into western categories may eventually be tantamount to appropriation of indigenous culture.

New intellectual property forms cannot ignore the politics of culture but must give regulatory specificity to practical issues of ownership, use, access, exploitation and duration not only on a regional and local scale, but also globally. It seems important to do things in the right order: first conserve, document and preserve, otherwise the expectation that the law will protect rights may be frustrated.

2.4 Conventions

The UDHR does not refer expressly to intellectual property rights, but Article 27.2 states that '[e]veryone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author'. Article 27.1 in turn refers to the right of everyone to enjoy the arts and to share in scientific advancement and its benefits. The tension between rules that protect the creators of information and those that ensure the use and dissemination of information is familiar to intellectual property law. Article 17 UDHR proclaims a general right of property, the implication of which is that states have a right to regulate the property rights of individuals, but that they must do so according to the rule of law.

The rights of the UDHR are further developed in the ICCPR and the ICESCR, which place

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[38] Farley 'Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?' 1997 *Connecticut Law Review* 1.

emphasis on the interest of humans in the diffusion of knowledge. Article 15.1(c) ICESCR repeats the UDHR guarantee of protecting the moral and material interests of the authors of scientific, literary and artistic works. As such, it constitutes one element of a general right, the two other elements being the rights of access to cultural life and to the benefits of scientific progress.[39]

The property relations of general international law still require transformation into relations of government. The reason is simply that property and government never evolved as separate social systems in the international system. The status of the right of property in international law raises complex issues. Modern governments regularly change the rules relating to the use of land or tax. Both public international law and private international law recognise the right of sovereign states to regulate property rights and to adjust them to economic and social circumstances. Generally, human rights instruments recognise a general right of property subject only to public interest qualifications. Fundamental human rights norms are not susceptible to adjustment by states, however. Yet it is difficult to conceive of the development of human personality in the absence of property rules that guarantee the stability of individual possession.

Several efforts have been made at the international level to harmonise standards and procedures for intellectual property protection.

The Convention concerning Indigenous and Tribal Peoples in Independent Countries of 1989,[40] adopted by the General Conference of the ILO, creates the obligation to adopt special measures appropriate to safeguarding the property of indigenous peoples. Their participation and co-operation in any such initiatives are deemed to be essential. Contracting Parties are committed to the full realisation and recognition of rights of ownership and possession over lands they traditionally occupy. The provision on land rights is the most extensive provision of this Convention (Article 14). The Western World has not yet widely ratified the 1989 ILO Convention. Australia has developed a political focus on the land rights issue, and the issue of

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[39] Drahos in WIPO *Intellectual Property and Human Rights* (1998) 24.

[40] Concluded 27 June 1989; 28 *ILM* 1382 (1989).

exclusive use versus co-existing interests in land is currently left off the domestic agenda.[41]

The 1992 Convention on Biological Diversity (CBD)[42] recognises the concept of indigenous intellectual property. Article 8(j) CBD requires states to respect, preserve, maintain and promote the knowledge, innovations, practices and lifestyles of indigenous communities relevant to the sustainable use of biodiversity. The CBD links sustainable development and commercial value with the concept of intellectual property rights and entitles local and indigenous communities to be their holders. The language used requires further specification of content through protocols and other instruments.

The Draft 1993 UN Declaration on the Rights of Indigenous Peoples is another initiative aimed at greater indigenous property protection. It refers to the following rights pertaining to the property of indigenous peoples –

- right of access to religious and cultural sites and the right to use and control ceremonial objects (Article 13);
- right to own, develop, control and use the lands, territories and resources they have traditionally owned or otherwise occupied or used, and the right to the restitution of these (Articles 26 and 27);
- recognition of the full ownership, control and protection of their cultural and intellectual property. They have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs and visual and performing arts (Article 29).

It is not known when the final text of the Declaration will be adopted. Although the declaration is still in draft form, it includes provisions that are considered minimum standards in the field of indigenous rights by experts serving on the Sub-Commission on the Protection and Promotion of Human Rights. The UN Working Group on Indigenous Populations has developed the draft in close co-operation with governments, indigenous communities, independent experts, NGOs and

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[41] Hocking & Hocking 1999 *Ratio Juris* 218.

[42] Done 5 June 1992, 31 *ILM* 818 (1992) (UNCED Summit held in Rio de Janeiro, Brazil). South Africa signed the Convention on 4 June 1993 and ratified it on 2 November 1995.

UN agencies.[43]

The inadequacy of categories of property strongly campaigns against use of the term 'property' in the context of the protection of cultural objects. Whereas property law is focused on protecting the rights of the possessor, cultural heritage law focuses, instead, on the protection of the heritage for the enjoyment of present and future generations. 'Heritage' depicts spiritual and intellectual achievements, and signifies a duty to preserve, protect, care for and pass on to successors. While various notions of property law may apply to cultural property, and may even be fitted into the grand scheme of things, 'cultural property' is not an addition to the law of property. The function of 'property' law has little in common with heritage values. The traditional legal incidences of property, rooted in the ideology of private ownership and power, could easily cloud the social purpose of preservation. This helps to explain why contemporary use favours 'heritage'. From the beginning, the documents emanating from the Council of Europe, for example, displayed a preference for 'heritage'.[44] The World Cultural and Natural Heritage Convention[45] refers to 'cultural heritage'. Only the Preamble to the 1970 Unesco Convention still refers to 'cultural and natural property'. 'Cultural property' is no longer preferred over the alternative terms 'cultural heritage' or 'cultural objects'.[46]

2.5 The intellectual property right to culture as a peoples' right

Those instruments that deal with cultural rights as peoples' rights reveal two broad principles. The first is a proprietarian principle, which lends recognition to the right of a people to claim its entire culture. The second principle is that of cultural diffusion.

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[43] Burdekin "Opening Address" in WIPO *Intellectual Property and Human Rights* (1999) 5, 8.

[44] European Convention on the Protection of the Archaeological Heritage *ETS* No. 66 (concluded 6 May 1969); the 1985 Convention for the Protection of the Architectural Heritage of Europe *ETS* No. 121.

[45] Convention for the Protection of the World Cultural and Natural Heritage (16 November 1972) *UNYB* 89.

[46] The Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects, Report on the fourth session of the Committee of Governmental Experts on the International Protection of Cultural Property, annex to Report, Study LXX – Doc 48 February 1994 (Rome, 29 September - 8 October 1993). The Unidroit Convention refers also to those objects belonging to the categories listed in Article 1 of the 1970 Unesco Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (14 November 1970) 823 *UNTS* 231. Compare also the national laws of Australia, Canada and South Africa.

Examples of the proprietarian principle are to be found in –

- Article 14 of the 1976 Universal Declaration of the Rights of Peoples, which states that 'every people has the right to its artistic, historic and cultural wealth';[47] and
- the Declaration of San José,[48] which claims that Indian peoples have natural and inalienable rights of access, use, dissemination and transmission in the cultural heritage of their territories.

Western intellectual property systems do not recognise these claims.

The principle of cultural diffusion is based on the idea that cultures form part of a global intellectual commons to which all humans have some access rights. However, increasingly stronger intellectual property regimes raise the cost of educational, cultural and scientific information, which inhibits the diffusion thereof.[49]

Generally, the protection of informational resources by means of existing intellectual property regimes raises problems. Western systems link the origination of rights to individuals and maximise individual capacity to trade in these rights. Indigenous cultures do not draw a sharp distinction between real and personal rights. Connections between land, knowledge and art form part of whole. Consequently, many informational resources are open to unrestricted appropriation.[50] Globalisation threatens community and local culture through the wide reach of communications ascribable to a few voices. Increased globalisation tends to compound social exclusion and poverty.[51] The right to culture must therefore include the know-how and the tools, not only to own and preserve culture, but also to utilise and exploit cultural resources.

3. COMMON HERITAGE, NATIONAL HERITAGE AND SOURCE NATION HERITAGE

Views on national restrictions on export of privately held cultural objects vary in accordance with ideology more than law. The concept of the 'common heritage of mankind' and the concept of

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[47] See Crawford (ed.) *The Rights of Peoples* (1988) 187.

[48] Done 11 December 1981, Unesco Doc FS 82/WF.32 (1982).

[49] Drahos in WIPO *Intellectual Property and Human Rights* (1998) 28.

[50] *Ibid.*

[51] The National Population Unit The State of the South Africa's Population Report 2000, 8.

'national heritage', for example, are often seen as dissonant sets of values,[52] because they presuppose different answers to the questions of ownership and proper distribution. Acquisitors (museums and collectors) and archaeologists have their own discourses that co-incide loosely with the international free trade discourse (discussed below) and source nation control respectively.[53]

3.1 Cultural property as common heritage

The roots of the concept of common heritage have been traced to an 1813 Canadian admiralty case, which depicted art (in particular artworks seized during the War of 1812) as 'the property of mankind at large, and as belonging to the common interests of the whole species'.[54] The first international agreement to encompass the concept of common ownership was the Hague Convention of 1954.[55] Its Preamble states that 'cultural property belonging to any people whatsoever' is 'the cultural heritage of all mankind' and 'each people makes its contribution to the culture of the world'. This idea recurs elsewhere in the Convention, with a shift in emphasis: that it is an 'international responsibility of all nations to protect their own and other peoples' heritage'. The 1972 Convention on the World Cultural and Natural Heritage[56] echoes this notion.

The central tenet of cultural internationalism is that a legally cognisable interest exists in cultural heritage: the cultural heritage of human society that belongs to a common humanity. The 'common heritage of mankind' may therefore be used to convey that all nations share an interest in the cultural heritage of the world; that humanity is the custodian of resources derived from cultural diversity; or that humanity is the beneficiary of these resources. The notion of common heritage may also affect the international law of cultural property in times of war and peace, in so far as it relates to the rights and duties of states. It may be employed to convey that states are

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[52] Merryman 'Two Ways of Thinking About Cultural Property' 1986 *AJIL* 831.

[53] Merryman 'The Free International Movement of Cultural Property' 1998 *International Law and Politics* 9 ff.

[54] *Case of the Vessel Marquis de Somereules* 1812 Stew. Adm. 482, 483 (N.S. 1813); referred to by Kenety 'Who Owns the Past? The Need for Legal Reform and Reciprocity in the International Art Trade' 1990 (23) *Cornell International Law Journal* 1, 8 n 36.

[55] The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (14 May 1954) 249 *UNTS* 215.

[56] Convention for the Protection of the World Cultural and Natural Heritage (16 November 1972) *UNJYB* 89.

competent to adopt legal measures to ensure preservation of property with special importance; that they are *justified* in doing so, or that a general duty rests on states to implement such measures. The notion of common heritage may affect the international law of cultural property if employed to designate future generations as a class. To limit plaintiffs to governments and states may leave many interesting and complex issues unappreciated. The standing to sue, claims to artefacts and monuments, or the claims of unborn future generations on present policy, represent ideas that have not been explored fully. Academics are slowly beginning to realise the inter-temporal dimension of international law, and the view that equality within the human family bears also on unborn generations and their claims on present policy. The question whether the object itself should ever be considered to have *locus standi* in a case for its return to its place of origin has now come before courts, and is discussed further in chapter 6.

The notion of common heritage is in vogue in discussions concerning the ownership of objects that are not clearly tied to, or located in, one state's territory (and the legal obligations with respect to the utilisation of areas beyond national jurisdiction), such as the sea,[57] outer space,[58] and Antarctica.[59] The emerging idea of spatial solidarity has become formalised enough to be introduced into the international agreements existing in the various fields. The concept functions as a mechanism to restrain the exercise of sovereignty over, or sovereignty claims to, the natural resources of the deep sea-bed and outer space.[60] The concept has its main impact in the field of international administration for areas open to the use of all states (the international commons) in

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[57] United Nations Convention on the Law of the Sea, *U.N. Doc.* A/CONF.62/122 (1982), Articles 133-141. Mankind is represented by the Sea-Bed Authority which is the organisation through which States Parties organise and control deep sea-bed activities in recognition of the duty of all states to co-operate internationally in the exploration and use of the sea-bed and the ocean floor (Article 157.9).

[58] Article 1 of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (27 January 1967) 610 *UNTS* 205; Article 4.1 and Article 11.1 read with Article 5 of the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (5 December 1979) 18 *ILM* 1434 (1979); *U.N.Doc.* A/AC.105/L.113/ Add.4 (1979).

[59] Recommendation XI-1 § 5(d) adopted at the 11th Consultative Meeting to the Antarctic Treaty on 1 December 1959; the common heritage principle has been used during the discussions in the UN on Antarctica to question the authority of the Antarctica Treaty Consultative Parties to negotiate and conclude a treaty concerning the exploration and development of Antarctic mineral resources.

[60] An interpretation that leads to poor nations being deprived of their special wealth turns the idea upside-down. The usefulness of the 'common heritage of mankind' argument may be confined to economically and technologically impoverished countries wishing to gain control over the resources for their development.

recognition of the responsibility for the peaceful use of the international commons and the protection of the environment.[61] One of the significant legal debates concerns the question of whether the principle of common heritage gives rise to peremptory consequences in the context of the law of the sea and outer space. Few would disagree with the duty resting on states to co-operate in the peaceful exploration and use of outer space including celestial bodies.

Habermas indicates, convincingly so, that the ecological perspective on the preservation of biodiversity cannot be extended to cultures. At the most, the constitutional state can make it possible for cultural heritages and identities to continue, but it could never guarantee cultural survival.[62]

Within Unesco, support for cultural internationalism is limited. The Preamble of the 1970 Unesco Convention, *e.g.* speaks of a common interest in the 'exchange' and 'circulation' of cultural property. So-called internationalists may prefer preservational or educational considerations to determine the movement of cultural objects. For them, the special interest of nations of origin that may allow them to retain objects in the context of their traditional setting takes second place. Merryman, a staunch supporter of cultural internationalism throughout his career, interpreted the obligation to protect cultural artefacts as a duty upon source nations to care for cultural objects by *allowing sale and export* to promote fundamental values.[63] When this interpretation applies, the humanity ownership argument does not allow countries of origin any special rights or claims. Items that pertain to a civilisation with linear descendants in the territory of a nation in which they were found, may raise particular difficulties for this argument. Nonetheless, the argument does not treat these any differently to other objects.

3.2 Source nation heritage

The notion of common heritage does not reveal much about the tension that exists between

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[61] Wolfrum 'Common Heritage of Mankind' in *Encyclopedia of Public International Law Vol. 11* (1989) 65, 66.

[62] Habermas 'Struggles for Recognition in the Democratic Constitutional State' in Gutmann (ed.) *Multiculturalism* (1994) 128 ff; Strydom 'The International and Public Law Debate on Cultural Relativism and Cultural Identity: Origin and Implications' 1996 *SAYIL* 1, 24.

[63] Merryman 1986 *AJIL* 844.

restricting the movement of cultural objects and encouraging trade. Cultural nationalism will not allow the rights of the possessor and the claim of the country of origin to interfere with one another.

Cultural nationalism, which may have had its roots in a 19th century Romantic idea that inspires the retention of cultural objects and that is directly opposed to the international trade in art, no longer displays an exaggerated concern with the preservation of context.[64] The analytical underpinning of cultural nationalism has deepened considerably and has become free from a facile 'Byronism'.

The 1970 Unesco Convention concerning the means of prohibiting and preventing the illicit import, export, and transfer of ownership of cultural property emphasises the interests of states in the 'national cultural heritage'.[65] The concept of a national cultural heritage attributes ownership to one specific group. At the same time, it acknowledges the difference in cultural, historical and spiritual importance of objects to people.

The discourse of the archaeologists has a lot in common with the source nation discourse: it tends to support rigorous national controls, mainly to ensure that information is not lost.

3.2.1 Source nation discourse: restitution claims

Claims for restitution are often based on 'cultural nationalism' since restitution relies on the relation between cultural objects and national history, culture and identity.[66] The 1970 Convention supports the ideology that other nations should respect and enforce source nation export controls in respect of privately held cultural objects. Return to a particular nation is largely

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[64] The transnational ramifications of this 'domestic export embargo approach' are given more detailed treatment in chapter 6.

[65] 'Cultural patrimony' is a widely used term; *cf* 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (14 November 1970) 823 *UNTS* 231; 10 *ILM* 289 (1972) (entered into force 24 April 1972) [hereafter UNESCO Convention]. International Chamber of Commerce *International Art Trade and Law* Briat & Freedberg (eds) (1991) 69, in respect of the domestic laws of states in Europe. However, Warren identifies it as a gender-biased category of analysis; see Messenger (ed.) (1989) 1, 15.

[66] Merryman 1998 *International Law and Politics* 12.

beyond dispute in the following examples of objects of outstanding cultural importance that were privately held –

- works stolen from collections;
- items that belonged to an earlier civilisation, the descendants of which continue to inhabit the geographic territory of the discovery; and
- sacred objects that living cultures still use, *e.g.* in rituals.

'Cultural nationalism' has also been convincingly argued for in the case of works of a public nature having been commissioned and created with the sole intention of being dedicated to the public as an enduring, site-specific memorial. If the works or objects concerned lack a cultural or historical relation to the nation seeking foreign enforcement of its export controls, restitution becomes difficult to justify.

Tension may exist between national identity and sub-national, tribal, or cultural identity. National identity may be set against group rights and consciousness of a common group past, and notions of national or sub-national identity may collide with practical conceptions of property ownership. To the extent that indigenous title to movable cultural objects arises, it may complicate claims between market state purchasers and former source state possessors. Market state courts may defer to source country laws on title.

The recent guidelines published by the Association of Art Museum Directors, an organisation of the largest art museums in the US, advise each member museum to develop a policy governing the legal, ethical and managerial practices concerning the legal status of the institutions' collections. The guidelines advise that works be repatriated where claims can be established. The guidelines contemplate a mediation process for resolving claims. By taking an active role in repatriating works of art that were systematically looted during the Nazi-era, museums demonstrate the moral obligations that attach to cultural heritage.

3.2.2 Implications of national heritage and nation of origin

Cultural nationalism and the concept of the nation of cultural origin are not problem-free. When Italy argued that a Matisse painting, in true Italian Renaissance tradition, and part of a private

collection in Milan, had become an essential part of the Italian cultural heritage, the American supreme court was unimpressed.[67] American courts have remained critical of cultural nationalism in respect of works that are movable without significant loss of information, such as European paintings. These are less dependent on context, and their provenance and appreciation are not likely to be subverted by buying and selling. This scepticism exists also in respect of privately held cultural objects.

Presumably, an object which constitutes an aspect of the identity of a nation, or is self-defining to a nation, could not mean as much or be as highly valued by others as by those who claim it as their heritage. These types of objects can normally be expected to remain with the descendants of its original creators, in the absence of severe poverty or calamity. Possession by another individual, museum or nation is bound to be regarded as diminishing and unfair. In the case of objects sacred to a nation, foreign possession may be experienced as inherently insulting and debasing. What is at stake in repatriation claims is not so much the taking of cultural objects: it is what the taking implies and what the loss means to those whose heritage it is believed to be. Intercession, for example, may be rejected as offensive.[68] A strictly legal approach may fail to consider the particular, distinctive emotions underlying repatriation issues.

4. LAW AND ECONOMICS: FREE FLOW AND FREE TRADE DISCOURSE

4.1 A utilitarian approach

Utilitarian arguments and a law and economics perspective are ideologies in support of the free movement of cultural objects. A means-end argument supports the free flow of most cultural materials,[69] and extols the benefits of import/export practices.

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[67] The American supreme court had the opportunity to decide the fate of Matisse's *Portrait sur Fond Jaune*, which was exported by its legal owner from Italy to the US without authorisation. The court did not accept that a French artist's interpretation of the Renaissance had become an essential part of the Italian cultural heritage. *Jeanneret v Vichey* 693 F 2d 259 (2d Circuit 1982) 263, 267; on the nationality of a cultural object, see Jayme *Kunstwerk und Nation: Zuordnungsprobleme im internationalen Kulturgüterschutz* (1991).

[68] Shapiro 1998 (31) *International Law and Politics* 95, 97.

[69] Bator 1982 *Stanford Law Review* 275 297, 309; Merryman 1986 *AJIL* 831 846-9; *id.* 1988 *U.C. Davis Law Review* 477; *id.* 1989 *Cal. Law Review* 339; Nafziger 1982 *Houston Journal of International Law* 189; Putnam 'Common Markets and Cultural Identity: Cultural Property Export Restrictions in the European Economic Community' 1992 *University of Chicago Legal Forum* 457; Kenety 1990 *Cornell International Law Journal* 1, 35, 39; Crowell 1992 *Texas International Law Journal* 173, 205. Also the rescue argument of Warren in Messenger (ed.) (1989) 3.

The market view is that the ability to put a monetary value on artefacts ensures preservation, because the buyer who pays the most for the object will have the greatest interest in its protection. As such, market forces, if left to operate without intervention, are best able to ensure preservation,[70] and will locate the locus of highest probable protection, assuring the maximum benefit to society.[71] Market states generally support the free flow and free trade in objects of cultural significance.

A law and economics perspective implies a commodification and monetisation of cultural objects, which support the freedom of everyone to appropriate these objects. Supporters often recognise exceptions to the free flow of objects, for example religious objects.[72]

The free market, universalist and humanity ownership arguments (objects belong to everyone and to no one in particular) all disapprove of export regulations. None of these approaches allows countries of origin any special rights or claims and all of them consider blanket declarations of ownership by countries of origin to be not binding. They encourage the view that foreign courts are free agents, and as such ought not to uphold laws that vest ownership in the state. As such, the market/universalist view serves the interests of the following broad categories of countries –

- economically strong but artistically poorer countries in possession of cultural treasures that originated elsewhere; and

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[70] Murphy 1994 *IJCP* 229.

[71] Bator 'An Essay on the International Trade in Art' 1982 (34) *Stanford Law Review* 275, 297, 309 is adamant that nations should allow and encourage the export of art treasures that cannot and will not be adequately protected and conserved at home. According to Merryman, retentionist policies not only jeopardise preservation, but also encourage redundancy and boost the black market. See among his writings for example, Merryman 'Two ways of Thinking about Cultural Property' 1986 (80) *AJIL* 831 846-9; *id.* 'The Retention of Cultural Property' 1988 (21) *U.C. Davis Law Review* 477; *id.* 'The Public Interest in Cultural Property' 1989 (77) *Cal. Law Review* 339. Generally also Nafziger 'An Anthro-Apology for Managing the International Flow of Cultural Property' 1982 (4) *Houston Journal of International Law* 189; Kenety 'Who Owns the Past? The Need for Legal Reform and Reciprocity in the International Art Trade' 1990 (23) *Cornell International Law Journal* 1, 35, 39; Crowell 'Autocephalous Greek-Orthodox Church of Cyprus v Goldberg & Feldman Fine Arts Inc: Choice of Law in the Protection of Cultural Property' 1992 (27) *Texas International Law Journal* 173 ff 205; Murphy 'The People's Republic of China and the Illicit Trade in Cultural Property: Is the Embargo Approach the Answer?' 1994 *ICJP* 234 ff with further reference.

[72] Merryman 'Notes Toward a Clarification of the Antiquities Conflict' *ASIL Proceedings* (1995) 438.

- countries that initiated efforts to preserve certain objects, and that keep these collections (for example objects obtained through lawful trade in a bygone era).

The above view is also part of the discourse of museums, collectors, dealers and auction houses, who depend on an international art trade. Acquisitors argue that export controls should receive at the most only selective international enforcement.[73] Among those who regard ownership by any one group (be it the nation of origin or an art dealer) to be a moot point, is Merryman.[74] He is known for his argued submission that the legality of Lord Elgin's removal of the Parthenon Marbles is clearly established and that its immorality has not been demonstrated. Applying preservation as the determining value, he argues for leaving the Marbles in London.

Cultural internationalists who attempt to reduce the influence of cultural nationalism condemn source nations' blanket prohibitions on the export of cultural objects, particularly where the object is redundant; the storage is harmful; and those objects, if not put up for display, are rendered inaccessible. Even the extreme arguments of cultural internationalists (*e.g.* that the export controls threaten the cultural heritage of humanity) remain noteworthy considering that the trade policies of developing source states seldom square with economic forces and realities from without and within many of them.

4.2 International trade law

The post WWII free trade movement produced the General Agreement on Tariffs and Trade (GATT)[75] and the Treaty of Rome.[76] The principal policy thrust of these treaties is the removal of 'impediments' and 'barriers' to international trade. Tariffs and non-tariff barriers such as export controls are therefore generally undesirable.[77]

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[73] Merryman 1998 *International Law and Politics* 10.

[74] Merryman 'Thinking About the Elgin Marbles' 1985 (83) *Michigan Law Review* 1881, 1920 n 123. See also Warren in Messenger (ed.) (1989) 5.

[75] General Agreement on Tariffs and Trade, 30 October 1947, 55 *UNTS* 194.

[76] Treaty Establishing the European Economic Community, 25 March 1957, 298 *UNTS* 11.

[77] In general, see Merryman 1998 *International Law and Politics* 9.

Each of these two treaties contains an exception to the prohibition against export quotas (quantitative restrictions). In terms of Article XX(f) of the GATT, measures 'imposed for the protection of national treasures of artistic, historic or archaeological value' are expressly exempted from the regime, provided 'that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination ...'. Article 36 of the Treaty of Rome equally exempts national cultural treasures. Neither of the two treaties defines the category or explains who decides whether an object falls into that category. Moreover, this provision has not been the subject of detailed analysis or litigation. In as far as it is premised on items being 'national treasures', it establishes a standard that is similar to the export control systems developed in accordance with the so-called Waverley criteria that refer to the close connection with history and national life.

Article XX(b) and (g) of the GATT contains other exceptions to the prohibition on export quotas. Recent initiatives with regard to trade barriers imposed for environmental reasons under Article XX(b) and (g) have been upheld only if the impugned trade restrictions are 'least trade restrictive' to achieve the desired legitimate environmental objectives.[78] It seems improbable that recourse will ever be taken to this international forum to determine the validity of cultural property export controls. Nonetheless, the extent to which international trade law has become sympathetic towards the removal of barriers to trade in movable property, deserves to be noted.

5. OBJECT VALUES

Whereas property theory starts from the premise of the powers of the owner, object values focus on finite and non-renewable objects and their need for care and respect if they are to be preserved. In the next section, these values are considered.

5.1 Preservation and integrity

The seminal writings of Henri Grégoire expounded the genesis of modern preservationist thought, which amounted to an expression of a modern public policy on cultural objects. The

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[78] Paterson 'The Legal Dynamics of Cultural Property Export Controls: *Ortiz* Revisited' 1995 *UBC Law Review* 241 244 ff.

essence of his idea is that there is some collective obligation to identify and protect cultural artefacts, and that there is a duty upon national sovereigns to preserve cultural treasures within their territory for posterity as trustees on behalf of mankind. Grégoire was a member of the revolutionary Convention that governed France in 1794.[79] He was asked by the government to suggest a response to a proposal to condemn as non-revolutionary, and destroy all Latin inscriptions and monuments. He wrote a series of discourses on cultural policy that examined the following –

- Why should caring for paintings, books and buildings be a concern of the nation?
- Why, especially in a republic that was beginning anew, should monuments redolent of the values of the old order, be respected?

The protective decrees issued by the revolutionary government marked a notable beginning for preservation as a responsibility of the state. Although these policies were eventually marred by official iconoclasm, the Monuments Commission, created in 1790, was the predecessor of the public museum as we know it.

Today, the modern 1995 Rome Convention refers to the need to protect not only the physical preservation of the object or of its context, but also the integrity of a complex object, the preservation of information of, for example, a scientific or historical nature, and traditional or ritual use of the object by a tribal or indigenous community.

Many other initiatives recognise that the preservation of knowledge about cultures is of great importance. In an era of television and tourism, access (public and scholarly) has lost some weight as a determining factor of adequate protection. The promotion and transmission of information and knowledge about the underwater heritage has become so refined, that it is not sport divers alone who may enjoy underwater parks. Archaeologists certainly do not need to be divers. Both the humanity ownership argument and the means-end argument in as far as they support unrestrained movement of cultural heritage, lose some of their force in this context. Moreover, at a certain point the quest for knowledge can start to threaten cultural integrity and

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[79] See 'Rapport sur la Bibliographie' in *2 Oeuvres* 211; discussed by Sax 'Heritage Preservation as a Public Duty: The Abbé Grégoire and the Origins of an Idea' 1990 *Michigan LR* 1142, 1158.

even cultural survival.

5.2 Inalienability

While continental systems generally protect the private *bona fide* holder of artefacts by ordinary rules (see chapter 5), state-owned objects that are particularly rare or unique may fall into special categories. The law of the public domain, as part of the Roman law system, usually provides for the inalienability of such property. This partly explains why protection of cultural property is often dependent on public ownership. In civil law, a distinction between public artefacts and private materials is common, and this has led to a differentiation between protection by ordinary rules (in the case of a *bona fide* acquirer) and protection accorded to objects designated in legislation as sacred, *extra commercio*, 'indefeasible', 'imprescriptable', 'inalienable' or unavailable for sale. A private owner cannot claim back his or her 'property' in all the circumstances in which a public owner may do so.

In France, the inalienability principle extends to local government and other public bodies. In this domain, the principle has strict application. However, the existing power to declassify inalienable material, or to sell or dispose of public collections by gift, have not been extended to cultural materials.[80] Being 'imprescriptible', these objects may often be reclaimed when lost or stolen. This is also the position in Spain, Italy and Switzerland. Germany recognises a number of limitations on the general public administrative rules determining the sale of public property.[81] In the UK, collections in national museums and galleries are legally inalienable, subject only to narrow powers of disposal in the Museums and Galleries Act of 1992.[82]

5.3 Alternatives to law and economics theory

Margaret Jane Radin's theory presents an alternative to law and economic theory, which relies on

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[80] Code on the Public Domain, article 52; Law 88-13 of 5 January 1988 article 13 (1).

[81] See the national and general reports contained in Briat & Freedberg (eds) *International Art Trade and Law* (1991) 68, 77-78. Private owners are left without recourse in the same circumstances, as explained in chapter 6.

[82] Section 4 Museums and Galleries Act, 1992 (1992 c 44); Palmer 'Recovering Stolen Art' 1994 *Current Legal Problems* 215, 247.

economic analysis as the sole determinant of legal outcomes and disregards legal reasoning.[83]

Radin's model works with 'personal' and 'fungible' property claims. She argues that as we embody ourselves in the world around us, some property, which she calls 'personal', becomes essential to our personhood. Fungible property, being more conventional property, or property not so closely related to personhood, gives rise to entitlements not worthy of any protection or protection by liability rules only. Fungible property can be bought or sold without harm to personhood. Recognised indicia of personhood ought to establish stronger property claims, or entitlements worthy of greater protection under property and inalienability rules than any conflicting 'fungible property claims' of others. Personal property should be protected by the property rule at least against cancellation by conflicting 'fungible property claims' of others. In this manner, the model envisages a suitable minimum level of protection for each category. In keeping with the pragmatic approach, the model draws on values Radin regards as implicit to our society and not on any grand theory of what is right.

Moustakas' model balances out commodification and monetisation of objects with artistic and cultural significance. Objects most closely connected to the person are subject to fundamental restrictions. He argues that adequate protection of cultural objects as 'property for personhood' would be granted by 'market-inalienability'. Market-inalienability prohibits sales (and by necessary implication forced transfers), but allows gifts and bequests. Adequate protection of group rights to property would require a higher level of protection still, namely strict inalienability, in terms of which all transfers, gratuitous or otherwise, are prohibited. The logic of public rather than private law makes it possible to take cognisance of the state's powers to care for the interests of cultural communities, on the basis of statutory authority. Moustakas bases his model of strict inalienability for a certain kind of object on the paradigmatic Parthenon Marbles case. 'Property for grouphood' denotes objects that are deemed essential to foster a sense of group or national identity and an understanding of its history, but at the same time enables the group to imagine and plan its future.[84] As a second criterion, Moustakas proposes that retention

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[83] Schnably 1993 *Stanford Law Review* 350.

[84] Criteria to identify property for grouphood include the length of time of ownership; historic factors; group identity and continuity; the intention of the creator to dedicate what has been created as grouphood property; and the public

must constitute 'good object relations'.

The inalienability paradigm of Moustakas neutralises the 'property' designation on certain objects. It restores the intrinsic value of objects with artistic and cultural significance, places a high premium on the ethnological, historical and cultural importance of the most significant art objects and effectively prevents the monetisation of certain objects. The inalienability paradigm requires respect for claims to objects indispensable to a nation's or a group's being or identity, whether self-created or not.[85]

The models devised by Radin and Moustakas link the level of entitlement with the level of protection and utilise the categories of 'public' and 'private' in a different manner. Both theories rely on the idea that property serves the development of the individual. Both theories focus on the power to alienate cultural objects and argue in favour of a fundamental limitation on the freedom to alienate the type of property that is important for the identity of individuals and peoples, by sale.[86] The work done by Radin and Moustakas facilitates an identification of the characteristics of a new category of property, which limits individual autonomy by making use of normative judgments regarding the social justifiability of particular property interests.[87] Their models also take psychological aspects into account.

As stated above, Radin's theory of property and personhood strives towards a pragmatic understanding of legal rules and draws back from grand theory to focus on context and plurality. Schnably discusses the centrality of social consensus in Radin's model. He disapproves of social consensus as a basis for property rules as Radin conceives of it. In his view, conflict is

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character of the property. See Moustakas 1989 (74) *Cornell Law Review* 1197-1201. Among its justifications is the fairness (the duty to transmit a heritage and a memory) to future generations who are not in a position to influence the market and decide on the most efficient use of cultural materials. Moustakas 1989 *Cornell Law Review* 1199, 1205. See also Brown-Weiss *In Fairness to Future Generations* (1989).

[85] Moustakas 1989 *Cornell Law Review* 1179. Contrast Merryman 1985 *Michigan Law Review* 1881; *id.* 1986 *AJIL* 831, 849, warning that intervention with market forces endangers cultural heritage.

[86] See Radin 'Property for Personhood'1982 *Stanford Law Review* 958, 968 (and see also Van der Walt 1995 *THRHR* 396, 410 ff.); Moustakas 'Group Rights in Cultural Property: Justifying Strict Inalienability' (1989) 74 *Cornell Law Review* 1179, 1193-4.

[87] Radin 1982 *Stanford Law Review* 958, 968; Van der Walt 1995 *THRHR* 396, 410 ff; Moustakas 1989 (74) *Cornell Law Review* 1193-4.

necessarily present and the most commonly shared social values deserve greater scepticism if we are to uncover power relations and the possibilities for resisting them. Simple acceptance of existing social values may mean that we underestimate the repressive effects of hidden power relations. The essence of Schnably's criticism against Radin's theory is that it both under- and over-estimates power, as such contributing to the legitimation of the *status quo*.[88] He also disagrees with her understanding of commodification.

The inalienability paradigm has important implications for objects used by living cultures or traditional communities, or that are invaluable to the spiritual life of an existing culture. If the very culture that created them chooses to alienate them, the conditioning value becomes important. Indigenous artists face many problems in reconciling obligations flowing from their communal responsibilities with entering their works into galleries and museums. Preservation as a value does not lead to a decisive answer in this instance. The free trade view approves of alienation by an indigenous community, even if the spiritual life of the group may suffer in this scenario.[89] Since persons other than the owner may gain an opportunity to access an object and to learn about it, accessibility is also enhanced. Schnably's critique of Radin's theory does not lead to any firm conclusion on, *e.g.* the legitimacy of a donation by a tribe who uses that object in rituals or ceremonies. Other critics of Radin's theory[90] have argued that 'the proper social context and the personhood-related value of the property involved' are not accounted for.[91] This criticism loses some force if applied to 'property for grouphood', for it may be argued that this kind of property is identifiable precisely at the hand of proper social context and the social purpose of preservation. The question is how large a social context ought to dictate the destiny of a cultural object that fulfils the conditions of grouphood but that has become separated from the group?

In the light of the discussion, it should be clear that while strict inalienability of objects used in

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[88] Schnably 'Property and Pragmatism: A Critique of Radin's Theory of Property and Personhood' 1993 *Stanford Law Review* 347, 404.

[89] See *e.g. Yumbulbul v Reserve Bank of Australia* (1991) 21 IPR 481; *Milpurrurru v Indofurn Pty Ltd.* (1995) 30 IPR 209.

[90] See Van der Walt 1995 (1) *TSAR* 15; 1995 (2) *TSAR* 322; also *id.* 1995 (58) *THRHR* 396.

[91] *E.g.* Van der Walt 1995 (58) *THRHR* 412.

rituals would be appropriate (and return of such an object in the case of sale by the tribe may, likewise, be appropriate) we may harm the very people we mean to protect. One solution may be to not penalise such a sale, but not enforce the contract either.

A different but associated approach, which appears to provide a via media between the extremes, is permitting export of all but the most valuable items. However, here it becomes acutely relevant who gets to decide what is 'most valuable', particularly in a multicultural environment, where communities are not directly involved in the compilation of inventories.

6. NON-EXPORT OF MOST VALUABLE ITEMS

It may become necessary to seek corrective principles in the morality of society when legalistic reasoning, or the traditional 'property legend', fails to satisfy justice and truth. What does the law do: Does it satisfy the desire of the possessor to possess totally, or does it keep open the path to justice?

Truth and justice will be served only if the right things get into the right hands. The law must accord with fairness and the fair distribution of property and not with selfish interest. The sentiment of John Stuart Mill, that the laws of property 'have made property of things which ought not to be property...'[92] rings true. In recognition of this, Murphy designed a 'preferred approach', which necessitates a process of ranking. Values need to be ranked so as to guide the creation of new legal regimes, and objects themselves need to be ranked according to their importance, having regard for the values. He argues that the export policies of the source states must be guided by –

> ...[a] cost-benefit approach, taking into account a scheme of values that ranks art objects according to their cultural significance. What is required is a process of judicious selection that may result in the export of all but the most culturally significant items. A country's comparative poverty becomes an argument against, rather than for, stricter national controls.[93]

Paterson echoes this view, stating that a supportive international public policy consensus may

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[92] Murphy 1994 *IJCP* 234.

[93] *Ibid.* 235.

exist in respect of export restrictions that are highly selective.[94]

If only those objects that are essential to the national identity and in respect of which retention would make sense, are rendered inalienable, this model appears to be well-balanced. However, the examples of a culture's heritage may potentially be limitless. All objects whose return is sought by indigenous communities belong to this category, for example. The criteria that describe the few, well-established icons, are likely to apply to countless others capable of evoking equally strong emotional responses in the relevant community if taken from them.[95]

The cultural heritage policy may be as restrictive as can be and definitions as comprehensive, yet objects thought of as critical may still be excluded. A longer inventory will simply complicate retention and repatriation. Limiting protection to the most culturally significant items can be interpreted as unpatriotic and repatriation may prove politically impossible.

> Moreover, with the passage of time, this already difficult situation can become more problematic. What is considered culturally important now may lose its significance in the future. Conversely, the heritage that will become important in the future may have gone unnoticed in the present, yet may be sought to be repatriated in the ever-changing flux of a people's constant re-defining of who they are.[96]

Asserting control over intangible property such as folklore, oral histories, sacred music or religious practices is fraught with even more problems than claiming ownership of cultural objects limiting their export effectively, or seeking their return. The threats are different from the threats against more physically embodied culture, but desecration and abuse are potentially equally diminishing or harmful.

7. CONCLUSION

It seems that the European and the non-European sides have failed to understand the essential values of each other's cultures. The materialistic values ascribed to primitive art illustrates this

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[94] Paterson 1995 *UBC Law Review* (special ed.) 250.

[95] Shapiro 1998 *International Law and Politics* 98.

[96] *Ibid.* 98.

point.[97]

A property rights framework will never fully solve claims to restitution or compensatory justice by countries of origin. Much depends on the nature and use of the artefact, and the relationship between that object and the family, clan, tribe, ethnic community, nation (or combinations of these) where the interest lies. Preservation and integrity are at least equally important. While a property rights framework searches for an owner, an object belonging to the past may disintegrate due to lack of care and preserving treatment. Object-oriented values underscore that the object is the central concern.

'Cultural heritage' implies that restrictions on the rights of the possessor, in favour of the right of the nation or the country of origin, are inevitable. Yet the rights of the originator should not be disregarded altogether. The intellectual property rights of the creator who is a member of an indigenous population, deserve recognition. In an era of digital compression, virtual imagery and multimedia products, protection of artists' rights is essential. Copyright law ought to guarantee the widest possible access, but must also protect the artist's interests. Social and institutional measures must be put in place to secure a future for the arts. In the area of language, every human language represents a culture. Many are fated to disappear, and therefore grammars, lexicons, texts and recordings must be prepared as a matter of urgency.

Indigenous knowledge and traditional management practices are embedded in local systems of value and meaning, and the conflict between different sets of cultural values requires mutual recognition of the solutions offered by each set. Allowing intangibles to be treated in ways that threaten the conception of self, may eventually impact on access to the tangible. The claim is not for repatriation, but that threats must be desisted from. Physical absence or harm may not be the principal source of damage. If it is about symbolic importance and recognition of one's heritage by others, recognition of underlying emotional and personal components of claims may make resolution possible. Such recognition may lead us to recognise also that the culture that makes us who we are, is within us and that the real battle is about trying to understand ourselves.

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[97] Murphy 1994 *IJCP* 229.

The social or religious interest a traditional community might have in a specific locality or site may require protection as property rights.

Cultural nationalism does not allow the rights of the possessor and the country of origin to interfere with one another. Access may be well provided for, but wrongful ownership will not be condoned.[98] However, rigid cultural nationalism and the ownership and rights paradigm pose difficulties, especially in poorer countries, where it makes little economic sense to hang on to a large number of cultural treasures. Poor source nations concerned about the loss and pillage of their cultural riches are tempted to resist the economic forces within and without that force an outflow by means of official policies that aim to prevent most cultural relics from leaving the state. Retention and repatriation become increasingly difficult under these circumstances.

The trade policies of nations display intriguing contrasts. In the case of poorer countries, retentive policies must be tempered with a measure of freedom to trade. Yet, it may be difficult to trade or to give away what one never fully had to oneself. In the case of the richer countries, free trade arguments must be tempered with fairness and a measure of unselfishness. If an object defines cultural identity, its donation or sale becomes questionable, owing to the emotional and psychological connection with the object.

Market states can be expected to remain wary about any perceived exercise of extraterritoriality and restraint on market forces, and to remain filled with scepticism over the argument of source nations that the nation of origin has the greatest interest in cultural objects. Much will be disclosed by their response to the 1995 Rome Convention, which moves in the direction of a new legal category in a potentially much wider context. Under the Convention, a court or other competent authority (of the market state) has to order return of illegally exported cultural property where their export has injured certain important defined cultural interests of the state requesting their return.

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[98] Dicke in Council of Europe *International Legal Protection of Cultural Property*. Proceedings of the 13th Colloquy on European Law, Delphi, 20-22 September 1983 (1984) 26.

The market view and utilitarian arguments generally fail to consider the importance of the maintenance, transmission of a domestic culture and the interests of future generations and do not foster respect for the identity and homogeneity of ethnically homogeneous groups. It remains unclear how utilitarian claims are to be balanced with claims of rights.[99] Often made in the hope of promoting intercultural understanding, utilitarian arguments cannot give guidance on issues such as –

- prevention of pillage of sites;
- protection of the most significant aspects of national patrimony;
- maintainance of a link between art and its geographical-historical milieu;
- guidance concerning preservation;
- domestic and international display and education;
- fostering of reciprocal trade; and
- avoidance of overreaching customs regimes (the American regime is covered in chapter 6).[100]

One way in which to reconcile retentiveness and free trade philosophies is to apply the inalienability paradigm to restrict sale and export of only the most valuable objects. It may also satisfy the international law criterion of 'least restrictive of trade' to achieve the preservation objective. The *via media* approach makes it possible for the state to preserve cultural objects and monuments in accordance with its preservation duty, without narrowly identifying with every object that it preserves, and without retaining a pool that is larger than what can be properly managed. However, this is not a universally popular approach and may even be interpreted as disparaging. The inalienability paradigm does not allow for meaningful reciprocal trade. Another failure of Radin's model of inalienability is that it does not spell out the relation between donation and ownership.

Arguably, market choices are unfair towards developing nations with limited resources that face a choice between cultural property protection considerations and public welfare needs. Countries that subscribe to the theory of public domain legislation are open to the principle of inalienability

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[99] Warren in Messenger (ed.) (1989) 6.

[100] Murphy 1994 *IJCP* 234-5.

of objects in national collections.

Acceding to repatriation of the most valued objects (objects that embody a country's, people's, or community's view of itself) could emphasise cultural exclusivity and cultural conflict, but the call for repatriation of cultural heritage cannot be ignored simply because these are sources of confusion. They should not be treated as foreclosed, since they are often about the need for recognition and respect of the beliefs, customs and practices that form a culture.

CHAPTER 5

THEFT ACROSS STATE BOUNDARIES : RETURN OF STOLEN OBJECTS

1. INTRODUCTION

A bird's-eye view of the possibilities for comparative research reveals the following hypothetical case as typical of a broad category of cases that may involve state, religious or individual property: the owner is dispossessed of a cultural object through loss or theft, perhaps also through misappropriation by an agent or restorer. The thief, finder or foreign buyer smuggles the *res alienae* from the country where it was created or where the collection was housed. A second transfer may open up one of the portals of entry to the legitimate world of art – museums make the works accessible and visible, while legitimate dealers are able to redistribute the merchandise unobtrusively. A series of sales ensures that the buyers have progressively less knowledge of the object's taint. The origin of an object is seldom immediately apparent so that a dealer or intermediary may pose as owner when transferring for value. If the only thing that matters is that the current possessor has a receipt or a bill of sale to show good title, unpalatable results are bound to ensue.[1]

Theft includes activities such as taking an object from a building during a break-in, dishonesty on the part of curators, removing it from its mounting in a public monument, and clandestine excavation on public and privately owned land. Modern theft seems to be inspired by a craving for privately owned heritage items. Perhaps the reasons may be found in the quest for an instant personal history or sense of belonging.

Case law provides fascinating details on the underworld of the predominant genre of cultural objects, namely art. The American courts appear to be favoured *fora* for settling disputes.[2] Suits

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[1] *E.g. Winkworth v Christie, Manson & Woods* 1980 1 All ER 1121; 1980 Ch 496. This chapter is based in part on Roodt 'Keeping Cultural Objects "in the Picture": Traditional Legal Strategies' 27 (1994) *CILSA* 314.

[2] See *e.g. United States v Hollinshead* 495 F 2d 1154 (9th Circuit 1974); *DeWeerth v Baldinger* 836 F 2d 103 (2d Circuit 1987) cert denied 108 S Ct 2823 (1988) 804 F Supp 539 (SDNY 1992); *Autocephalous Greek-Orthodox Church v Goldberg & Feldman Fine Arts Inc* 717 F Supp 1374 (SD Ind 1989) affirmed 917 F 2d 278 (7th Circuit

by individuals for the recovery of stolen cultural materials have almost always been instituted only where the true owner and the present possessor (or one of these and the cultural materials themselves) are in the same country. The jurisdiction concerned will almost always become the *forum* of the dispute. The prospective litigant faces many obstacles in trans-national litigation. This explains why cases for the recovery of stolen cultural objects are generally marked by massive expense. Expense escalates if the questions of fact and law are intricate, proof of place of origin and original ownership is difficult, and expert testimony is required in respect of the particular object. The legal hurdles to be overcome, for example availability of evidence, proof of ownership, issues pertaining to the conflict of laws and proof of foreign law may prove formidable where the persons and the goods concerned do not have a common location.

The purpose of the conflict of laws is to apply the legal system that will resolve the dispute before the court in a just fashion. Essentially, its rules are designed to avoid conflict between two or more systems of law with claims to resolve the issue. The status of cultural objects in the conflict of laws depends on whether the action is delictual or penal, or whether it is a matter of transfer of real rights or contractual obligation. Juridical defenses may include the legal characterisation of the claim, the principles of the conflict of laws, the content of the governing law, how the law apportions the risk of loss of cultural objects between dispossessed owners and good-faith purchasers, alleged abandonment of title, the state of mind of the purchaser, the pertinacity with which the claimant has pursued his/her claim, and whether that claim has become prescribed.[3]

When required to argue the above-mentioned matters as well as the domestic and cross-border implications of the *nemo dat* and *lex situs* rules, and having regard to the complexities of laws of limitations and the general practicalities of civil litigation, most potential claimants prefer not to press the issue.

1990) cert denied 112 S Ct 377 (1992); *Guggenheim v Lubell* 569 NE2d 426 (N.Y. Ct App 1991); *Republic of Lebanon v Sothebys* 561 NYS 2d 566 AD 1 Dept 1990; *Republic of Turkey v The Metropolitan Museum of Art* 762 F Supp 44 (SDNY 1990); *Jeanneret v Vichey* 541 F Supp 80 (SDNY 1982); reversed and remanded 693 F 2d 259 (2d Circuit 1982).

[3] This aspect is reserved for chapter 6.

In practice, questions of application of foreign law and arguments in the area of the conflict of laws are significantly more expensive to pursue than the alternatives offered by criminal law or import and export controls. However, criminal prosecution faces other challenges, which may result in a failure to secure convictions.[4] Awareness of the gist of arguments that may arise in the area of the conflict of laws, is invaluable in any negotiation on return and possible compensation. Nonetheless, the question whether dispossessed owners or good faith purchasers should bear the risk of loss of culturally significant objects is vital only within the ambit of a rights and ownership paradigm.

This chapter focuses on the loss of objects of artistic or other cultural significance, through theft, misappropriation, abuse of authority or fraud on the part of agents, borrowers, restorers or curators. For better or for worse, the legal distinction between stolen and illegally exported objects dominates the topic of the protection of cultural objects. This chapter concentrates on traditional legal actions in respect of property stolen in the traditional sense. Theft is defined by a property rule that prevents forced transfers, but allows voluntary alienation. Chapter 4 exposes the shadows the property rule casts in this field. Since the question of the burden of proof is tied to the seller's ability to convey property rights, the various different 'property legends', which belong to a rights and ownership paradigm, must be borne in mind. Title is the main issue for present purposes, as is the effect of applying the connecting factor of *situs*. Questions on classification, which arise in the area of the conflict of laws, will be referred to in passing.

Few, if any, jurisdictions have a particular rule of choice of law governing the proprietary aspects of transfers of real rights in objects of historic, artistic or other cultural significance. The non-specific rules of the choice of law applicable to international sales and commercial contracts apply by default. They need to be canvassed for their suitability to the transfer of objects of cultural significance. Connecting factors, which feature prominently in the category of contractual obligations and which may deserve some consideration in the context of cultural property contracts include the following: the domicile of the parties, the intention of the parties, the *locus contractus*, the *locus solutionis* and the *situs* of property. Yet, this chapter is not

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[4] See chapter 6; Paterson 'The Legal Dynamics of Cultural Property Export Controls: *Ortiz* Revisited' *UBCLR* 241, 251.

directed at setting out choice of law rules governing contracts of sale, consignment, transport, consumer and insurance contracts, auction sales, formalities, capacity to succeed to cultural property in testate and intestate succession law. The chapter investigates the role of the conflict of laws in the trade in stolen art,[5] focusing on alternative rules and suggestions for displacement of the *lex rei sitae*. It canvasses some of the differences in the general title laws of various jurisdictions. Chapter 9 compares them with South African substantive law of title and ownership. International efforts at harmonisation in the field of transfer of ownership and the comparative work that has been undertaken with a view to private law reform, have not lessened the great disparities in eventual results. While choice of law rules, specific versions of these rules, and specific connecting factors could never be a cure-all for the disparity in results, the wide differences among various national laws underline the importance of determining the applicable law.

2. GENERAL AND NON-SPECIFIC TITLE LAWS TO SAFEGUARD CULTURAL HERITAGE

Among the factors that contribute to the vulnerability of cultural heritage, is the discrepancy between the civil law protection of the good faith purchaser of stolen, lost or illicitly exported cultural objects and the common law protection of the dispossessed owner. Traditional distinctions, for example between movable and immovable property,[6] or the civil law distinction between public and private ownership,[7] further predispose cultural materials to careless treatment. The spider's web is woven tighter still by the fact that choice of law is often outcome-determining and as such has far-reaching international consequences. Traffickers often target art-

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[5] Prott & O'Keefe *Law and the Cultural Heritage Vol. 3 Movement* (1989) 614 refer to a number of studies.

[6] *Fondation Abegg v Ville de Genève* D 1988.325, note Maury (decision of the *Cour de Cassation*, reversing the decision of the *Cour d'Appel* Montpelier 18 December 1985 *Recueil Dalloz Sirey* 1985 205). Known as the *Cazenoves frescoes* or the *Montpelier frescoes* case.

[7] The difficulty of deciding when an object is public property and when it is private property, was adverted to in chapter 1 (*Arnamagnaean Institute v Ministry of Education* 1966 UfR 22; 1971 UfR 299 (Denmark)); see in general also Prott & O'Keefe'"Cultural heritage" or "Cultural Property"?'1992 *IJCP* 307 ff 315-7; Greenfield *The Return of Cultural Treasures* (1989) 33-40; Moustakas 'Group Rights in Cultural Property: Justifying Strict Inalienability' 1989 *Cornell Law Review* 1179. The Italian court recognised a type of property intermediate between public and private property, lying somewhere on the continuum between mere assertion of ownership and actual possession, in *Republic of Ecuador v Danusso* Civil and District Court of Turin, First Civil Section 4410/79; Court of Appeal of Turin Second Civil Section 593/82; 18 *Rev Dir Int Priv Proc* 625 (1982).

rich countries and countries concerned with establishing a cultural identity such as Greece, Turkey, Italy, Eastern Europe and the new nation states of Africa and Asia. Multiple transactions across particular borders will gradually launder the holder's claim, as many civil codes protect the good faith purchaser.[8]

The risk of loss of movable tangible objects is apportioned in widely and fundamentally different ways by different jurisdictions. At a very basic level, it can be stated that common law jurisdictions tend to favour the owner and extend no protection to the *bona fide* purchaser as such. The owner's right of recovery is often limited to lost or stolen goods. English law commits to the principle *nemo dat quod non habet.* The two principal ways of acquiring title in English law is through the discovery of ownerless property and purchase from the owner. English law used to permit a sale in market overt to extinguish ownership in favour of the good faith buyer.[9] The principle *nemo dat quod non habet* is balanced by limitation periods, damages and other exceptions to the principle, which provide some security for the good faith purchaser.[10] The finder can acquire good title and sell the property, except if the property was found in or attached to land of another, or if the Treasure Trove Act, 1996, applies.

In many other countries, a good faith buyer may obtain good title even from a thief. Generally, continental systems are kinder to the *bona fide* purchaser on account of the civil law tenet as expressed in the French maxim *possession vaut titre*. Whereas some jurisdictions grant title even if the purchaser is in possession of lost or stolen property, others allow the owner a right of repossession, but the prior title of the owner is extinguished after a relatively short period.[11]

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[8] Occasionally, as in *Kunstsammlungen zu Weimar v Elicofon* 678 F 2d 1150 (1982), the theft takes place on the continent and the object is transported to a common law jurisdiction.

[9] Prott & O'Keefe *Law and the Cultural Heritage Vol. 3* 397-404; Vrellis 'Le Statut des Biens Culturels en Droit International Privé' General Report delivered at the *XIVth International Congress of Comparative Law* Greece (31 July – 4 August 1994) 4. A buyer purchases an item in good faith when he acts honestly in the transaction, irrespective of negligence.

[10] Sale of Goods Act (Amendment) Act, 1994 (1994 c 32). Before this amendment was passed, *market overt* regularly negated the principle in terms of section 22(1) of the Sale of Goods Act, 1979. The rule of *market overt* developed in the Middle Ages at a time when most goods were bought and sold at the local market. As people and goods became more mobile, the rule prevented the owner from recovering his or her possessions from thieves.

[11] Reichelt 'International Protection of Cultural Property' (1985) *Uniform Law Review* 105 ff, reprinted as Unidroit Study LXX Doc 1 1986; also Zweigert 'Rechtsvergleichend-kritisches zum gutgläubigen Mobiliärerwerb' (1958)

Restitution depends on the bad faith of the possessor. While Italian law does not allow for a presumption that the possessor is owner, it allows the *bona fide* purchaser to acquire good title immediately, even when title of the object was tainted by theft.[12] Such a presumption is common to many continental systems, and removes the incentive for the purchaser to inquire into the provenance of an object of art (title and origins) and the seller's ability to transfer lawfully. Consequently, the reputation of experts and institutions is accorded more importance than the provenance of any particular piece.

In their own jurisdictional spheres, systems not adhering to the maxim *nemo dat quod non habet*[13] effectively bestow a lesser title on the 'common law owner' than that which he or she may have had under the laws of a common law jurisdiction. Where this discrepancy becomes a matter of practical concern, the owner's civil remedy against the thief hardly amounts to sufficient compensation. In common law jurisdictions such as that of the UK, the true owner may find himself trumped by the Crown's acquisition of discovered antiquities through the doctrine of treasure trove[14] and the general common law rule that the *lex situs* governs the transfer of title. Before 1994, a sale in market overt could complicate matters further. Worse follows when this backdrop combines with a generous interpretation of *bona fides* in applying civil law: dealers in cultural objects become less than meticulous in their handling of these items, and the owner stands to lose.

Rabels Zeitschrift für Ausländisches und Internationales Privatrecht 1 ff; O'Keefe & Prott *Vol. 3 Movement* (1989) 396 ff.

[12] The only requirements are that bona fides must exist at the moment of consignment and the transaction must be capable for transferring ownership. See Beltramo *et al*, *Italian Civil Code* Book 3 (issued March 1991) articles 1153-1157.

[13] Known to South African lawyers as *nemo plus iuris in alium transferre potest quam ipse haberet*. Voet 6.1.20; *Dig* 50.17.11, 54.

[14] Chapter 1. Section 11 of the Treasure Trove Act, 1996, requires the preparation, review and revision of a Code of Practice. The Code deals with practical matters connected with the finding and disposal of material suspected of being treasure. It sets out, among other things, the basis for the division of treasure or its monetary equivalent, the practice in relation to rewards, and in particular the position of trespassing finders, finders not acting in accordance with the reporting requirements, chance finders, professional archaeologists, etc. For a discussion of the provisions contained in the Code, see Marston & Ross 'The Treasure Trove Act 1996: Code of Practice and Home Office Circular on Treasure Inquests' 1998 (62) *The Conveyancer & Property Lawyer* 252.

In America stolen cultural property is the subject of specific federal legislation.[15] The position has long been uncertain,[16] but the American system is now reverting to protection of the true owner, reducing the burdens imposed on him or her.[17] Under common and statute law, a thief cannot convey good title. Not even a *bona fide* purchaser for value can obtain good title to an object purchased from a thief. Nevertheless, *bona fides* is important, because only a *bona fide* purchaser acquires the benefit of the seller's implied warranty of good title and can take good title from one who has only voidable title.[18]

In the American system, ownership claims of the rightful owner are known as actions for replevin, a generic term for an action to recover an item *in lieu* of damages or criminal prosecution of the possessor. Certain approaches base the success of the replevin action on the efforts of the owner to locate his property. A proper delivery will pass ownership effectively to a third party if there is a valid agreement *in rem,* which depends on the intention to transfer ownership and to receive ownership rights. It is of no consequence that the contract creating the obligation is voidable, void or unenforceable. While a thief and a borrower selling a *res aliena* would lack the requisite intention to transfer ownership, an agent may have such an intention. A swindler, whose fraudulent statements prompted the owner to relinquish title, would be unable to pass good title as no distinction is made between void and voidable title. Where the seller is aware that he or she has no real right as regards the *res*, and goes ahead with the sale regardless, he or she is liable to the *bona fide* purchaser, whose possession has been disturbed, for fraud

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[15] NSPA 18 USC ss2311-2320 (1988). Aspects of its application are discussed in chapter 6.

[16] On account of the implications of *DeWeerth v Baldinger* 836 F 2d 103 (2d Circuit 1987) cert denied 108 S Ct 2823 (1988); 804 F Supp 539 (SDNY 1992). In this case, the conflicts rules did not favour the dispossessed owner. A Monet painting was stolen from Mrs DeWeerth in Germany in 1945 and brought to Switzerland. The court found that the plaintiff had been insufficiently diligent in attempting to trace her stolen painting between 1945 and 1981, and barred the claim (at 111). See also O'*Keeffe v Snyder* 83 NJ 478, 416 A 2d 862 (1980) concerning the weight of the burden of victim diligence in jurisdictions which apply the demand and refusal rule.

[17] UCC § 2-403(1) (1991); In *DeWeerth v Baldinger*; the Federal court was allowed to apply state law, not develop it further. See for background Bibas 'The Case Against Statutes of Limitations for Stolen Arts' 1994 (103) *The Yale Law Journal* 2437; Collin 'The Law and Stolen Art, Artifacts, and Antiquities' 1993 (36) *Howard Law Journal* 17; Hayworth 'Stolen Artwork: Deciding Ownership is no Pretty Picture' 1993 (43) *Duke Law Journal* 337, 347 ff; Kenety 'Who Owns the Past? The Need for Legal Reform and Reciprocity in the International Art Trade' 1990 (23) *Cornell International Law Journal* 1; Pinkerton 'Due Diligence in Fine Art Transactions' 1990 *Case Western Reserve Journal of International Law* 1.

[18] UCC § 2-312 (1989); UCC § 20403 (1989) respectively.

(intentional misrepresentation). The seller is obliged to provide an *ex lege* tacit warranty of *vacua possessio*, which may give rise to a contractual action in particular circumstances and which would provide a basis for a claim in delict against the merchant.

3. RULES SPECIFICALLY TAILORED TO PROTECT CULTURAL OBJECTS

If unique and important objects and excavated finds ought not to be governed by rules specific to trade in ordinary goods, which rules should govern them? Rules regulating the standards of conduct of merchants[19] and museums[20] exist, but whether or not they can contribute meaningfully, is contentious. Dealers' codes have purely contractual force at most, and can be enforced only against members of the relevant group or their disciplinary body. They give no direct rights to third parties such as disposessed owners. Nevertheless, they may have legal significance for buyers, since proof of purchase from a dealer who subscribes to a code, may assist in establishing a buyers' good faith or due care under one or the other of the international restituary regimes.[21]

The 1995 Rome Convention adopts the common law presumption of *nemo dat* in Article 3.1 by placing the possessor under an obligation to return stolen property. In terms of Article 4.1, the possessor is entitled to 'fair and reasonable compensation provided that the possessor neither knew nor ought reasonably to have known that the object was stolen and can prove that it (*sic*) exercised due diligence when acquiring the object'. The compensation arrangement is conducive to the international protection of cultural objects, and has found support among many civil law countries like France. Yet, the more radical common law alternative (*nemo dat*) would have been cheaper and more effective in terms of the standard of care.

The so-called art-importing or dealer-collector states such as the UK, France, Germany, Switzerland and the United States have much to gain from the new Rome Convention. The Convention has found support among civil law countries such as France and Italy, as well as a

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[19] *E.g.* 1984 Dealers' Code; Antique Dealers Association Code.

[20] *E.g.* MA Museums Code 1977 or the Museums Association Code of Practice for Museum Authorities; Council of American Maritime Museums; Code of Conduct for Museum Professionals or the MA Professionals Code.

[21] Palmer 'Recovering Stolen Art' 1994 *Current Legal Problems* 239.

number of countries in Africa. It remains to be seen whether its imaginative and positive proposals will win wide support among other states, or will prove effective in market states, and whether the UK will ratify it.

Chapter 1 contains a discussion of the European Union initiatives regarding the enforcement of the public laws of member states. Other non-specific municipal rules allowing some form of ownership and securing valid title after a specific number of years complicate the picture. Until international agreements win global support, these non-specific rules retain relevance.

3.1 Acquisitive prescription of movables by a possessor or a thief

The standard of good faith is inextricably linked to appropriate statutes of limitations, for the legal picture is complete only after having determined whether the owner's action for recovery is barred or has been extinguished by the expiry of the prescriptive period. An unlawful form of control of property, while not a right in property, often has legal effects and implications.

Civil law countries consider adverse possession as a matter of substantive law applicable to both movable and immovable property. Common law countries focus on the statute of limitations barring the dispossessed owner, after a certain period of time has lapsed, from bringing an action for recovery of the property.

Limitation statutes differ as to the event that sets them running and the length of time for which a particular period may run.

Spanish law provides protection upon *bona fide* acquisition.[22] A three-year delay from the day the loss or theft occurred is common throughout Western Europe.[23] The Swiss, Portuguese, Dutch and Scandinavian systems also provide for relatively short periods of acquisitive prescription and compensation of the *bona fide* purchaser acquiring movable property *a non domino*.

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[22] Article 464 Civil Code of Spain.

[23] Article 2279 French Civil Code; Article 2014 Dutch Civil Code. If the purchaser loses the object to the owner within the delay period, he may still recover from the seller.

American law subjects the *bona fide* possessor to a number of equitable doctrines, which interrupt or 'toll' the statute of limitations on the owner's replevin (recovery) action and which modify the mechanical operation of the statute of limitations. Over the last 25 odd years, courts have found it difficult to identify the best method to determine when the statute of limitations in replevin actions to recover stolen art accrues or begins to run. Applying equitable principles to determine whether the statute of limitations has run against the claims of the rightful owner, or whether he or she has the benefit of an extended statutory period in which to file suit, courts have construed judicial powers liberally. In the *Kunstsammlungen zu Weimar v Elicofon* case, the paintings stolen from a German castle were sold to an American citizen in 1946. The court applied New York law as *lex rei sitae* rather than German law as *lex furti*. The application of German law would have required the application of the German statute of limitations, which allows a thirty year time period, and which would have meant that the Weimar Museum's claim had been extinguished. Instead, it was decided that the statute of limitations period should run from 1966, when the Weimar museum made several demands for the return of the paintings, and not 1946 when the original transaction took place, thus allowing the suit to be brought in 1969.

Approaches have vacillated between the demand rule and the discovery rule (that the cause of action accrues when the plaintiff discovers or should have discovered the facts needed to recover the object). The discovery rule – the rule applied in the majority of replevin actions[24] – prevailed over adverse use in the now famous case concerning the four surviving *Kanakaria Mosaics* from the 6th century apse of a Greek-Orthodox Church located at Kanakaria in Northern Cyprus.[25] The mosaics were stolen sometime between 1976 (two years after Turkish occupation of Northern Cyprus) and 1979 (when the theft was reported). They were exported from the island but their location remained unknown despite repeated efforts by the Cypriot government to locate them. In an action before the courts of Indiana, the Church succeeded in its claim against Peg Goldberg, a dealer who had bought them in the free port area of Geneva airport in 1988. The law of Indiana,

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[24] Hayworth 1993 *Duke Law Journal* 356.

[25] *Autocephalous Greek-Orthodox Church v Goldberg & Feldman Fine Arts Inc* 717 F Supp 1374 (SD Ind 1989) affirmed 917 F 2d 278 (7th Circuit 1990) cert denied 112 S Ct 377 (1992); See in general Byrne-Sutton 'The Goldberg Case' 1992 (1) *IJCP* 151; Crowell 'Autocephalous Greek-Orthodox Church of Cyprus v Goldberg & Feldman Fine Arts Inc: Choice of Law in the Protection of Cultural Property' 1992 (27) *Texas International Law Journal* 173 ff; Pinkerton 1990 *Case Western Reserve Journal of International Law* 1, 3.

including Indiana conflict of laws, was applied since the court characterised the replevin action as a matter of tort rather than as a question related to the transfer of ownership.[26] It applied Indiana substantive law as the law 'having the most significant contact' with the defendant's acquisition. Under Indiana law, a case is time-barred under the statute of limitations as soon as more than six years have passed since the cause of action has accrued. The limitation period was taken to have accrued in 1988, in favour of the plaintiff's case being heard, and not 1979 when the theft was reported to the Cypriot governmental authorities.

Courts, most notably in a principal art market jurisdiction such as New York, have regularly held that the owner's cause of action against a good faith purchaser does not accrue until the date of the claimant's demand that the purchaser return the object and is refused.[27] In *Guggenheim Foundation v Lubell,*[28] for example, where both parties were less than diligent (the museum did not report the theft and the good faith purchaser did not investigate the provenance of the Marc Chagall watercolour, Merchant of the Beasts), the mere lapse of time, no matter how long, was regarded as insufficient to affect the respective possessory rights of the parties. The museum triumphed over the later good faith purchaser.

While American courts have shifted away from a statutory due diligence-in-searching requirement on the part of the original owner, diligence (*e.g.* in taking care not to cause unreasonable delay in the making of the demand once the possessor has been found, or in reporting the theft to the police and to a computerised theft database) is not regarded as altogether inappropriate. There seems to be agreement that the law should spread the risk of loss, placing it

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[26] In Indiana, the statute of limitations for recovery of personal property is six years; Indiana Code Ann § 34-1-2-1 (1983).

[27] *Kunstsammlungen zu Weimar* 678 F 2d 1150 (2d Circuit 1982) 1151. One of the main issues in *Republic of Turkey v The Metropolitan Museum of Art supra* was whether there was delay in making the demand. In *DeWeerth v Baldinger* 836 F 2d 103 (2d Circuit 1987), cert denied, 108 S Ct 2823 (1988) the demand rule was applied together with the due diligence of the owner rule, and the defendant was allowed to retain the painting. The *Guggenheim* case relied once again on the demand rule, and resulted in DeWeerth instituting action de novo; see *DeWeerth v Baldinger* 24 F 3d 416 (2d Circuit 1994); 38 F 3d 1266 (2d Circuit NY 1994) cert. denied 115 S Ct 512. Also O'Keefe & Prott *Vol. 3* (1989) 422; Hayworth 1993 *Duke Law Journal* 341, 360, 375 ff; Furtak 'Abschluss im New Yorker Verfahren DeWeerth v Baldinger um den gutgläubigen Erwerb eines Monet' 1995 *IPRAX* 128. The recent Convention on Cultural Property Implementation Act 19 USC 2607 (Supp 1989) provides for statutes of limitation of variable lengths. The more widely possession is publicised, the shorter the period.

[28] *Guggenheim Foundation v Lubell* 569 NE 2d 426 (NY Ct App 1991) 622.

on buyers and ultimately on dealers, provided that a registry system could be run effectively.[29] Modern international litigation, which maintain original owners' claims for the recovery of objects including those plundered in times of war, insurrection and occupation, sends a positive signal that theft is being curbed.[30] The good faith of buyers of art objects from war-torn nations ought to be particularly tightly drawn when it comes to inquiries as to provenance.

If the possessor acknowledges the better title of the owner, the *animus domini* may disappear altogether. The course of prescription can be disturbed by either interruption or suspension and interruption may be either natural or civil.[31] The running of prescription is judicially interrupted when process commences, for example a document demanding ownership is served on the possessor. Prescription is provisionally interrupted but becomes conclusive when judgment is obtained in favour of the true owner.

Article 11 of Turkish Antiquities Law of 1983 deals with owners' rights and responsibilities. As pointed out in Chapter 1, it states that 'cultural and natural property to be conserved cannot be acquired through possession' (and by implication, not through acquisitive prescription).

As long as different periods remain for criminal and civil action against purchasers from agents or depositaries and purchasers from thieves and finders, there is bound to be uncertainty about foreign or local limitation rules.[32] A unified period for acquisitive prescription and agreement on

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[29] Collin 1993 *Howard Law Journal* 25-6; Bibas 1994 *Yale Law Journal* 2444, 2461; O'Keefe & Prott *Vol. 3* (1989) 422-425; 649-50; Pinkerton 1990 *Case Western Reserve Journal of International Law* 1 ff.

[30] Collin 1993 *Howard Law Journal* 40; Kenety 1990 *Cornell International Law Journal* 14; Blake 1994 *IJCP* 286-7.

[31] In terms of section 2 of the Prescription Act, 1969, actual, factual and voluntary loss of possession interrupt the prescription period's running against the owner. Involuntary loss of possession, even if lost to the owner, does not interrupt the running of prescription, if the possessor manages to regain possession by instituting legal proceedings within six months or by other lawful means within one year.

[32] The American demand rule *e.g.* harbours the potential for awkward discrepancies between the position of the thief and the *bona fide* purchaser. The statute of limitations commences immediately upon commission of the theft, while the good faith purchaser must wait indefinitely for a demand to be made before the statute begins to run. The decision in *Kunstsammlungen zu Weimar* (*supra*) 1163 contrasts with that in *DeWeerth v Baldinger* 836 F 2d 103 (2d Circuit 1987). This anomaly has been described as illusory, since a thief who has fraudulently concealed the whereabouts of an artwork will not have the benefit of a shorter limitation period. The statute of limitations may be 'tolled' for the benefit of the owner (interrupted in favour of the owner), who retains the right of possession *vis-à-vis*

the date from which the limitation period is to run, will significantly enhance protection of cultural objects.[33] Unification of substantive laws would appear attainable.[34] Most art transactions span more than one jurisdiction, necessitating resolution of the conflict of laws before considering which party is to bear the loss of the object or its value. The 1980 UN Convention on the Law of Contract in the International Sale of Goods (UNCITRAL) contains no special provisions for works of art, yet provides solutions for those countries adhering to it. Article 3(3) of the 1995 Rome Convention states that:

> Any claim for restitution shall be brought within a period of 3 years from the time the claimant knew the location of the cultural object and the identity of its possessor, and in any case within a period of 50 years from the time of the theft.

This absolute time limit was included to meet the requirement of the international art market. Article 3(4) restricts its reach by stating that a claim for restitution of an object belonging to a public collection of a contracting state shall not be subject to any time limitation other than the period of 3 years from its discovery.

Return of stolen art to its lawful owner (private owners and public institutions alike), is a tenet few people would question, and is conceptually consistent with the Unesco Convention's prohibition on importing cultural objects stolen from the documented inventory of an institution. Scope for expansion of the principle to cultural patrimony is discussed in chapter 6.

Public and private law categories prevent uniform results in litigation for return. Continental systems do not consider privately-owned artefacts as falling into any special category, so that the private *bona fide* holder is protected by ordinary rules. Rare or unique state-owned objects, on the other hand, may be inalienable in the strict sense. In France, public collections of inalienable

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the thief. When the thief has sold the object, the statute assumes that the purchaser possesses lawfully, but only until demand is made; Hayworth 1993 *Duke Law Journal* 382.

[33] Arts 3.3 and 5.5 Unidroit Convention (both these articles may relate to objects unlawfully removed from excavations); also Collin 1993 *Howard Law Journal* 25.

[34] Article 3.3 Unidroit Convention provides for a period of three years from the time the claimant knew the location of the object and the identity of its possessor, and in any case within a period of 50 years from the time of the theft. A longer period applies to cultural objects that belong to public collections. South African law is not much different from current international law in this regard. The civil law is bound to differ more substantially. See also the 1974 UN Convention on the Prescription (Limitation) Period in the International Sale of Goods (concluded 14 June 1974) *UN Doc* A/CONF 63/15.

cultural material cannot be declassified, nor sold or given away.[35] These objects may thus be reclaimed when lost or stolen, whereas privately held objects often cannot. When an object has left the territory and there is no bilateral agreement in place with the new *situs* state, the periods in statutes of limitation may be short enough to favour the innocent purchaser. Lack of jurisdiction may add to an already desparate situation. Finally, there is the distinction between movable *res* and immovable *res*. Usually it has an important bearing upon the applicable law involving property, yet the *lex domicilii* rule is of little use in title disputes, and the movable nature of the object does not change this. The *situs* state has a unique power to determine the character of objects within its borders. It may be asked why the movable character of cultural objects should be accorded significance for any but jurisdictional aspects?

The classification movable/immovable is used primarily to inhibit illicit traffic (exportation, importation and transfer) of cultural objects,[36] but is becoming increasingly difficult to draw and sustain. This is due in part to an advanced modern technology that has modified the nature of the property and consequently influenced the use to which objects are put. A traditional analysis reveals that immovables are better protected by law than are movables. In civil law countries, the return of movables depends on the bad faith of the possessor while immovables such as monuments have to be restored to their original condition irrespective of any standard of conduct. It is agreed that objects and parts of objects of artistic, historical or archaeological interest, which have been pried loose to transport, hide and sell, are under the direst threat of spoliation. Authoritative writers furthermore agree that, when applied to cultural heritage, the subdivision adds to the confusion.[37] Recognising cultural heritage as a new category of property would cause the distinction to dwindle, and would facilitate a reconciliation of civil and common law notions

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[35] Code on the Public Domain, article 52; Law 88-13 of 5 January 1988, article 13 (1). This is also the position in Spain and Switzerland. Germany recognises a number of limitations on the general public administrative rules determining the sale of public property. See the national and general reports contained in Briat & Freedberg (eds) *International Art Trade and Law* (1991) 68, 77-78.

[36] Dicke 'The Instruments and the Agencies of the International Protection of Cultural Property' in Council of Europe *International Legal Protection of Cultural Property: Proceedings of the 13th Colloquy on European Law* Delphi 20-22 September 1983 (1984) 17, 18.

[37] Reichelt (1985) 67, 99 calls for its abandonment; Prott 'Movables and Immovables as Viewed by the Law' 1992 *IJCP* 389 ff 391 advocates the elimination of rules that encourage dismemberment of cultural ensembles; Dicke (1984) 18 doubts the value of this distinction for purposes of protection of cultural heritage.

as well as a uniform definition of good faith.[38] The first hesitant steps in the direction of recognition of a new category of property have been taken by the Parliamentary Assembly of the Parliament of Europe in Recommendation 1072 of 1988.[39] Radin and Moustakas's models (referred to in chapter 3) analyse the characteristics of a new category.[40]

3.2 Good faith standards

In cases of cross-border theft and illicit exportation, civil law courts and common law courts applying civil law have adopted non-demanding good faith standards.[41] These attitudes have permeated trans-national litigation, but are now being called into question in respect of cultural materials. Among the international attempts to develop a uniform rule, were the suggestions made in the 1985 and 1988 Unidroit studies, conducted by Reichelt at the request of Unesco. The first of Reichlet's studies recognised that the question of good faith had to be regulated by a rule that would constitute a compromise, at the level of comparative law, between the different principles contained in national legal systems.[42] It was suggested that a uniform law should provide that the purchaser of stolen registered cultural property be prevented from relying on his or her good faith.[43] The protection of the *bona fide* purchaser could be retained in commercial transactions (where the property is sold on the open market, at public auctions and by traders of goods of the same kind) while the *nemo dat*-rule could govern individual dealings and lost or stolen goods.[44] The second study recommended that protection of the good faith purchaser be restricted as far as possible[45] while leaving the possibility of compensation open.[46] This line of

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[38] See Reichelt (1988) 23.

[39] In general O'Keefe & Prott *Vol. 3* 647.

[40] Radin 'Property for Personhood'1989 *Cornell Law Review* 957, 958-8, 968; Moustakas 1989 *Cornell Law Review* 1193-4.

[41] *E.g. Winkworth v Christie, Mason & Woods* 1980 1 All ER 1121; *Union of India v Bumper Development Corporation Ltd. (unreported, QBD)* 17 February 1988.

[42] Reichelt (1985) 43.

[43] Reichelt (1985) 61. Undocumented objects which have been unlawfully removed from excavation sites and from the state concerned are left vulnerable. Article 3.2 Unidroit Convention assimilates archaeological objects to stolen objects while article 5.1 assimilates them to illegally exported objects.

[44] In general Zweigert 315-17; *cf* Swiss Civil Code, article 934.2.

[45] Reichelt *The International Protection of Cultural Property, Second Study* Unidroit Study LXX Doc 4 (1988) 3.

thinking has been taken further by a suggestion that the extent of the reimbursement of the *bona fide* purchaser be linked to the extent of care he or she exercised.[47]

A study group of experts on the question of restitution has reiterated the importance of exacting standards of good faith for settling title in the purchaser, compelling him to inquire into the provenance of the object before purchase.[48] This has led to a near universal acknowledgement of the value of computerised registries of missing works of art and documented archaeological artefacts. Such electronic databases are used to standardise good faith and diligence and this obviates the need to overhaul either the common or the civil law approach.[49]

Other attempts have been made to counter the effect of time limitations on the question of ownership of stolen cultural objects and artefacts, *e.g.* –

- refusing to add the time period for which the art work was in one jurisdiction to the time the work was in another jurisdiction that recognises acquisition by adverse possession; and
- considering all museum items to be *res extra commercium,* inalienable and exempt from adverse possession and statutes of limitation. Conventions and reliable international public registers must guarantee this, otherwise transfer of the object outside the state that renders the object inalienable will render the status unenforceable. As yet, no state is obliged to recognise the *extra commercium* character conferred upon an object by another state.

The conflict of laws has been affected by the tension between the security of title in international commerce and global protection through recovery. The *Kanakaria Mosaics* have been rightly returned to the Church of Cyprus, but the application of Indiana law was either an obvious mistake, or an effort to circumvent the consequences of a traditional conflicts analysis on the basis of the *lex situs* rule. The return of the two Albrecht Dürer portraits stolen in Germany in 1945 in the *Kunstsammlungen zu Weimar v Elicofon* case, was laudable, but the application of

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[46] Reichelt (1988) 23-31 on the owner's right to repurchase his (or her) objects in continental systems. It was suggested that proof of *bona fides* ought to give rise to a right to payment.

[47] O'Keefe & Prott *Vol. 3* (1989) 414.

[48] In general the proposition of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation (Unesco Doc CC-81/CONF 203/10 18); Explanatory Report on the European Convention on Offences relating to Cultural Property, Strasbourg 1985.

[49] Lowenthal 'The Role of IFAR and the Art Loss Register in the Repatriation of Cultural Property' 1995 *UBCLR Special Issue* 309 ff.

New York law to the case was not borne out by the conflict of laws method chosen. To what extent can the resolution of conflict of laws ensure reasonable results? The *lex rei sitae* at the time of acquisition or loss of rights is a general rule of the common law, applicable to cultural objects and commercial commodities alike. With remarkable consistency, municipal systems of the conflict of laws designate the law of the place where a tangible, physical thing is situated as governing the creation, modification and termination of rights therein.[50]

In the section that follows, the *lex rei sitae* rule, possible alternatives and the rules that may displace it, are considered. As a rule that ensures the rapid and smooth transfer of goods, it is useful for the majority of transactions involving irregular purchases of minor and common objects. However, it may defeat the owner's claim in case of irregular purchase. Title validly acquired in one place will be lost if, once the object has been transported to a jurisdiction protective of *bona fide* purchasers, a sale is made to a good faith buyer. Examples of practical application are discussed under 4.

4. CONFLICT OF LAWS

It would be unwise to leave the conflict of laws unharnessed in the quest to enhance the international protection of cultural heritage. Conventions have a time dimension; there are serious political difficulties involved in persuading states to subscribe to international instruments; a single set of substantive rules is lacking; and efforts at unification of substantive laws in the area of good faith have been abandoned for the time being. Nevertheless, compliance with the municipal legal system assigned to govern the validity of title and transfer of objects, including immovables that have become movable by detachment or by destruction of a building, does not enhance protection automatically: as such, it has as much potential as compliance with multilateral provisions, jurisdiction and enforcement. As a traditional and technical means, the conflict of laws relies on a stale vocabulary, which tends to use static conceptions of property

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[50] Rabel *The Conflict of Laws: A Comparative Study Vol. 4* (1958) 40; Staker 'Public International Law and the *lex situs* Principle in Property Conflicts and Foreign Expropriations' (1987) LVIII *BYBIL* 151, 163 ff; Vrellis 'Le Statut des Biens Culturels en Droit International Privé' General Report delivered at the *XIVth International Congress of Comparative Law* Greece (31 July – 4 August 1994) 12. The position that prevails in Anglo-American courts is set out in Dicey & Morris *The Conflict of Laws Vol. 2* (1987) 942-946. In general O'Keefe & Prott *Vol. 3* (1989) 638 ff.

ownership.[51] Its corrective force and inner pliability are the qualities that need to be harnessed.

4.1 The *situs* rule

As stated previously, *the lex situs* governs the transfer of title of immovables. As no system of analysis has been codified in any international instrument, the *situs* rule is susceptible to a variety of interpretations by the courts and legislatures of each state. Moreover, its significance for *res in transitu* is limited and it poses problems where the *res* is found beyond the territorial boundaries of states.

Portuguese law regards prescription as a question of title to be determined by the *lex situs*. Problems may arise when the object is removed to the territory of another state before the requirements of the law of the previous *situs* have been met.

4.2 Exceptions: *res in transitu*

In the course of events leading to litigation, the *situs* of a cultural object may change. Ownership may be transferred or acquisitive prescription may run while the object is on the move. Conflicts scholars consistently emphasise that the law of a temporary *situs* should not be allowed to govern.[52] A variety of laws, some of which have no real connection to the goods, may vie for application or the *situs* may be unknown at the relevant time. Application of the civil codes of continental Europe in these circumstances may tip the scale in favour of security of title and the innocent purchaser. The effect will be that a previously dispossessed owner, oblivious to the fact that his or her movables are being dealt with on civil law terms, is left stranded.

In the *Goldberg* case, the agreement for sale of the mosaics was concluded in the free-port area of the Zurich airport. The debate in the District Court was whether to apply the substantive rules of Swiss law or Indiana law. While the *lex situs* rule would point to Swiss law as the place where the object was located at the time of the transfer, the court chose to apply Indiana law.

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[51] Moustakas 1989 *Cornell Law Review* 1182-3.

[52] Staker 186 with further (inaccurate) reference to the *Rose Mary* case.

The problem of identifying the particular *lex situs* that must govern is complex when a sale takes place while goods are in transit. Among the options advocated are: continued support for the *lex situs* principle in unamended form,[53] the domicile of the owner,[54] the proper law of the transfer ascertained in accordance with the principles which determine the proper law of the contract of sale,[55] the *lex loci expeditionis,*[56] the *lex loci destinationis* of the goods[57] and in the case of art, the artist's main place of activity as a starting point.[58] In the US, interruption of the transit has been recognised as a circumstance that renders the in-transit exception inapplicable.[59]

4.3 The *lex situs* rule applied

The classical mechanism of the conflict of laws amenable to a result in the case of a transfer of an object from the territory of one state to the territory of another, allows the real rights acquired in the regular manner to continue to exist in principle, until they are replaced in accordance with the new *lex rei sitae*. However, illicit trade is boosted by differing national laws and the gradual 'laundering effect' on title as a result of trans-border transactions involving at least one civil law country – a fact sophisticated traffickers are all too aware of. Objects may be concealed for the duration of the statute of limitations period, to be purged of their tainted title upon sale by the *lex situs* rule. The risk of loss to the original owner increases as recovery may be effectively blocked.

The *Winkworth* case, decided in the UK,[60] illustrated clearly that the original owner's title may be extinguished by a post-theft sale to a buyer who receives in good title. Valuable Japanese miniature ivory carvings were stolen from A in the UK and subsequently purchased by C in Italy in what is defined under Italian law as good faith. C later sent them to the UK, where they were

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[53] Rabel (1958) 101.

[54] *Ibid.* 101 n 8.

[55] Dicey & Morris (1987) 946-7.

[56] Vrellis (general report) 12.

[57] Article 12.2 Benelux Treaty Concerning a Uniform Law on Private International Law 3 July 1969 (1970) 18 *AJCL* 420 (but abandoned in 1975); Switzerland's private international law statute 1987, article 101.

[58] *Internationaler Kulturgüterschutz – Wiener Symposion 18/19 Oktober 1990* Reichelt (ed.) 168.

[59] *E.g.* Crowell 1992 *Texas International Law Journal* 203.

[60] *Supra.*

claimed by A. The British court held that under Italian law the sale in Italy overrode A's title and gave C good title. C's title prevails even if the sale would not have had this effect under English law. English law could determine whether the theft in the UK gave the thief good title, but had no power beyond English borders to decide whether the thief or transferee could give good title. Dicey and Morris describe the case as an 'excellent example' of the principle that if the statute law of the place of the last transaction enables non-owners to pass good title, the previous title is overridden.[61] The laws of Italy took precedence over those of the UK, because the stolen Japanese collection was already in Italy at the time of its acquisition by the Italian purchaser. Under English law, the proprietary rights of the rightful owner (prior title) would not have had to be sacrificed in favour of the rights of the *bona fide* purchaser.

The interpretation that real rights acquired in the regular manner continue to exist until they are replaced in accordance with the new *lex rei sitae,* means that removal of objects from E (country with a common law system) to S (a country with a continental system) creates an opportunity for a new title to be acquired under the law of S. When this happens, the title previously acquired under the law of E is displaced. If E is the system that created a new title, *e.g.* in circumstances which, by the statute law of E, enable non-owners to pass good title, the new title thus acquired will override the title previously acquired under the law of S.

The *Winkworth* decision treats the *lex situs* rule as an ideal rule of international law. However, it amounts to a 'rehabilitation of offenders' rule if a later acquisition of a good title under the *lex situs* rule is supposed to purge any original theft, illegal excavation or export from the country of origin.[62] There is some support among commentators for an exception to the *lex situs* in similar circumstances, especially among those who are wary of a mechanical application of the law of the last transaction by which acquisition of title is alleged. The court chose in favour of commercial or business convenience, and ignored the difficulties of disregarding English law. Much of the criticism against the decision is based on the absence of a close link with the *lex rei*

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[61] Dicey & Morris (1987) 949.

[62] Palmer 1994 *Current Legal Problems* 249, with reference to the acquisitions policy of the British Museum.

sitae and the disregard displayed in respect of links that gave the case an English orientation.[63]

Dicey and Morris's example of a non-owner or thief having obtained possession of the goods in S and taken them to E with a view to sale in *market overt*[64] is less common than transit through civil law countries, where more circumstances may work to the advantage of the purchaser. In *Kunstsammlungen zu Weimar*[65] title in two valuable paintings was traced through an American common law jurisdiction. In deciding that New York rather than German law should apply, the court expressly invoked the forum interest to prevent the state becoming a marketplace for stolen goods. Its choice of law analysis, particularly with regard to the *lex situs* rule, was conducted in true impressionist style. It was a case of relaxed application of the rule, which disregarded the German requirements for acquisition by prescription, to the advantage of the original owner.

French courts follow a peculiar interpretation in private actions for recovery. They apply their national law to test title to objects stolen from an owner in France, even where the holder had held valid title under the law of the place of the last transaction.[66] That the application of the law of the place of the object's location when the claim is made may cause holders to try to evade claims by relocating the object, has been acknowledged by French academics.[67]

Guidance in the interpretation of the *situs* rule in cultural heritage cases is provided by the case *Republica dell' Ecuador v Danusso.*[68] More than 25 000 pre-Columbian antiquities had been sold

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[63] O'Keefe & Prott *Vol. 3* 616; Reichelt (1985) 81 ff; Collin 1993 *Howard Law Journal* 23-24; in general Pecoraro 'Choice of Law in Litigation to Recover National Cultural Property: Efforts at Harmonization in Private International Law' 1990 *Virginia Journal of International Law* 1 ff 15-16.

[64] Dicey & Morris 948 ff. Other English statute law examples of circumstances which enable non-owners to pass good title are the Sale of Goods Act, 1979 (section 25) and the Hire-Purchase Act, 1964 (section 27).

[65] *Supra* n 8.

[66] Audit 'Le Statut des Biens Culturels en International Privé Français' 1994 *Revue Internationale de Droit Comparé* 405, 417-9. Possession is considered a fact governed by the current location of the movable, even where this law casts doubt on a prior transaction in another country. The 1958 Hague Convention on the Law Applicable to the Transfer of Title in International Sales of Goods (tr in 1956 (5) *AJCL* 650) provides in Article 5 that the rights of the purchaser against the third party are governed by the *lex situs* at the time the claim is made. Arguably, this rule would encourage the deflection of objects to civil law systems.

[67] Audit 1994 *Revue Internationale de Droit Comparé* 419. He suggests that the model provided by the 1970 Unesco Convention for public recovery actions be followed.

[68] *Supra* n 7. See O'Keefe & Prott *Vol. 3* 630.

to an Italian speculator in Ecuador, and clandestinely exported to Italy in violation of the Ecuadorian vesting statute. There the Italian dealer put them up for sale. Investigations culminated in civil proceedings. An Italian court held that interpretation of the *lex rei sitae* rule depended on the nature of the dispute: whether it was a title dispute or a dispute over the content of the real right. Title is an expression of the right to property and thus cannot be invalidated by removal. On the other hand, the law of the new *situs* determines the content of the right. Thus, where the new *situs* recognises the real right claimed, the rights of the person entitled are no different in the two different places; where the new *situs* does not recognise title to the alleged real right, it is not a fact relevant to the determination of title. If the content of the real right differs in the two places, the law of the new *situs* is determinative of the content. Any dispute concerning the manner in which the person entitled to the right enjoyed it when the object was still located at its original *situs*, will continue to be governed by the law that governed the thing at that time and not by the law of the place where the dispute arises or the action is instituted.[69] The court ordered the objects to be returned to Ecuador despite the fact that neither side could assert clear title to the objects under Italian law. Ecuadorian law was regarded as fully compatible with the Italian regime, which declares certain cultural objects outside the bounds of ordinary commerce. The protective powers of Ecuador were recognised as being inalienable and indefeasible, and part of the *dominio eminente* of Ecuador. Since Ecuador possessed an *in rem* right, it was able to prohibit free trade, impose limitations on acquisition by private individuals and prohibit export.[70] The outcome is likely to have been different, however, had the objects been resold to a *bona fide* purchaser in Italy before Ecuador brought suit, as Italian law would then have been decisive.

The Turin court did not resort to the law of the place of actual location when the claim was made. It enforced the Ecuadorian rules limiting acquisition and transfer and prohibiting export of archaeological objects on account of their similarity to Italian rules on the subject. A very strict test of *bona fides* was applied. The law of the place where the objects were located at the time the suit was commenced was disregarded, and the law of the location at the time of the alleged

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[69] First Civil Section 4410/79, 44-47.

[70] Second Civil Section 593/82, 632-3.

transfer (*lex loci actus*)[71] was applied.

It is possible that the *lex situs* at the time of the alleged transfer may differ from the law of the last *situs* where the transfer of the object was authorised by the original owner.[72]

Some authors have proposed substituting the *lex rei sitae* with the *lex furti*, *i.e.* the law applicable to the place of the theft. However, the *lex furti* can be unknown to people trading the object in good faith or may be as fortuitous as the *lex rei sitae*.[73]

The *lex originis* of the object is considered by some as a new corrective for the ills and uncertainties inherent in the *lex situs* – especially among those who recognise the potential value of the public policy of the international community in this sphere.

4.4 Displacing the *lex rei sitae* rule with the *lex originis*

The law of the place of origin ('nation of origin') of an immovable is more likely to extend protection to the detached elements of a complex than the laws of the place where the detached cultural object turns up unexpectedly. Writers maintaining that parts of important cultural complexes, which are detached and sent to another country, ought not to lose the protection of the law of the immovable, favour displacement of the *situs* rule by the law of the nation of origin.[74] In the case of the Casanova frescoes,[75] the highest court in France opted for the least rigorous standard of protection. A more inventive standard is embodied in the inquiry whether the purchaser is allowed to rely on the movable character of a particular cultural relic against owners who have not consented to its detachment. The purchaser who is in any way *mala fide* or knows

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[71] New York courts display a preference for the latter where the validity and effect of a transfer, as well as the capacity to effect such a transfer, are at issue. In general O'Keefe & Prott *Vol. 3* 641.

[72] Lalive *The Transfer of Chattels in the Conflict of Laws* (1955) 159.

[73] Gattini 'The Fate of the Koenings Collection: Public and Private International Law Aspects' 1997 *ICJP* 81, 93 with further references.

[74] Droz 'The International Protection of Cultural Property from the Standpoint of Private International Law' in Council of Europe *International Legal Protection of Cultural Property: Proceedings of the 13th Colloquy on European Law* Delphi 20-22 September 1983 (1984) 538; Prott 1992 *IJCP* 390.

[75] The frescoes were held to be immovable by nature by the court of first instance; the appeal court judged them immovable by intention, while the *Cour de Cassation* determined that they were movable; n 5 above.

that the owner has not consented, cannot be allowed to regard detached objects as movables.[76]

Do we assume that the law of the country of origin will provide the most effective protection to its cultural heritage or do we try to identify the law that grants the most extensive protection to cultural property? Is the 'best protection' provided by the law that places the greatest constraints on the contractual freedom (and thus the freedom of movement) in respect of cultural property? It could be that the *lex originis* dictates more restrictive time limitations than the *lex rei sitae*. Could there be any logic to the contention that contractual parties, as just and reasonable persons, 'ought to have' decided in favour of the law most restrictive of the freedom to trade in national treasures, had they considered the matter?

In the European Union, the idea to give the *lex originis* some recognition has eventually been incorporated into legislation, albeit not in directly applicable form. Council Directive 93/7/EEC on the return of cultural objects defines the notion of 'return' in Article 1 in a way that leaves the question of ownership to the national law designated by the choice of law rule of the court hearing the case (*i.e.* the competent court in the requested member state).[77] Article 5 establishes the competence of the national judicial authorities to which the requesting member state makes its request for restitution, to rule on the merits. Article 12 provides, however, that ownership of the cultural object after return 'shall be governed by that law of the requesting Member State'.

To regard the law of the place of origin as the place of domicile of the dispossessed owner, amounts to a restrictive application of the *lex situs*, albeit one that would tend to favour return and discourage wrongdoers from passing title in jurisdictions with favourable *bona fide* purchaser rules. It has been argued that such a rule is undiscriminating in its application to private and public interests while the latter are more compelling and the former do not warrant the creation of a new regime.[78] Moreover, the public interest in the property issue may well concede that the

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[76] Prott 1992 *IJCP* 391.

[77] Compare also the German *Gezetz zur Umsetzung der Rechtlinie 93/7/EC des Rates über die Rückgabe von unrechtmässig aus dem Hoheitsgebiet eines Mitgliedstaates verbrachten Kulturgütern vom 15 Oktober 1998. BGBl. 15.3162.*

[78] Pecoraro 1990 *Virginia Journal of International Law* 16.

nation of origin might be only tenuously connected with the modern history of the object in question. If so, its equitable claim upon the object would be of little consequence.[79]

A proper evaluation of the *lex originis* demands answers to a number of questions. Does the *lex originis* meet the stringent criteria required of an alternative rule? Does it avoid creating havens where good title may be passed to stolen property? Does it provide the degree of convenience and security necessary to maintain marketable title and investor security in objects that do not meet the 'property for personhood' and 'property for grouphood' criteria? Does it alter business convenience concerns to highlight the problem of trafficking? Does it leave scope for a state to assert its interest in controlling the commercial norms and standards by which business is conducted in its jurisdiction? Does it prompt the international community to move towards a consensus on the transfer of ownership of cultural objects?[80]

Even if the answers to all of the above were affirmative, it would be unwise to assess and resolve all competing claims in terms of an ethical framework limited to property rights only.[81] Cultural heritage law is an area cut out for compromise models to resolve conflict.

4.5 Displacing the *lex rei sitae* rule: closest connection

The earliest Unidroit studies state that the intention of the parties ought to displace the *lex situs,*[82] and suggest that the law with the closest connection should displace the *lex situs* in the case of lost or stolen goods. It is not entirely clear whether this suggestion refers to the closest connection with the actual purchase of the stolen object, or to the closest connection with the circumstances surrounding the transaction.

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[79] *Ibid.* 17. The justice of a claim of the nation of origin for retention or repatriation is a hotly debated issue. Merryman is a staunch supporter of 'cultural internationalism' and opposes 'blind' return. Where the work concerned becomes assimilated in the culture of the place of location after export, the connection with the country of origin could become tenuous. See Merryman 'Thinking About the Elgin Marbles' 1985 *Michigan Law Review* 1881, 1915.

[80] Collin 1993 *Howard Law Journal* 24-5, 27, with reference to *Kunstsammlungen zu Weimar supra*; Crowell 1992 *Texas International Law Journal* 209.

[81] Warren 'A Philosophical Perspective on the Ethics and Resolution of Cultural Properties Issues' in Messenger (ed.) *The Ethics of Collecting Cultural Property* (1989) 1, 18; in general also Moustakas 1989 *Cornell Law Review* 1182.

[82] Reichelt (1985) 91; 125-7.

The *Elicofon* and the *Autocephalous Greek-Orthodox Church* cases, decided by American courts, illustrate how analysis of the 'most significant relationship' can function in the same way as a clear public policy exception to the *lex situs* rule. Content-selecting rules are rather attractive where substantive rules diverge sharply and where an important international policy demands consideration.[83] 'Adaptation' may also be accomplished by the traditional first stage in a conflict of laws analysis, namely that of categorisation. Characterisation of the issue surrounding the taking of cultural objects as delict or contract, rather than as an action related to the transfer of ownership, may lead to the application of the law with the most significant relationship with the cause of action – perhaps as an escape clause to a standard rule that shows little connection with the action.[84]

If title were acquired by a *bona fide* purchaser in a post-theft sale of the object while the object was located in a country whose laws regard that sale as conferring good title, the *lex situs* rule is not going to be ousted by the right of action of the member state from which the object was removed unlawfully.[85]

5. CONCLUSION

The *lex situs* principle is generally favourable to the international trade in art. Considerations of convenience, certainty and predictability in international commerce have been adduced in support thereof. It protects the integrity of the transaction and focuses legal attention on the conduct leading to possession. As such it favours neither owner nor purchaser, as the level of protection depends on the rules contained in the designated law. It is not a content-selecting rule, yet its effects are never neutral. The *situs* rule is not sensitive to the significance of cultural objects as personal property, nor to cultural objects as 'property for grouphood'. Restrictions on transfer, export and other measures of protection applied by the country of origin will all fail to be observed, once the goods have passed through a transaction in another country. Private common

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[83] Pecoraro 1990 *Virginia Journal of International Law* 10.

[84] *Autocephalous Greek-Orthodox Church* 717 F Supp 1393.

[85] Palmer 1994 *Current Legal Problems* 239 (presuming that the case comes within the scope of the 1994 implementing Regulations (UK)).

law owners of foreign art and antiquities not intended to be site-specific will not benefit from a strict application of the *lex situs* rule. By contrast, the broad principle of the international community favours return of stolen art to its rightful owner.

The entitlement of a private owner who has fallen victim to common theft is beyond doubt. Irrespective of whether his or her identity was bound up with the object of art or the object was held 'purely instrumentally', as a dealer might, at least a property claim exists. Recovery is bound to 'promote good object relations', as the thief cannot use the property argument. Consistent with Radin and Moustakas' theories, inalienability may attach to rights that are at the personal end of the metaphysical continuum running from personal to fungible. Market-inalienability would lend a suitable level of protection to the owner's rights.[86]

This chapter did not investigate the scope for extending the principle of return of stolen art to its lawful owner, to return of stolen cultural patrimony to its nation of origin. Nevertheless, the case law selected for discussion has raised the issue. Are the issues so different if the victim is not a private citizen but a church? Or not a temple but an art rich nation? Or if the theft occurred during a time of war, insurrection or occupation?

The *Goldberg* and *Bumper* decisions, taken in relation to objects worth the investment in litigation and without the assistance of an international convention, are equally encouraging. Litigation was relentlessly pursued and yielded results. The *DeWeerth* case investigated the wealth and sophistication of the victim, and judged the failures in her search and the length of time during which she failed to search, all the more harshly. A nation that claims to be losing its patrimony could thus be expected to spare no expense in a diligent search to recover and to conduct whatever examinations and inquiries it deems necessary to establish its claim, but the allocation of resources to field such enquiries may be another matter.

The insensitivity of the *lex situs* rule to 'cultural internationalism' is understandable: the proper social context is not an international one. In cases where it is not required to decide whether

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[86] Radin 1982 *Stanford Law Review* 968 n 100; Moustakas 1989 *Cornell Law Review* 1188.

export restrictions promulgated by foreign nations should be respected or not, the arguments for and against cultural nationalism and the nationality of the object remain peripheral.

The *lex situs* rule, when applied in combination with stringent standards of diligence and the possibility of compensation to the *bona fide* purchaser, approaches a compromise model of conflict resolution. The conceptual framework is not a strictly value-hierarchical one based on a win-lose approach. The framework envisaged by the Unidroit Convention considers imprescriptibility of public collections (Article 3.4) and compensation to the diligent purchaser (Article 4.1); it also contains a definition of diligence (Article 4.2). The Convention does not presume bad faith on the part of the possessor in the absence of an export certificate. This is a wise course of action. A rigid choice of law rule would be a workable option only if no other appropriate model is available. Even a content-selecting rule or a law selected for its amenable content will not yield reasonable results if the substantive values, underlying policies and the importance of the consequences of applying these rules have not been taken into account. The debate cannot always be conceived in terms of property rights.

Not all the forces of renewal within the conflict of laws have dwindled. For example, an international choice of law standard based on interest-analysis will investigate the express policies regarding cultural materials of the country whose laws are identified as applicable. In so far as this approach contains the seed of a consensual model of conflict resolution that neutralises the win-lose aspects of the case, it is to be commended.

French law provides an interesting example of treating possession and title entirely as substantive law issues. It steers clear of the traditional vocabulary of the conflict of laws. Blind application of any one version of a choice of law rule or any single connecting factor could never harmonise national and private interests and public and private law in the way required by title disputes. Even if a particular version of the *lex rei sitae* rule could be universally accepted, results could still be clouded by incorrect application of foreign law. Correct application may be particularly difficult where courts of a foreign jurisdiction have not yet considered the matter.

Whichever model of conflict resolution is followed, reasonable standards of commercial conduct

among dealers and intermediaries in the distribution network are necessary to ensure the long-term health of the legitimate marketplace for art. Municipal laws of title do not always reflect the spirit of international law policies on cultural heritage. The solutions adopted by municipal systems are directed by distinctions regarding the legal nature of the property, the cause of loss of possession and the circumstances of acquisition: their private law regimes for transfer of ownership are designed for *res in commercio*.

All jurisdictions would potentially benefit from a uniform law on acquisition in good faith and standardising commercial practices in their jurisdictions (for example, obliging the purchaser to seek export documents and ensure a clean chain of title). American courts have been thrusting a more onerous duty of care on innocent purchasers who, eager to avoid liability, prefer the existing situation to continue. They have allowed gradual erosion of the protection of possessors, having made a policy choice, albeit *ad hoc*, in favour of the true owner. The provenance of the cultural object is becoming more important than the reputation of the merchant or intermediary. This is the only way in which commercial indifference may be reduced. This may also strengthen the integrity of the art market.

CHAPTER 6

STRATEGIES FOR RETENTION AND RECOVERY

1. INTRODUCTION

Several problems routinely confront the country seeking the return of an item in cultural heritage jurisprudence.[1] 'State of origin'[2] may connote a number of vastly different notions. Standing to sue, identity and title represent issues that may effect the outcome of any strategy for recovery. Another obstacle in law and litigation is the possibility of interpreting export control law as extraterritorial in so far as it may be regarded as affecting legitimacy of import. Illegal export (in the sense of objects removed from the territory of a contracting state contrary to its law regulating the export of cultural objects)[3] and its effect on title, apparent or real, creates a conundrum. Export control legislation applies primarily to privately held cultural objects, that is, to cultural objects held in private collections, private museums, or held by dealers and auctioneers.

The difficulties are best explained by means of examples.

Example 1

The Netherlands may wish for the return of a Frans Hals painting, sold privately by its Dutch owner to a Canadian, and exported illegally to Canada. Suppose that this painting could have

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[1] *Republic of Ecuador v Danusso,* Civil and District Court of Turin, First Civil Section, No. 4410/79; Court of Appeal of Turin, Second Civil Section, No. 593/82; 18 *Rev. dir. int. priv. proc.* 625 (1982); *Attorney-General of New Zealand v Ortiz* [1982] QB 349; reversed [1982] 3 All ER 432 CA; appeal dismissed [1983] 2 All ER 93 HL; *King of Italy and Italian Government v Marquis Cosimo de Medici Tornaquinci and Christies* 1918 34 TLR 623; *United States v Hollinshead* No. 10970 (S.D. Cal. 14 March 1973) affirmed 495 F 2d 1154 (9th Circuit 1974); *United States v McClain* 545 Fed Rep 2d 988 (1977); 593 Fed Rep 658 (5th Circuit 1979). More recently also *De Raad v OvJ* NJ 1983 445, rev'd on appeal to the Hoge Raad; *Government of Peru v Johnson* 720 F Supp. 810 (C.D.Cal.1989) affirmed, sub nom *Government of Peru v Wendt,* 933 F 2d 1013 (9th Circuit 1991), full opinion in No. 90-55521, 1991 US App. LEXIS 10385 (9th Circuit 1991); *Kingdom of Spain v Christie, Manson and Woods Ltd* [1986] 1 W.L.R. 1120; and *Republic of Turkey v The Metropolitan Museum of Art* 762 F Supp. 44 (SDNY 1990).

[2] Article 149 of the 1982 United Nations Convention on the Law of the Sea. The LOSC was concluded on 10 December 1982 at Montego Bay. It was signed by 119 delegations, by all but fifteen states.

[3] The Unidroit Convention uses the term 'illegally exported cultural objects' to designate objects removed from the territory of a contracting state contrary to its law regulating the export of cultural objects for the purpose of protecting its cultural heritage (Article 1).

been acquired by the state if it exercised its right of *pre-emptio* (pre-emption). However, at the time of its illegal export, it belonged to the collector who discovered the painting in an attic after years of neglect. Dutch law would have allowed him a defeasible title until notification or presentation of the find to the state authorities for appraisal and purchase. Having exported the painting illegally, the seller of the Frans Hals painting cannot sue for recovery in a Dutch court. On the other hand, the Dutch government will be denied standing in the courts of the place where the object is located. Even if the painting was sold lawfully, the original owner and the nation would not be able to retrieve it. Resale of the object may prove difficult on account of the violation of export restrictions.

Example 2

The Metropolitan Museum in the US is exhibiting antique gold and silver vessels as well as mural frescoes, originally crafted by Greek settlers. The find was unearthed in what is now Turkish territory, after alleged illegal excavations by local peasants. A state official managed to organise a false permit for export and sale abroad. The Turkish laws apply to finds on private land as well, and provide a mechanism for acquisition by the state.[4] The government became aware of the existence of the treasure after the law came into force, but the treasure was removed shortly before it could be properly documented *in situ*.

The question of illegal export does not necessarily involve a preceding theft at the original location, but often the question is whether removal in violation of export restraints of the state of origin pre-empts legal transfer, or whether it constitutes theft.[5] There seems to be agreement that removal of inventoried property amounts to theft, no matter in what state of neglect the object may have been. Where private law problems of a trans-national nature feature in civil cases and

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[4] These are the facts in *Republic of Turkey v The Metropolitan Museum of Art* 762 F Supp. 44 (SDNY 1990). Turkey refers to the find as the 'Lydian Hoard'. The find was restored after 25 years. See in general Church 'Evaluating the Effectiveness of Foreign Laws on National Ownership of Cultural Property in U.S. Courts' 1992 (30) *Columbia Journal of Transnational Law* 179; Blake 'The Protection of Turkey's Underwater Archaeological Heritage – Legislative Measures and Other Approaches' 1994 *IJCP* 273, 287 ff.

[5] The legality of a removal of cultural objects during colonial rule is not discussed here. See Thomason 'Rolling Back History: The United Nations General Assembly and the Right to Cultural Property' 1990 (22) *Case Western Reserve Journal of International Law* 47. For a discussion of the obligation to return anthropological and ethnographic items removed during colonial rule and currently in the public collections of the former coloniser, see Walter *Rückführung von Kulturgut im internationalen Recht* (1988) 103 ff.

prosecutions, judicial strategy often hinges on the question of whether or not theft can be alleged.

Paragraph 1 of Protocol I of the 1954 Hague Convention has given rise to more than one interpretation. Paragraph 1 reads:

> 'Each High Contracting Party undertakes to prevent the exportation, from a territory occupied by it during an armed conflict, of cultural property ....'.

Some authors interpret this regulation as intending to ban all types of removal. If cultural objects were exported during an armed conflict, there would be an absolute right of restitution under the Protocol. Others see the regulation as imposing a duty on the occupying power to forbid any transactions that are contrary to the internal regulatory legislation of the occupied country. All issues of private law and conflicts of law were excluded from the Hague Convention because of irreconcilable differences in national laws. Public international law rules on restitution were included in the first optional Protocol.

Traditional international law obligates no nation to enforce another nation's restrictions on the export of privately held cultural objects. The 1970 Unesco Convention, the 1995 Rome Convention and EU Council Directive 93/7 of March 1993 modify this principle to an extent,[6] but the debate continues. A number of states favour the idea that illegal export from one jurisdiction renders import into a second jurisdiction illegal. Whether illegally exported goods automatically constitute 'stolen' goods, within the meaning of an act declaring state ownership in respect of certain objects, is a question typically related to the North-South, or art-poor and art-rich, divide. States that do not grant extraterritorial effect to what a foreign jurisdiction regards as criminal behaviour, allow import of these materials into their territory. Consequently, they are loath to concede that a taint may attach to the purchaser's title due to illegal export from a foreign jurisdiction. To concede as much would, for them, amount to an expropriation of the property of the purchaser.[7]

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[6] See chapter 3 in respect of Article 7(a) of the 1970 Unesco Convention and Articles 3 and 5 of the 1995 Rome Convention.

[7] *Jeanneret v Vichey*, 541 F Supp 80 (SDNY 1982); reversed and remanded, 693 F 2d 259 (2d Circuit 1982), discussed *infra*; the MA Museums Code takes an ambiguous approach to acquisition of illegally exported objects. For an analysis of clauses 4 and 5, see Palmer 1994 *Current Legal Problems* 242-245.

If one country enforces the export law of another, it is possible that all the objects illegally exported from that country are considered stolen in the country where they are. Considering that 36 different cultures flourished on Turkish soil at different periods, that Turkey has more Roman towns and antique Greek sites than Italy and Greece, and that a new theory links ancient Troy (in north-west Turkey) with the lost Atlantis,[8] the practical questions may be –

- Does Turkey have the best chance of success if it uses theft as the basis for recovery?
- Should Turkey's action for recovery be allowed to succeed?

The inadequacy of the existing international enforcement scheme and the resulting uncertainty over which nation is entitled to a particular cultural object, has prompted national[9] governments to draw legislation aimed at ensuring retention and ultimately recovery. Domestic legislation may be motivated by the wish to retain, or to recover an object once a country has sustained a loss. Import restrictions are based on the hope for reciprocal treatment. The question of legislative changes required for a conflicts scheme to apply, is investigated below.

Strategies for the recovery of unlawfully exported items of cultural heritage include import restrictions, domestic legislation and a conflict of laws scheme. While the act of state doctrine, in one of its typical applications, relates to the taking of property by a state within its own territory, the doctrine will not be canvassed here. Usually, if the original taking of cultural objects by the state had been compensated, recognition of foreign restitution claims against *bona fide* purchasers follows and the claims may be allowed.[10] The conflict of laws scheme is based on a measure of willingness on the part of courts to give effect to foreign laws. Poor source nations' efforts to

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[8] Blake 1994 *IJCP* 273.

[9] Including central and federal governments, where applicable.

[10] This was the nature of the action and the theory on which claims in respect of paintings, mosaics and artefacts were based in *Kunstsammlungen zu Weimar v Elicofon*; 678 F 2d 1150 (1982); *Autocephalous Greek-Orthodox Church v Goldberg & Feldman Fine Arts Inc* 717 F Supp1374 (SD Ind 1989) affirmed 917 F 2d 278 (7th Circuit 1990) cert denied 112 S Ct 377 (1992); *Government of Peru v Johnson, Wendt, Swetnam et al* 720 F Supp. 810 (C.D.Cal. 1989) affirmed, sub nom *Government of Peru v Wendt,* 933 F 2d 1013 (9th Circuit 1991), full opinion in No. 90-55521, 1991 US App. Lexis 10385 (9th Circuit 1991); *Republic of Turkey v The Metropolitan Museum of Art* 762 F Supp 44 (SDNY 1990). The foreign immunity defence does not prevent a claimant state from suing for recovery in a foreign jurisdiction, if its government is recognised by the *forum* state. O'Keefe & Prott *Law and Cultural Heritage* (1989) *Vol. 3 Movement* 621.

retain their cultural heritage include demands for more favourable treatment of their claims for the return of illegally exported objects.

This chapter gives an overview of modern legislative and judicial strategies for recovery, and is set out as follows –

- A background on illegal export
- Judicial and legislative strategies for recovery in domestic legislation
- Trans-national consequences of various strategies, including a case law study on public law actions.

American authors have contributed significantly to the identification of the differences between theft and illegal export. Since case law and the new Unidroit Convention have been influenced by their work, a significant section of this chapter deals with American law.

2. JUDICIAL AND LEGISLATIVE STRATEGIES FOR RECOVERY IN DOMESTIC LEGISLATION

2.1 Standing to sue

The judicial recognition or denial of standing to sue constitutes one of the most important determinants of the outcome of litigation over cultural objects, and is likely to be raised as a preliminary issue. *Union of India v Bumper Development Corporation Ltd.*[11] raised some particularly interesting issues. Some of these deserve discussion. Advocates of return may find many encouraging signals in the case.

A collector-agent had bought a *Siva Nataraja*, one of the sought-after Chola bronze temple idols.[12] The transaction included also a Sivalingam, a carefully fashioned stone object that formed the focus of religious worship. A labourer had unearthed the objects in the village Tamil Nadu, India, in 1976. After the illegal excavation and export from India, a complex series of transactions took place, including a sale, under false provenance, to a Canadian oil company

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[11] (Unreported, QBD) 17 February 1988.

[12] Siva Natarajas are representations of the Hindu God Siva and are found in various forms. The estimated value of the Siva in this instance is in excess of £1.5 million.

(Bumper Development) in 1982. While the Nataraja was in the hands of the British Museum for appraisal and conservation, the Metropolitan Police seized it with the intention of restoring it to its true owner. Bumper Development brought an action against the Commissioner of Police, claiming return and damages.

When the claims to the Nataraja were brought before the English Court of Appeal (*Bumper Development Corp Ltd. v Commissioner of Police of the Metropolis*[13]), the court held that the sculpture belonged to the god Shiva himself as 'localised' in a stone emblem at the site of a ruined temple in India, and had to be returned. The court had to consider the following –

- the legal capacity in India of a temple and/or Sivalingam to hold title to property and pursue an action in the UK directly or through a 'fit' person;[14]
- the sufficiency of a fit person's continuity of association with the temple to qualify as *de facto* trustee in terms of Hindu law;
- whether a foreign legal person, which would not be recognised as such under English law and which has an essentially inanimate content, can sue in the English courts;[15] and
- the comity of nations.[16]

In its consideration of the *locus standi* of a Hindu religious institution to sue for the recovery of property in an English court, the English Court of Appeal came close to deciding that the Sivalingam in issue was a juristic entity for the purpose of English law. The court ruled that the ruined 12th century Indian temple, whence the object came, and which was recognised as a legal entity in Indian law, was capable of being recognised as a legal entity in English law. Consequently, the third claimant (who claimed as a 'fit' person of the temple on his own behalf and on behalf of the temple itself) had standing to sue. The Foundation which owned th etemple received the right of possession for ten years, and the dealer had to reimburse the Foundation.

The finding was that the pious intention of the benefactor as enshrined in the Sivalingam was represented in the third claimant, who had a good title to the Nataraja, and that the state of Tamil

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[13] [1991] 4 All ER 638.

[14] At 643.

[15] *Bumper Development Corp Ltd. v Comr of Police* [1991] 4 All ER 638, 647.

[16] At 648.

Nadu would have title to the Nataraja under the provisions of Indian Law, including the Indian Treasure Trove Act of 1878.[17]

The Court of Appeal treated the foreign law as a question of fact to be decided by the Judge, according to the general rule that foreign law is assumed to be the same as English law unless the party asserting it to be different from English law proves otherwise. Foreign law must be proved by an expert, and the Judge may consider the texts relied on by the expert witnesses better to appraise the evidence.

English law, as the law of the *forum*, allows foreigners to be party to legal proceedings in the UK. Under the British Law Ascertainment Act 1859, it is possible for a judge to refer a dispute over the effect of a law of a Commonwealth country to the courts of that country. However, the situation presented to the court was different. Could a foreign legal person that would not be recognised as a legal person by English law, sue before English courts? In this instance, the court recognised that the English law took a very limited view on legal personality compared with other systems (insisting on personified groups or series of individuals). It was stated that –

> ...[t]he touchstone for determining whether access should be given or refused is the comity of nations ...[18]

and standing to sue for the recovery of the Nataraja was conceded. Having made the finding that the Temple was a juristic entity for the purpose of English law, it was unnecessary to decide whether the Sivalingam was a juristic entity for the purpose of English law.

The idol was returned to India in due course, after having been entrusted to the Indian High Commission in London.

Public policy played a significant part in the decision. If the judgment means that any institution that is a legal entity in its own country will be held to have standing to sue in the UK to recover

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[17] Ghandi & James 'The God That Won' 1992 *ICJP* 369 ff. The authors had access to the transcript and not only to the All English Reports.

[18] At 647.

lost property, international protection will receive a welcome boost.[19]

2.2 Import restrictions

Import restrictions may be implemented in the wake of a bilateral treaty or executive agreement. Such an agreement materialises when both parties stand to gain directly or indirectly from it. As chapter 3 explains, import restrictions may also be effected in terms of the 1970 Unesco Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (hereafter referred to as the 1970 Unesco Convention).

America concluded bilateral treaties with Mexico 1969, and executive agreements with Peru (1981), Ecuador (1983) and Guatemala (1984). The US has imposed import restrictions on archaeological objects from an endangered zone in El Salvador (1987), on ethnographic textiles from a town in Bolivia (1989), on archaeological materials of an ancient culture from a site in Peru (1990), on archaeological materials from a state in Guatemala (1991) and on archaeological objects from a region in Mali (1993). A treaty was also concluded between the US and Mexico, in respect of goods on US territory.[20]

An Import Prohibition Scheme is one of the possibilities raised by the 1984 Consultative Document on the Commonwealth Scheme for the Protection of the Material Cultural Heritage.[21] The country of location prohibits the import of items covered by the Scheme that were exported without a permit as required by the country of export. The country of location does not enforce the prohibition so as to enforce the laws of the latter, but in order to enforce its own laws. The laws of the country of export merely provide the operative event for bringing the forum's law into play (see below in relation to *datum*).

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[19] Follow-up litigation was instituted before Canadian courts in 1995; see 1995 7 80 (Alb. C. A.) Western Weekly Reports.

[20] Treaty of Cooperation between the USA and the United Mexican States Providing for the Recovery of Stolen Archaeological, Historical, and Cultural Properties, 17 July 1970, 22 *UST* 494.

[21] See the criticism of Prott & O'Keefe *Law and the Cultural Heritage Vol. 3: Movement* (1989) 588, 606, 625; See also the update by O'Keefe 'Protection of the Material Cultural Heritage: The Commonwealth Scheme' 1995 (44) *ICLQ* 147, 153.

One of the best examples of import restriction legislation is Canada's Cultural Property Export and Import Act, 1975 (CPEIA),[22] which entered into force in 1977. CPEIA controls the movement of cultural goods at the point of entry, *i.e.* the import into Canada of any 'foreign cultural property' that was illegally exported from a 'reciprocating state' (a state that is party to the Unesco Convention), after the coming into force of a 'cultural property agreement' between the two countries. Once the property is designated as having been illegally imported into Canada, the government of the reciprocating state is permitted to request the recovery and return of the property from the Minister of Canadian Heritage. If the property is located in Canada, the Attorney-General of Canada may bring action for recovery of such property on behalf of the reciprocating state. The court ordering return of an object may also order payment of compensation to a *bona fide* purchaser who has valid title but was unaware of the illegality of its exportation.

US enabling legislation adopted to give effect to the 1970 Unesco Convention requires a deliberate response to a country that requests the imposition of US import controls against their illegally exported endangered cultural property. The country must demonstrate the seriousness of threat to its cultural objects before the US will be willing to impose controls.

2.3 Domestic ownership rules

Many of the 'new' states of the postwar world have introduced comprehensive statutes asserting state ownership in the vestiges of the past. Examples of such 'vesting statutes' are to be found among Latin, Central American and African states. Governments of 40 odd other countries – with Greece amongst them– have established similar claims in respect of archaeological objects.

Legislative changes in the UK (in the form of the Treasure Trove Act, 1996, referred to in chapter 1) are aimed at encouraging the effective reporting and monitoring of finds, the duty being enforced by the threat of the abatement or denial of a reward. Local agreements between coroners, local government archaeological officers, local and national museums indicate whether or not the items will be acquired by a museum and whether or not a coroner's inquest will be

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[22] RSC 1985 c.C-51.

held. In this way, local agreements give substance to the principle that treasure vests in the Crown. The national museum will be entitled to first right of acquisition.[23] The museum will probably wish to purchase only finds of national importance. In respect of non-treasure, ownership and right to possession must be settled by the ordinary civil process.[24] Article 5 of the Turkish Antiquities Law, 1983,[25] is an example in point. It states –

> All movable and immovable cultural and natural property that needs to be conserved and is found or is to be found on property belonging to the state, public institutions or private institutions and individuals is considered state property.

In Russia, the nationalists have also backed a bill that would make all wartime trophies the property of the state. A more recent document promises the return of art treasures that disappeared during the war. A number of the art treasures removed by Russian troops from Germany at the end of WWII were subsequently found in the storerooms of Russian museums. Germany has been trying to recover various items in the course of the last decade. In June 1995, the Duma failed by some 30 votes to approve a draft statute, which would have made restitution to Germany conditional on very strict requirements. A revised draft (1996) was declined by the Upper House of the Russian Parliament. Yet another revision (1997) was approved by both Houses, vetoed by President Yeltsin but passed by both Houses when they voted to override the Presidential veto.

Article 7 of the statute declares all cultural goods removed from the territory of enemy states at the end of WWII and presently located within Russian territory to be the property of the Russian Federation by virtue of its right to restitution in kind for war losses. Articles 8 and 11 provide for exceptions to the property rights of the Russian Federation only in the case of cultural items which –

- ascertainably belonged to religious or charitable organisations not connected with militarism or Nazism;

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[23] Subject to the rights of the Museum of London and Bristol Museums and Art Gallery in respect of finds in the relevant franchise.

[24] Marston & Ross 'The Treasure Trove Act 1996: Code of Practice and Home Office Circular on Treasure Inquests' 1998 (62) *The Conveyancer & Property Lawyer* 252 ff.

[25] Law Protecting Cultural and Natural Property, Kanun No. 2863 published in Regulations Concerning Cultural and Natural Property, The Republic of Turkey, Ministry of Culture (Ankara 1990) 1-21. See Blake 1994 *IJCP* 273, 276 ff.

- ascertainably belonged to individuals who had been dispossessed on grounds of religion or race or opposition to the Nazi regime; and
- were brought into the Soviet Union illegally, *i.e.* without order or authorisation by the relevant Soviet Military Heads of the occupied territory.

So-called 'vesting laws' contain rules that define the property of the state or nation of origin. Litigation that requires proof of foreign law before foreign courts may depend heavily on the relevant provisions. The declaration of all natural and cultural property as state property is part of the Turkish system of legislative control (article 5). It constitutes an 'umbrella statute' necessary for a state claim to the ownership of cultural property found above or below the ground or underwater within Turkish territory. Characteristically, these laws prohibit export or sale for export, or they restrict both activities to guard a nation's jurisdiction and its power to regulate use or disposition.

Nations such as Guatemala, Mexico and Peru have national legislation declaring broad categories of objects to belong to the nation – whether discovered or undiscovered, whether found on public or private land, whether possessed by public institutions or private individuals.

When these laws are applied to portable or monumental antiquities from an earlier civilisation within a country's frontiers, it may be asked which state of origin has a rightful claim to the objects. Cultural nationalists would suggest that the 'state of origin' has the strongest claim. Yet, the term can be very confusing. The term could refer to –

- the nationality of the artist or the manufacturer;[26]
- the place where it was created or where it was excavated;
- the place from whence it was exported;
- cultural context;
- the place where it forms part of the unique cultural identity of a people; and

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[26] Jayme traces the predominance of the nationality of the artwork in claims for restitution of cultural property, and the historic origin of national policies, to the role played by Canova (1757-1822) in the return of Roman artworks from Paris to Rome. See Jayme *Kunstwerk und Nation: Zuordnungsprobleme im internationalen Kulturgüterschutz* (1991); *id.* 'Die nationalität des Kunstwerks als Rechtsfrage in internationaler Kulturgüterschutz', Wiener Symposion 18./19. October 1990 7 ff. Jayme opts for allocation of artworks on a national basis, as the only and most peaceful way in which the particular could be protected in a world of uniformity.

- the place where it was excavated if the cultural descendants of those who made the objects still inhabit the territory where antiquities have been found.

The return of objects originating from excavations in a place where no cultural descendants of those who made the objects are left, is never a matter easily negotiated. The heritage may possess characteristics that apply to an entire region of antiquity. The heritage may even lack all relation to the state that has a territorial claim. Which nation is the entitled nation? Under the 1970 Unesco Convention, the legal bases for restitution or return by market nations to source nations, refer to the nationality of the artist, and to foreign artist's works created on the territory (Article 4). It reverts to a territorial theory of enforcement, and promotes the return of cultural objects to the people and territory of origin. The nation of origin is the only nation who may rightly retain or claim repatriation of cultural objects, and who has authority to control and regulate location, to determine title and disposal of cultural materials. The 1970 Unesco Convention employs the term 'nation of origin' as –

- the nation of cultural origin (a nation whose people are the artists who made the objects or the cultural descendants of those who made the objects); and
- the nation who inhabits the territory of a state where the object or the original site was reported or believed to be located at the time when the discovery was made in modern times.

The last-mentioned basis is also the basis of Turkey's claim to the putative horde of King Priam of Troy, found by Schliemann among Trojan ruins. It vanished from the Berlin Museum in 1945, and recently turned up in the Pushkin Museum in Moskow. A state that first documented the existence of an object in modern times does not necessarily establish a stronger relation with the objects recovered, than the people who made either the discovery or the purchase. The recording state may have lost its connection with the modern history of the object in question.

Claims made by countries of origin, in favour of restitution or in favour of retention, often rely on any one of the following three considerations –

- the cultural heritage (patrimony) argument;
- the argument that the country of origin owns the cultural materials inside its territory or crafted by its nationals; or

- the concern over decontextualisation, which destroys scholarly or educational value and aesthetic integrity.[27]

Restitution of cultural materials to their 'countries of origin', the restriction of imports and exports of cultural materials and the rights retained by relevant parties (rights of ownership, access, inheritance) tend to focus on *ownership* of the past[28] without treating ownership as relative. If claims to restitution or compensatory justice by countries of origin are treated only in a framework of property, ownership and rights, few questions are asked. Within this framework, an owner, or the most appropriate owner is sought. Consequently, the legal solution depends on who may legally retrieve and own historic artefacts.[29] In the meantime the object may cease to exist for lack of care and preserving treatment. Preservation and integrity are, therefore, at least equally important factors. They underscore that the object is the central concern.

2.4 Domestic export law

Other developing nations have enacted domestic export embargoes.[30] These usually contain a prohibition on the export of privately owned cultural property classified in some way as 'national treasure' or national cultural patrimony. There are many variables connected with such laws. They differ in the type and amount of objects placed under restriction, and a variety of systems are used to enforce them. While some countries have comprehensive legislation, others have more rudimentary provisions. Legislation may take the form of total prohibition, or it may entail a total prohibition on listed objects only with permit requirements for other objects, or a scheme based on export permits for broad classes of goods.[31] Many countries, among which members of the Commonwealth, have enacted export prohibitions on cultural materials. Canada, Cyprus, India, Malaysia, New Zealand, Nigeria, Papua New Guinea, Swaziland and Zimbabwe as well as the RSA count among these. This type of regulatory export law may include forfeiture and confiscation clauses, which physically restrict the object to a particular territory. Those segments

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[27] Warren in Messenger (1989) 8-11.

[28] *Ibid.* 2.

[29] Dicke in Council of Europe (1984) 25-6.

[30] Murphy 1994 *IJCP* 231ff for an overview of PRC embargo legislation.

[31] An example of the latter is the PRC's 1982 Cultural Relics Law.

of commerce based on fraudulent documentation are obviously illegal. Consequently, many have argued that export restrictions only stimulate illicit trade. Nonetheless, there have been initiatives to encourage a licit market.

Forfeiture and confiscation clauses have implications beyond limiting physical removal from the boundaries of a state. The civil or penal nature of forfeiture proceedings in the US is a technical issue, complicated by the differing scope and content of statutes authorising civil forfeiture.[32] Most civil forfeiture laws incorporate the procedures of customs laws that allow the government to seize property on a showing of probable cause.[33] Automatic transfer of title to the state upon illegal export (forfeiture) has been implemented in Mexico, New Zealand and Australia. When contravened, the enforcement of the export prohibition may secure return where international co-operation and negotiations fail.

In countries such as Sweden and the United Kingdom, cultural objects are legally protected and controlled only if a request is made to export an item. UK law requires export permits for certain cultural objects and works of art.[34] The government is allowed to acquire the object for its stated value or the price that another party has agreed to pay. UK authorities are less prone to attitudes of national property or cultural nationalism. Nevertheless, and despite rather minimal regulation, art export laws are praised for their general effectiveness, balance and moderation.[35]

The Canadian Cultural Property Export and Import Act 1975 implements the Unesco Convention and establishes a system of controls on the export from Canada of significant cultural property. Canadian and UK export controls are selective: export permission is withheld for a small number of objects of outstanding importance only, in order to allow the government and domestic

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[32] Pretorius & Strydom 'The Constitutionality of Civil Forfeiture' 1998 (13) *SAPR/PL* 385, 392 ff.

[33] *Ibid.* 403.

[34] Import, Export and Customs Powers (Defence) Act 1939 with ministerial announcement on the open general export licence, 7 July 1989; the Export of Goods (Control) Order No. 2070 (1987); Notice to Exporters (Relating to Export of Works of Art and Antiquities) (1972).

[35] Palmer 1994 *Current Legal Problems* 252.

institutions an opportunity to buy such objects at their full price.[36] Canadian export control legislation and UK laws reflect a keen regard for trade.

The US is often categorised as a country without any export controls for cultural objects. However, there are federal statutory prohibitions on the export of objects illegally removed from federal and Indian lands.[37] Recently, a legal framework was constructed for repatriating indigenous cultural heritage objects within the US. The success of the initiative supports the conclusion that national legislation is an effective means for avoiding and resolving issues related to the possession and repossession of items of cultural heritage within a single country.[38] However, there is no systematic scheme of export controls similar to the UK or Canadian laws (discussed in Part I) or South African laws (discussed in Part II).

To the extent that export prohibitions exceed those allowed under Article XX(f) of the GATT (which seek to prohibit the export of a wide range of indigenous cultural material), they render the country liable for GATT-sanctioned retaliatory measures from importing market countries.

2.5 Conflicts techniques

The purpose of the subject conflict of laws is aimed at achieving uniformity of result. Rigid application of some of the rules of this branch of the law by the judiciary may, from time to time, defeat the aim of preserving the cultural heritage of countries. Two judgments bode well for foreign governments seeking recovery of stolen property in circumstances where they are not assisted by international and bilateral agreements: the *Elicofon* and *Goldberg* cases (discussed in chapter 5). The resolution of the conflict was positive in both instances. However, intellectual rigour was sacrificed.

Certain well-known techniques of the conflict of laws have the potential to enhance the global

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[36] In general Palmer 1994 *Current Legal Problems* 215 ff.

[37] 16 USC § 470 ee(c) 1988.

[38] Nafziger 1995 *UBCLR* 37, 38.

protection of cultural heritage.[39] The ordinarily applicable rule of choice of law may be by-passed and effect may be given to provisions of foreign law on export or excavation of cultural objects. Where a satisfactory level of consensus exists, mutual recognition of judgments and legislation is a further possibility.[40]

International regimes tend to oblige importing states more and more to regulate imports according to a universally recognised scheme of values. Yet, even the most sophisticated system of export controls will not prevent removal of all stolen or illicitly exported objects. The readiness of importing states to recognise and enforce foreign export controls is therefore critical.

A conflict of laws scheme represents another strategy that will assist recovery by a country. It has gained in significance especially in common law countries. Pleas for the enforcement of export laws by importing countries would be in line with the recognition that present international law extends to the right of every state to its historical and cultural wealth. States do not generally dispute that the development of national cultures enriches the culture of mankind.

3. TRANS-NATIONAL CONSEQUENCES

The uncertainty over which nation is ultimately entitled to cultural objects has prompted national governments[41] to pass legislation aimed at ensuring retention and recovery.

3.1 Legislation claiming title

So-called 'vesting laws' contain rules that define ownership of cultural property – the property of

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[39] Reichelt considered the application of a foreign rule to be justified 'in order to reach a certain measure of harmonization between the different laws'. Verheul regards the extraterritorial application of national export prohibitions related to objects in the public domain as justified. 'Foreign Export Prohibitions: Cultural Treasures and Minerals' 1984 (31) *NILR* 420.

[40] Movement of important cultural heritage items frequently involves exporting, transit and importing states, sometimes several of them. The majority of claims for recovery of ownership have been brought by states. The question of recognition and application of foreign law has been raised in an important subset of disputes where states and government agencies have invoked foreign law. In general see *Attorney-General of New Zealand v Ortiz* 1982 1 QB 349; 1982 3 All ER 432 CA; 1983 2 All ER 93 HL; *US v McClain* 545 F 2d 988 (1977); 593 F 658 (5th Circuit 1979); *Government of Peru v Johnson* 720 F Supp 810 (CD Cal 1989) affirmed by *Government of Peru v Wendt* 933 F 2d 1013 (9th Circuit 1991); *De Raad v OvJ* NJ 1983 445 reversed on appeal to the Hoge Raad.

[41] Including central and federal governments.

the state or nation of origin. A declaration of ownership of monuments, relics, contents of tombs and other items as state property –

- neutralises the concern over lack of standing;
- confers standing to sue for the return of objects removed subsequently;
- confers a right to intervene in the proceedings as guardian of a national cultural patrimony; and
- means that theft will trigger the usual private law remedies.[42]

It may be necessary to decide whether export restrictions and declarations of title promulgated by foreign nations should be respected or not. Once a nation declares ownership of an artefact, it may allege theft in the event of illegal export. A vesting law gives a measure of control over the dispersion of creative works and artefacts emerging from a culture or a nation.

Although the US is accused of insufficient efforts to formulate government policy on broad claims of national ownership and has no vesting law of its own, the principle guiding the provisions of the Archaeological Resources Protection Act of 1979 (ARPA) is consistent with claims of government ownership. ARPA gives the federal government authority over artefacts found on public and Native American Lands.[43] It prohibits the sale, purchase, exchange and transport in interstate or foreign commerce of any archaeological materials taken in violation of any state or local law but does not mention privately owned land. The US Court of Appeals in *US v Gerber*[44] gives an expansive interpretation to the Act, in upholding a conviction for theft of archaeological materials from a Native American Indian site located on private land.

3.2 Forfeiture provisions and automatic transfer of title upon illegal export

Forfeiture, confiscation and seizure are primarily penalties for illegal export, although it may be argued that these penalties embody a spirit of national ownership, meant to secure the enjoyment of historic articles for the people of a country in the territory of that country. Where the foreign state asserts title, which only vests in it as a result of illicit export, it may be asked when

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[42] Murphy 1994 *IJCP* 232.

[43] 16 USCA § 470aa-470mm (West Supp 1989).

[44] 7th Circuit.

forfeiture, confiscation or seizure took place, and whether courts elsewhere will regard the foreign law as attributing ownership to the state.

If state ownership is embodied, exclusively, in a penalty upon attempted export, a question mark rests on the issue of how conservation or preservation is supposed to be accomplished.

The US Supreme Court has approached the nature of civil forfeiture proceedings in an inconsistent manner. Findings vacillated between the conclusion that civil forfeiture proceedings are non-punitive in nature and that they are, in fact, punitive.[45] US statutes authorising civil forfeiture vary in scope and content to a considerable degree.

3.3 Conflicts scheme

In many ways, classical conflict of laws method remains ill-suited to the protection of cultural objects. Connecting factors, in particular the *lex situs* rule, are often static.[46] As a result, there is a continuing need for the rules of the conflict of laws to take account of realities. The last decade of this century bears witness to the polycategoric role that the conflict of laws has assumed in the battle against art smugglers. The co-existence of the conflictual and policy-oriented methodologies (functional and result-selecting methods) has boosted the multiplicity and diversity of solutions available to private law problems of a trans-national nature. Attention has focused less on a choice of law rule for return than on pliant techniques of the conflict of laws –

- that can override ordinary choice of law rules when the enhancement of the global protection of cultural objects so requires; and
- that may be applied also where a government is the plaintiff.[47]

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[45] *Various Items of Personal Property v US* 282 US 577 (1931); *US v One Assortment of 89 Firearms* 465 US 354 (1984); *US v Ursery* (1996) 116 S Ct 2135. See Pretorius & Strydom 'The Constitutionality of Civil Forfeiture' 1998 (13) *SAPR/PL* 285, 293 ff.

[46] The *lex situs* rule is not always able to harmonise national and private interests and public and private law. See Roodt 1995 *CILSA* 314.

[47] Reichelt argued that national laws prohibiting export should be allowed to limit the resale of (registered) works and objects geographically. She considered the application of a foreign rule to be justified 'in order to reach a certain measure of harmonization between the different laws'. See Reichelt 'International Protection of Cultural Property' 1985 *Uniform Law Review* 105 ff, reprinted as Unidroit Study LXX Doc 1 1986, 45 (hereafter 1986 Study).

A growing number of parties have sought a determination of their rights in the courts by bringing claims for restitution in respect of a variety of different categories or classes of objects. Cases instituted by governments now form an important subset of cultural heritage jurisprudence.[48] Whereas foreign penal and administrative rules have a minor effect on trans-national traffic in culture objects, recognition of a claim to title or enforcement of foreign public law rules – depending on what the particular action requires – could erode the resource bases of international trafficking networks. Recognition and enforcement of legislation on national cultural patrimony has the obvious advantage of dealing with a unique object in the unique way the state of origin had intended for it.[49] It is small wonder then that a modern stream of thought in the conflict of laws would prescribe recognition and enforcement of foreign public law before municipal courts in the absence of treaties on mutual recognition of legislation and reciprocity statutes. If courts should entertain and adjudicate, recognise and enforce claims based on public rules of inalienability, classification, pre-emption, notification of transfer, export control in respect of important and identifiable items, control of archaeological excavations, then applying the legislation of a foreign state in the courts of the *situs* of the object may create effects very similar to reciprocal import restrictions.[50] To the extent that the question of indigenous title to movable cultural objects arises, claims as between market state purchasers and former source state possessors may be complicated. If the market state courts defer to source country laws on title, these laws may now include recognition of indigenous title.[51]

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[48] *Republic of Ecuador v Danusso (supra); Attorney-General of New Zealand v Ortiz (supra); King of Italy and Italian Government v Marquis Cosimo de Medici Tornaquinci and Christies* 1918 34 TLR 623; *United States v Hollinshead* No. 10970 (S.D. Cal. 14 March 1973) affirmed 495 F 2d 1154 (9th Circuit 1974); *United States v McClain* 545 F 2d 988, 551 F 2d 52 (5th Circuit 1977); 593 F 2d 658 (5th Circuit), cert. denied, 444 US 918 (1979). More recently also *De Raad v OvJ (supra)*; *Government of Peru v Johnson, Wendt, Swetnam et al* 720 F Supp. 810 (C.D. Cal. 1989) affirmed, *sub nom Government of Peru v Wendt* 933 F 2d 1013 (9th Circuit 1991), full opinion in No. 90-55521, 1991 US App. Lexis 10385 (9th Circuit 1991); *Kingdom of Spain v Christie, Manson and Woods Ltd.* [1986] 1 W.L.R. 1120; and *Republic of Turkey v The Metropolitan Museum of Art* 762 F Supp. 44 (SDNY 1990). See Church 'Evolving US Case Law on Cultural Property Disputes' 1993 *IJCP* 47; *id.* (1992) 185 ff; Kenety 'Who Owns the Past? The Need for Legal Reform and Reciprocity in the International Art Trade' 1990 (23) *Cornell International Law Journal* 1, 19-22; O'Keefe 'Export and Import Controls on Movement of the Cultural Heritage: Problems at the National Level' 1983 (10) *Syracuse Journal of International Law and Commerce* 352; Reichelt (1986 Study) 18.

[49] See 9(2) Unidroit.

[50] Import restrictions implemented in the wake of a bilateral treaty or executive agreement are a sensible alternative to litigation.

[51] Walker & Ostrove 1995 *UBCLR Special Issue* 13, 24 ff.

As stated above, the practical effect of enforcement of such claims by the court of the place where the object is situated may be very similar to reciprocal import restrictions. The shorthand for this idea is a 'conflicts scheme' – which relies on the willingness of courts in the importing state to enforce export controls of another country to assist recovery by that country. It has gained in significance especially in common law countries. Pleas for the enforcement of 'vesting laws' or foreign law provisions relating to claims of title are part of this issue. These title claims usually define the property of the state or nation of origin.

Application[52] of these types of foreign laws flies in the face of the traditional axiomatic rule of non-application of foreign public law in the conflict of laws.[53] The principle that foreign revenue and penal laws will not be directly or indirectly enforced is a public policy exclusion of the *lex causae.*[54] Considerations of public policy are relevant in developing common law solutions. The issue is one of deciding which country's laws should apply according to well-established rules concerning the applicable law. Few problems exist regarding recognition of foreign laws affecting private rights, such as the law of tort or contract. In the case of foreign legislation of a public character, the added dimension of enforcement of foreign government regulations and laws of a public nature are daunting to courts. Emerging legal recognition of title may be a further complicating factor.[55]

The US Supreme Court has recognised that the statutory labelling of proceedings as either civil

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[52] Although the line between recognition and enforcement is not very clear, English courts differentiate between enforcing a foreign law and recognising a foreign law. A foreign law is recognised whenever a contract which requires its violation, is not upheld (*e.g.* the unenforceability of exchange contracts). English courts have recognised foreign statutes vesting title in a foreign government by means of expropriation of property which at the time of the transfer was located in the expropriating country as long as it is in keeping with its own public policy. Under Canadian law it is not necessary for enforcement of foreign export control that the source state claims title to the object. However, this procedure is unavailable in England. In the *Ortiz* case, enforcement left New Zealand with no option but to argue that it held title to the carvings. The trial judge regarded the claim as amounting to one for enforcement rather than recognition, because the claim of title was through forfeiture.

[53] Kegel *Internationales Privatrecht* (1977) 290; Dolinger 'World Public Policy: Real International Public Policy in the Conflict of Laws' 1982 (17) *Texas International Law Journal* 167, 176, 179. Also Spiro *Conflict of Laws* (1973) 46.

[54] Be it the law governing proprietary aspects of transfers (the *lex rei sitae* rule), or the law governing contractual aspects of transfers.

[55] Walker & Ostrove 'The Aboriginal Right to Cultural Property' 1995 *UBCLR* 13, 24 ff.

or penal can never be decisive of its real and *de facto* nature.[56] Nonetheless, the characterisation problem caused by the possibility of classifying the law prohibiting export as penal or as public and not enforceable lurks in every case to do with smuggling. The outcome of a case depends on whether the whole of the foreign law is applied, including the penalties it prescribes. Where criminal sanction is the primary conditioning force of the legal order under consideration in any particular case, the general gist of the foreign law may remain concealed by the practice of non-application.

Famous rulings have distinguished categories besides 'penal' and 'revenue' laws, and occasionally the principle has been extended to a third category altogether, namely the rules of public law, without any regard for their closeness to the public law 'core'.[57] Assimilating export regulations to 'other public laws' has heightened the awareness of the supposed non-binding nature of foreign rules that regulate the export of cultural objects because of their cultural significance and of foreign vesting laws that extend to archaeological finds on private land in general.[58]

English law is marked by uncertainty as to the criteria for recognition of a law as a public law, and as to whether such laws should be enforced. Generally, the common law perspective of the category 'foreign public law' is that it contains little besides the notion of domestic public policy. This means that if the export controls of the reciprocating foreign state are significantly different from the domestic controls (much more or much less discriminating), they will not be enforced. The fact that the 1975 Canadian Cultural Property Export and Import Act (CPEIA) supersedes

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[56] *Halper v US* 490 US 447.

[57] See Rule 3 in the influential text of Dicey & Morris *The Conflict of Laws Vol. 1* (1987) 100, included in the 7th ed.; also in general Williams *Protection of Movable Cultural Property* (1978) 106; When a foreign state sues to give effect to its own law, English courts consider it to be a request to enforce a foreign law. *Attorney-General of New Zealand v Ortiz* [1982] 3 All ER 432 CA *per* Staughton J 443-4; Denning MR 457; *Re Helbert Wagg & Co Ltd, Re Prudential Assurance Co Ltd* [1956] 1 All ER 129, 138-9 *per* Upjohn J. In the *Ortiz* case (*supra*), the House of Lords did not express any opinion on the general question of enforceability of penal and public laws. The Court of Appeal regarded a forfeiture provision in the plaintiff state's laws to be unenforceable in England, on the basis of the principle of non-application of foreign laws of a certain kind. While Denning MR considered it to be a foreign public law (457), Ackner LJ considered the forfeiture clause to be a foreign penal law (467). It was not explained whether there is an additional category of public laws, apart from revenue and penal laws, which the court would not enforce.

[58] Kenety 1990 (23) *Cornell International Law Journal* 1, 35.

considerations of public policy, renders it commendable. Nevertheless, no foreign representative has standing to institute recovery proceedings. The Attorney-General of Canada may decline a foreign request to institute recovery proceedings if the government thought certain aspects of the request were unreasonable or contrary to Canadian public policy. There has not yet been a reported case involving a recovery proceeding under the Act. It cannot be predicted how Canada would assist in the enforcement of foreign export control laws whose scope vastly exceed that of Canadian laws.[59]

The continental approach, as followed in Italy, is different. The application of foreign public law is not frowned upon. Rather, if not applied, reasons are often sought.[60]

A technique that effectively eliminates the public law exception to the *lex situs* rule, is the enforcement of export restrictions at the border of the art-importing nation. The CPEIA has abolished the distinction between foreign vesting statutes, mandatory laws and export regulations, with favourable consequences.

Article 9 of the 1995 Rome Convention allows contracting states to apply rules more favourable to restitution or the return of stolen or illegally exported cultural objects than the Convention provides for, but without creating an obligation to recognise and enforce foreign decisions that depart from the provisions of the Convention.

3.4 Mandatory rules

The axiom of non-application could be neutralised and balanced by the theory of *lois de police* (directly applicable rules) and by comity. The theory functions as a limitation on party autonomy. *Lois de police* may be defined as domestic laws binding on all persons within the country concerned and not subject to waiver by parties to a contract. These rules are also referred to as domestic *ius cogens*, *lois d'application immédiate*, peremptory or imperative rules. They interrupt the choice of law process and demand immediate application either on their express terms or by

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[59] Paterson 1995 *UBC Law Review* 251.

[60] See *Géri v France* 1918 Clunet 1249.

their nature.

The theory of *lois de police* first attracted attention as a private law tool for effecting return and facilitating recovery in cases where countries of origin sue for recovery, when Reichelt conducted her two Unidroit studies at the request of Unesco.[61] Reichelt suggested introducing a rule, or a special connection rule that would ensure recognition of mandatory rules, which would (a) effect restitution to the country of origin and (b) reflect international co-operation to prevent illicit traffic.[62] The theory was considered once again at the cultural property session of the XIVth International Congress of Comparative Law, held in 1994.[63]

Courts in common and civil law systems share the view that their rulings should not enforce contracts concluded in the course of private trans-national transactions, or entered into with the purpose of undermining foreign public law or of smuggling goods into or out of a foreign state. They will not hesitate to allow the inter-penetration of private and public law and the application of foreign public laws in a suit between two private parties.[64] Pleas for the enforcement of export

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[61] First study 1986; Reichelt *The International Protection of Cultural Property, Second Study* Unidroit Study LXX Doc 4 (1988) 32-7.

[62] Reichelt (1988 Study) 32 ff.

[63] Held on 31 July–2 August 1994 in Greece. Vrellis 'Le Statut des Biens Culturels en Droit International Privé' (general report).

[64] English courts will not enforce a contract that is illegal by the proper law of the contract or by the *lex loci solutionis. Libyan Arab Foreign Bank v Bankers Trust Co* [1987] 2 FTLR 509, 519; see generally *Ralli Brothers v Compania Naviera Sota y Aznar* 1920 2 K.B. (CA) 287 (foreign price control). A further set of English rulings refused to enforce contracts offending against the laws of states which merely had a strong interest in the contract. In *Regazzoni v KC Sethia (1944) Ltd* (2) [1956] 2 All ER 487 (CA) 490 319, the proper law of the contract was English law, but an Indian mandatory rule prohibiting export to South Africa was applied. None of the parties resided or traded in India, yet India was the *lex loci solutionis*, and the contract required the violation of Indian law. The court was reluctant to enforce any contract requiring the procurement of cultural objects from a foreign country prohibiting their export. The Indian law received recognition in the *Regazzoni* case, but co-incided with the general testing law for legality. A decision of the German Federal Court of Civil Claims, *Allgemeine Versicherungsgesellschaft v E.K.* 22.6.72 59 BGHZ 83, confirmed that German courts are not likely to enforce foreign export control, but will not uphold a contract in breach thereof. A contract was signed between a German insurance company and a Nigerian company to cover the transport by sea of three cases of African masks and statues from Nigeria to Hamburg. The shipment violated a Nigerian export prohibition on cultural objects. In an action on the policy, one of the arguments in the shipping insurer's defense was the lack of an insurable interest because the transaction was *contra bonos mores*. The German Federal Supreme Court granted that the precepts of *boni mores* common to both Nigeria and West Germany had been violated, finding that the Unesco Convention represented emerging international public policy on the issue. Although Germany had not ratified that Convention at the date of the decision, the court drew its conclusion in the interest of maintaining proper standards for the international trade in cultural objects. An *in rem* agreement had not been established with certainty. Consequently, the contract was not declared to be contrary to

laws of foreign countries by importing countries are not extraordinary.[65] However, they remain contentious when modelled in the cast of foreign *lois de police*. The application of foreign *lois de police* is not easily reconciled with the non-application rule, and is much debated for that reason.[66]

Different *fora* may apply the rule governing the proprietary aspects of transfer differently, but legal systems that derive their rules of the conflict of laws for exchange of goods from the 1980 Rome Convention on the Law applicable to Contractual Obligations of the European Communities,[67] may be expected to be favourably disposed towards recognition of the mandatory public laws of other states. Where every relevant element links a contract to the legal system of a particular country, a court bound by the Convention may apply that country's relevant rules. Application of a third state's mandatory rules is not compulsory under the Convention. A proper perspective on this Convention reveals many avenues for circumventing its application. Germany, the UK and Portugal exercised their right to abstain from applying it. Interestingly enough, English case law affords examples of refusal to enforce contracts offending against the laws of states with a strong interest in the contract. French courts invariably prefer to apply French law rather than foreign public law. The ultimate effect of the Convention will not be determined for many years to come. Other treaties that incorporate this technique follow the modern practice of reserving the right of states to reject foreign domestic law, which is applicable according to the treaty, if it is manifestly against *forum* public policy. The parties to the European Convention on Offenses relating to Cultural Property have committed themselves to the

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German public policy and the rule against the enforcement of immoral, illicit and impossible contracts was interpreted to refer only to those contracts offending against the mandatory rules of domestic law.

[65] Reichelt, second study (1988); in general also Verheul 'Foreign Export Prohibitions: Cultural Treasures and Minerals' 1984 (31) *NILR* 419-420, 423; O'Keefe & Prott (1989) 655-6; Pecoraro 'Choice of Law in Litigation to Recover National Cultural Property: Efforts at Harmonization in Private International Law' 1990 (31) *Virginia Journal of International Law* 1, 11.

[66] See Guedj 'The Theory of the *lois de police*' 1991 (39) *AJCL* 661, 666; in general McLachlan 'The New Hague Sales Convention and the Limits of the Choice of Law Process' 1986 (102) *Law Quarterly Review* 591; Verheul 'Foreign Export Prohibitions: Cultural Treasures and Minerals' 1984 (31) *NILR* 419, 422.

[67] Concluded 19 June 1980; 19 *ILM* 1492 (1980); entered into force 1 April 1991. Parallels have been drawn with the decision of the Hoge Raad in *Alnati* [1967] Nederlandse Jurisprudentie 3. Essentially Article 7(1) of the Rome Convention allows a court to give effect to the mandatory rules of the law of another country with which the situation has a close connection, if and insofar as, under the law of the latter country, those rules must be applied irrespective of the law applicable to the contract.

reciprocal enforcement of contracting parties' mandatory rules. Those that have mandatory rule clauses in their national law will be equally prepared to follow this course, even if they adhere to a formulaic application of the *lex situs* rule.[68]

Member states of the European Union enjoy reciprocal rights of action in the courts of fellow member states. This in itself represents a vast advance on the non-applicability rule.

3.5 Comity

In a globally interdependent world, basic notions of comity have the power to neutralise the axiom of non-applicability. The notion of an international public order demands deference to the comity between nations, which may go a long way in the battle to limit trans-border trafficking. English,[69] German[70] and Italian courts have demonstrated a willingness to consider the concept. When the English Court of Appeals allowed a Hindu religious institution to sue in an English court for the recovery of an object that was recoverable under English law in *Bumper Development Corporation v Commissioner of Police,*[71] it stated that –

> [t]he touchstone for determining whether access should be given or refused is the comity of nations .... [72]

In *Loucks v Standard Oil Co of New York*[73], Cardozo J stated that –

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[68] *E.g.* article 19 Swiss Private International Law Statute of 18 December 1987 which states that a provision of a law, other than the one designated by this statute and that is meant to be applied mandatorily, may be taken into account if 'legitimate' and 'clearly overriding interests' so require and the case is closely connected to that law. A foreign law strictly regulating all commerce in ancient objects and declaring them to be state property seems to fulfil the requirements.

[69] Staughton J declared as follows in *Attorney-General of New Zealand v Ortiz* [1982] QB 371-2 –

> Comity requires that we should respect the national heritage of other countries, by according both recognition and enforcement to their laws which affect the title to property while it is within their territory. The hope of reciprocity is an additional ground of public policy leading to the same conclusion.

[70] A decision of the German Federal Court of Civil Claims of 22 June 1972, *Allgemeine Versicherungsgesellschaft v E.K.* 22.6.72 59 BGHZ 83 may not have referred to comity by that name, yet it recognised that decency in international trade of cultural objects and high standards of international cultural co-operation may require the observation of a foreign export prohibition.

[71] All ER [1991] 4 648.

[72] At 647.

[73] (1918) 224 NY 99, 111.

> [t]he courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.

Furthermore, there are solid examples of the incorporation of international public policy into Canadian law (*e.g.* judicial recognition of an increased international acceptance and preference for private arbitration of international business disputes[74]).

Italy is most direct in basing its position on comity. In the landmark decision *Republic of Ecuador v Danusso*,[75] an Italian court upheld Ecuador's claim to more than 25 000 pre-Columbian antiquities. These had been sold to an Italian speculator in Ecuador and were clandestinely exported to Italy in violation of the Ecuadorian law. The Italian dealer put them up for sale in Italy, but Ecuador brought suit before they could be resold to a *bona fide* purchaser in Italy. Ecuadorian law did not contain any direct claim to ownership of all cultural objects. The regime authorised prohibition of free trade, imposition of limitations on acquisition by private individuals and prohibition on export.[76] Investigations finally culminated in civil proceedings, at which point Ecuador passed legislation declaring the state to be the owner of all archaeological objects beneath the soil. The Italian court took cognisance of this new law clarifying the state's declaration of ownership. Consequently, it recognised a type of property intermediate between private property and property owned by the nation in the public interest, lying somewhere on the continuum between mere assertion of ownership and actual possession. Ecuadorian law was regarded as fully compatible with the Italian regime, which declares certain cultural objects outside the bounds of ordinary commerce.

The decision to uphold a foreign state's mandatory rule that renders inalienable and indefeasible its protective powers as part of its *dominio eminente*, makes the *Danusso* case a notable one. It is even more notable for its affirmation of the Unesco Convention as a statement of international policy, notwithstanding the fact that the Convention had not entered into force at the time of the

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[74] Paterson 1995 *UBC Law Review* 249.

[75] *Supra* n 4.

[76] Second Civil Section, 632-3.

events in question and was not directly applicable. The Appeal court in Turin upheld the decision, despite the unpopular notion of the retroactive applicability of a vesting statute as a basis for demanding restitution.

As an expression of a new conception of international comity, the international public order is not a matter of absolute obligation, nor of mere courtesy. It is best understood as a pragmatic response to the international context of the trans-national movement of cultural objects.[77] Comity favours acceptance of the laws of foreign states, particularly where they 'do not encroach on any cognizable interest of the forum'.[78] Portugal has expressed exactly this conviction, and a remarkably internationalist spirit, in a provision of domestic law that supports recognition of foreign legislation in the realm of cultural heritage protection. Transactions in Portuguese territory concerning objects of artistic, archaeological, historic and bibliographic value originating in a foreign country are rendered null and void when effected in breach of that country's legislation regulating alienation or exportation.[79]

The relationship between international public policy and the common law is much more uncertain.

Comity is an appealing basis for application of foreign law in that it is familiar and avoids characterising foreign legislation as illegal, thus lessening the need for extraterritorial application of legislation that may raise questions of justifiability.[80] Verheul states that refusal to apply foreign laws that protect values that are universally shared on account of their being public laws –

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[77] In *Hilton v Guyot* (1895) 159 US 113, 163, Mr. Justice Gray described it as:

> the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or of other persons who are under the protection of the laws.

See also Dolinger 1982 (17) *Texas International Law Journal* 167, 186, 191 on enforcement of international contracts.

[78] Pecoraro 1990 (31) *Virginia Journal of International Law* 126 with reference to Maier.

[79] Article 1 Decree-Law No. 27633 of 3.4.1937; Article 31 Law No. 13 of 1985; in general O'Keefe & Prott *Vol. 3* (1989) 607.

[80] Schachter *International Law in Theory and Practice* (1991) 259.

> would be to frustrate a new trend on the ground that it is not in conformity with the archaic concept it has supplanted.

He extends this view to a court whose state is not a party to international conventions on the subject.[81]

3.6 Encouraging signs

Mandatory rules of another country that express a vital interest of the legislating state often are the result of a common concern of states. These concerns may lead to international co-operation to frustrate activities designed to undermine shared public policies. A policy of international law may be invoked in order to promote some international end or in order to recognise the mandatory rules of a third state. The policy may neutralise the law of the *situs*. International co-operation may lead to taking into account – as a *datum* – foreign public law that restrains certain transactions, irrespective of whether the *lex fori* or the foreign law applies.[82] The 1975 Wiesbaden Resolution of the *Institut de Droit International* documents an emerging consensus in favour of the general application, to the extent that *forum* public policy allows this, of foreign public law not only as a *datum*, but also as 'an incidental but determinative element of the *lex causae*'.[83] The 1977 Oslo Resolution reflected a tripartite approach to the treatment of public law claims of foreign states, stating that they should be admissible if based on propositions of public law which, as viewed by the *forum*, are 'consequential or accessory to private law claims'. Moreover, even when, from the perspective of the *forum*, the objective of such a claim is connected to the exercise of governmental power, they can be considered admissible where the *forum* state views this as justified by, for example 'the convergence of the interests of the states concerned'. The public law claims of foreign states, which can be fitted into standard categories such as contract or property, ought not to be excluded as a matter of principle. Past sovereign claims, which are

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[81] Verheul 1984 (31) *NILR* 420.

[82] See Ehrenzweig *Private International Law* (1967) 83-4 on 'foreign rule by nonchoice'; Baade 'Operation of Foreign Public Law' in *International Encyclopedia of Comparative Law Vol. 3* chapter 12, 16; Lipstein *Principles of the Conflict of Laws, National and International* (1981) 66.

[83] *Institute of International Law Yearbook Vol. 56 Session of Wiesbaden 1975*, 20th Commission, Res. 4: The Application of Foreign Public Law, 551-3.

the equivalent of private law entitlements, should not have failed for being based on public law,[84] even where the relics concerned have not been in the possession of the state.

Article 13 of the Swiss Federal Law on Private International Law of 18 December 1987 reiterates that a foreign provision of public law may be applied provided that it is not in conflict with Swiss public policy. Articles 14-16 and 27 of the European Convention on Offenses relating to Cultural Property have very much the same objective.[85]

3.7 Optimism clouded

Despite these encouraging signs, confusion continues to reign in the case law regarding the applicability of foreign public law. The general state of confusion has not been alleviated by the blurred distinction between a rule that defines property (*e.g.* a declaration that vests ownership in the state) and a rule that regulates property. A rule that precludes certain types of cultural property from being traded or owned, may be a mandatory rule. It is not always clear at what point a mandatory rule becomes a property interest and whether protective provisions qualify as mandatory rules with extraterritorial intent, regardless of whether there is a clear statement to that effect.

Refusal by courts to recognise and enforce foreign laws may be justified with reference to international law principles of independence and equality of states. These principles recognise the reality that different states may follow different policies and make no choice between them.[86] One basis for the non-application rule is that judicial assistance with the enforcement of export or excavation legislation represents an incursion into the role of the executive branch of

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[84] *Per* Powell J in the 'Spycatcher' case; *Attorney-General for the United Kingdom v Wellington Newspapers Ltd.* [1988] i NZLR 129 (CA); *Attorney-General (UK) v Heinemann Publishers Australia (Pty) Ltd. [No. 2]* (1988) 62 ALJR 344 (HC of A); 1988 78 ALR 449, 457. The majority of the High Court of Australia regarded the non-enforcement rule to be applicable to 'claims enforcing the interests of a foreign sovereign which arise from the exercise of certain powers peculiar to government'.

[85] In general also Pecoraro 1990 (31) *Virginia Journal of International Law* 25; Ehrenzweig-Jayme *Private International Law Vol. III* (1977) 26-7.

[86] See the supposed rule in Dicey & Morris *Vol. 1* (1987) 100 ff; *Attorney-General of New Zealand v Ortiz* [1982] 3 All ER 432 CA.

government.[87] The traditional consideration that foreign export control is unenforceable can also be linked to the general agreement that a refusal to consider foreign public law outside the *lex causae* is not contrary to international law.[88]

The following section focuses on the persistence of confusion between states and actionable public law on the practical level.[89]

4. CASE LAW STUDY: PUBLIC LAW ACTIONS

The level of global protection of cultural materials is determined, at least in part, by the public policy requirements set by domestic courts to resolve disputes over ownership of cultural materials. Their notions of property and heritage have often given shape to the destiny of cultural objects.

Many systems base their conceptions of property on possession,[90] an element not necessarily present in claims with a public law character. It may be argued that a characteristic of ownership is missing if a government remained passive in respect of possession, preservation, housing, or display of a particular class of objects, or, if it neglected to enforce its domestic law against its own citizens. In the event, a foreign sovereign will not be treated as a private plaintiff, unless the validity of a foreign law has been ascertained. The implication is that the validity of a foreign law, be it one that vests ownership in the state, one that provides for inalienability of title or a law merely regulatory in nature, will have to be ascertained before a foreign sovereign could be treated as a private plaintiff. A number of disputes that occurred on an interstate level, show that the trans-national nature of a dispute may thwart the effectiveness of vesting laws.

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[87] *Moore v Mitchell* 30 F 2d 600 (1929).

[88] Baade *International Encyclopedia of Comparative Law Vol. 3* chapter 12, 52. The Hague District Court has intimated that foreign mandatory rules would be accorded priority if legislative jurisdiction is established under the rules of public international law, and tested the connection between the contract and the country by these rules; *Compagnie Européene des Petroles SA v Sensor Nederland BV* 22 *ILM* 66 (1983).

[89] Pecoraro 1990 (31) *Virginia Journal of International Law* 25; Strydom 'Reflections on the Discourse on the "public" and "private" in international law' 1990/1991 *SAYIL* 126; in general Tay & Kamenka 'Public Law – Private Law' in Benn & Gaus (eds) *Public and Private in Social Life* (1983) 281, 285; Lipstein (1981) 63-91.

[90] O'Keefe 1983 (10) *Syracuse Journal of International Law and Commerce* 352.

4.1 America

American courts are troubled by 'omnibus' ownership laws. Courts do not apply a foreign vesting statute if there is any uncertainty as to whether the foreign state reduced the materials in question to possession. In civil suits for return, American courts adhere to the rule that the customs laws of one country are not effective in the courts of another. As far as they are concerned, export restrictions cannot 'create ownership' of undocumented archaeological objects or fully documented sites, or transform illegally exported property into stolen property.[91] The return of national cultural patrimony of Guatemala was ordered in the case of *Hollinshead.*[92] In this case, the identity of the rare Mayan stela in dispute, taken from ruins in the jungle of Guatemala, could be proven conclusively on account of documentation thereof *in situ.*[93] *Peru v Johnson* was a civil action based on a foreign statute. Peru brought the case against an art dealer. The dealer bought pre-Columbian gold ceramic and fabric objects (allegedly stolen, but evidence was brought that the purchase was made in good faith). These objects were seized by the US customs service. Peru based its claim on its own statutes, which were understood, in Peru, to mean that removal without government permission constituted theft. The decision turned on Peru's failure to demonstrate standing based on injury in fact. In a detailed analysis of Peruvian laws, a 1985 decree declaring as untouchable pre-Hispanic artistic objects belonging to the nation's cultural wealth and forbidding their removal from the country, was considered. The trial court found the language of this decree too vague to be accepted as a declaration of state ownership. Johnson was allowed to keep the objects, and Peru was denied its remedy for three different reasons: for failing to prove that the objects were excavated at a particular site within Peruvian territory and that they were exported from a site in Peru; for failing to prove the date the objects were discovered or exported so as to determine which was the effective law to be applied;

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[91] *Government of Peru v Johnson* 720 F Supp, 814, citing *McClain* 545 F 2d, 1002. *Jeanneret v Vichey* 693 F 2d (2d Circuit 1982) 259.

[92] *United States v Hollinshead* No. 10970 (S.D. Cal. 14 March 1973) affirmed 495 F 2d 1154 (9th Circuit 1974).

[93] Consequently, the dealer and two conspirators were convicted. The common law meaning of 'stolen' under the United States National Stolen Property Act (NSPA) was enlarged to allow for the Guatemalan legislative declaration of ownership (the actions as such were no crime under US law). After the criminal convictions, Guatemala sued to recover the stela and the court ordered its return. The Government of Guatemala allowed the stela to be exhibited at the Los Angeles County Museum for one year where it was restored before being returned.

and for failing to prove that the Peruvian laws gave clear notice of national ownership.[94] The fact that Peru enacted new legislation on 22 June 1985, providing specifically that all archaeological sites belonged to the state, did not sway the court to give effect to the Peruvian conception of property. Even after the criminal conviction of Swetnam, who was involved in the removal, most of the artefacts remained with their current possessors.

In the *Hollinshead* case, the court failed to raise the question of the distinction between stolen and illegally exported objects. The stela probably fail to qualify for protection under the narrow Article 7(b) of the 1970 Unesco Convention and would possibly be classified as stolen under Article 3 of the 1995 Rome Convention. The *Peru* decision is consistent with the 1970 Unesco Convention and the American implementing legislation, the Cultural Property Implementation Act.[95] The gold artefacts the *Peru* decision was concerned with, certainly fail to qualify for the protection offered by Article 7(b).

The slightest indication that an object was allowed to remain part of a private collection, or, that the objects may have been transferred by gift or bequest or by intestate succession, will result in an onerous burden of proof for the foreign government. It would have to prove that the illegally exported antiquity falls within the purview of the foreign law by virtue of state possession, otherwise foreign statutory presumptions as to state ownership will not be applied. An object that cannot be linked to excavations at a particular site may be excluded from the purview of the foreign law, as it may previously have been owned privately. If a registration programme has been provided for, failure on the part of a private owner to register an object will not create state ownership. Failure to follow the proper notification procedures and payment of the purchase price will be deemed insufficient to vest ownership in the state. Also, if the foreign law does not preclude private ownership of all future finds, American judicial standards will not be satisfied.[96] A legislative assertion of an interest in cultural heritage will not be enforced if it remained unimplemented in the domestic sphere. A provision causing ownership to revert to the state if an

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[94] *Peru v Johnson supra.* Prott & O'Keefe '"Cultural Heritage" or "Cultural Property"?' 1992 (1) *IJCP* 307 ff 315, 317.

[95] 19 USC § 2601 ff. The CPIA relieves the country of origin from the burden of proving ownership.

[96] See Church 1992 (30) *Columbia Journal of Transnational Law* 179, 199; *id.* 1993 *IJCP* 53-5.

attempt is made to export an item illegally will not be considered enforceable.

In *Jeanneret v Vichey*[97], the trial court faced the question whether the claim of the exporting nation, that the legal owner of a painting had removed it illegally from its territory, cast a sufficient cloud on the title of a subsequent *bona fide* purchaser to allow rescission of the sale for breach of warranty of title on the plaintiff's part. The Italian government was neither claimant nor defendant, but interceded. While the Italian Civil Code contains a national ownership claim, the laws applicable in this particular case did not vest ownership of such objects as the painting in the state. As explained in chapter 1, Italian law prohibits export of an object of cultural significance if its export will endanger the national heritage. If the object is privately owned and declared to be of national interest, an export permit must be obtained from the Minister of Public Instruction, who has a right of pre-emption.[98] A Swiss art dealer bought a Matisse painting from the defendant in 1973. The defendant did not obtain an export licence, but the dealer was unaware of this fact when she exhibited the painting in her Geneva gallery. When she learnt that the painting had probably been exported from Italy illegally, she wrote to Vichey in New York and asked to rescind the transaction. Almost a decade after the export of the painting, the Italian government instituted criminal proceedings against Vichey. Several art dealers testified to the effect that the marketability of the painting was impaired by Italy's claims and threats of fines and confiscation. Forfeiture provisions, imposition of an ownership interest and stipulations that certain examples of contraband are subject to seizure may make a finding, that the *bona fide* purchaser's title was clouded, almost inescapable. Nevertheless, the Court of Appeals refused to commit to the enforcement of foreign policy, yet allowed 'trade practices' (the unwillingness of reputable auction houses and dealers to handle the painting) to determine proper title. In our example of the Frans Hals painting in the introduction to this chapter, return may be possible if the *bona fide* purchaser institutes action for breach of warranty of title, and the foreign court is open to a *de facto* enforcement of Dutch export laws in the absence of an international agreement. If illicit export or import should throw a cloud on title, the practical concern is where the risk of error should lie.

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[97] 693 F 2d 259.

[98] Article 39, Law No. 1089 of 1 June 1939 on Protection of Things of Artistic or Historical Interest.

In the *Autocephalous* case concerning the Kanakaria Mosaics,[99] Goldberg had no proof of export from the Republic of Cyprus, which is the only government recognised by the US for the island of Cyprus. The court's ruling as to whether the defendant had failed to act as a reasonably prudent buyer in her failure to ask for export documents from the recognised government was referred to in chapter 5.

The decision in *United States v McClain*, taken in respect of Mexican pre-Columbian ceramic articles and jewellery, is worth considering as an example of how US courts have dealt with restrictions on export. The case concerned a criminal action for violation of a domestic statute. The careful exegesis of Mexican laws in both the US District Court for the Western District of Texas and the Appeal Court revealed that, prior to 1972, Mexican law contained a declaration to the effect that all pre-Columbian movable artefacts (objects declared to form part of the Cultural Patrimony of the Nation) exported without authorisation will be considered stolen. The 1934 Mexican law required the registration of privately owned objects and the recording of all transfers of ownership. Upon export or attempted export of these objects, ownership became vested in the state. The same type of objects could thus be owned by the state through legislation and by private persons through registration. Under the Mexican Federal Law on Archaeological, Artistic and Historic Monuments and Zones 1972, 'archaeological monuments, movables and immovables, are the inalienable and imprescriptable property of the Nation'. This declaration of national ownership extended public control over previously privately owned property and forbade absolutely the export of pre-Columbian items.

The 1972 Mexican law is the only one ever to have been recognised by US courts as creating a legitimate entitlement in a foreign sovereign. However, the Appeals Court ultimately reversed the conviction on the substantive counts (for violation of the NSPA), but upheld the conspiracy conviction. It found the content of the foreign law too vague to be a predicate for criminal liability.[100] Particularly incriminating is the fact that administrative co-operation in 1981

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[99] *Autocephalous Greek-Orthodox Church v Goldberg & Feldman Fine Arts Inc* 717 F Supp 1374 (SD Ind 1989) affirmed 917 F 2d 278 (7th Circuit 1990) cert denied 112 S Ct 377 (1992).

[100] 593 F 2d, 670-1 (5th Circuit).

concerning the return of objects to Peru indicated that Mexico's and Peru's national laws met the requirements set out in the *McClain* case.[101]

The Turkish government initiated an action against the Metropolitan Museum of Art in the US in 1987 for the return of a hoard of gold and silver belonging to the Lydian period, which the Turkish government asserts were illegally excavated in the 1960s and smuggled out of Turkey. Both the unauthorised excavation of the objects and their exportation were in contravention of the Turkish legislation in force at the time (Antiquities Law of 1906). This law contained a blanket ownership claim over all antiquities, allowed for a blanket prohibition of the export or removal overseas of any antiquities without special licence and provided for a permit system to control archaeological research and excavations. A new law was introduced in 1973 and the 1983 law currently in force mirrors these provisions. The decision hinged on whether Turkey's attempts to locate its stolen property had been sufficiently diligent to prevent the case being time-barred and the alleged concealment by the Metropolitan of the illicit origin of the objects when it bought the objects. As in the *Kunstsammlungen* and *Autocephalous* cases, those limitation rules were invoked which, in the case of the New York District courts, require that an action to recover chattels be brought within three years of the time at which the action accrues. The Metropolitan's claims that the action was time-barred came up against the readiness of US courts to treat cases concerning stolen antiquities and works of art as special cases. The fact that the Lydian artefacts had been illegally excavated in the 1960s and had never been reduced to possession by the Turkish authorities previous to their illegal exportation could have complicated the proof of good faith. In September 1993, after legal proceedings had dragged on for seven years, the museum agreed to return the hoard to Turkey. Arrangements were made for the exchange of professional expertise and collections under loan agreements. This is an example of a consensual return without admission of any wrong by the party making restitution, and accompanied by a co-operative agreement. Turkey has since mounted a vigorous programme to retrieve other works from foreign possession, such as the Mausoleum of Halicarnassus from the British Museum, items in the collections of the Boston Museum of Fine Arts and Dumbarton Oaks, and a sphinx from Bogazköy from the Pergamon Museum in Berlin, Germany. Institutional and private

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[101] Prott & O'Keefe 1992 (1) *IJCP* 317.

collectors will no doubt make more careful efforts to avoid difficulties over Turkish antiquities of disputed provenance.[102]

The ruling in the *McClain* case cannot serve as a policy statement about imported cultural objects in the light of the qualifications laid down by the CPIA in 1983. The ambivalence of US national policy persists, however, and is accentuated by a number of facts.[103] The American administration responded to foreign requests for return of the *Afo-A-Kom* to the Kom people of Cameroon, and the request for emergency implementation of an import ban on ceremonial textiles used in religious ceremonies of the Aymara culture of Coroma in Bolivia. It also returned the Crown of St. Stephen to Hungary. France's request for return of Poussin's work *La Madonne à L'Escalier* was not granted. Criminal prosecution for art theft is possible under the NSPA, although the Act appears to have had little impact since the *McClain* ruling.

Forfeiture clauses functioning as penalties have seldom been recognised by courts in other countries. In *Attorney-General of New Zealand v Ortiz*,[104] the Attorney-General sought an injunction restraining the sale of a valuable Maori relic by Sotheby's and an order for its delivery. It was unlawful, under the Historic Articles Act 1962, to remove this particular article from New Zealand without a certificate of permission from the Minister of Internal Affairs. Since the export control legislation purported to vest title to the Maori carvings in the New Zealand Crown upon unlawful export, counsel for New Zealand argued that it was suing to enforce a proprietary title in the Maori panel. Title was allegedly rooted in a forfeiture provision contained in the 1962 Act, to the effect that cultural articles exported in breach thereof are to be forfeited to Her Majesty. For the English court, the issue was the extent to which effect had to be given to this foreign law in respect of property situated in the UK. The British Court of Appeal and the House of Lords

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[102] Blake 1994 *IJCP* 273 ff.

[103] *E.g.* the dearth of effective national restraints on trade and on export of cultural objects from its own territory; its foreign relations policy dating from the 1970's which endorses the import restrictions of Central and South American countries; and the commitment of the Customs Service under the Unesco Convention, implemented in 1983, to seize property stolen from public institutions, to return property to the lawful owner if Article 7(b) has been transgressed and to seize and return smuggled goods as defined under foreign export laws. The US Code subjects improperly imported pre-Columbian monumental or architechtural sculpture or murals to seizure, thereby seemingly clouding title to such objects under US law; 19 USC § 2093(a)(1988).

[104] *Attorney-General of New Zealand v Ortiz* [1982] QB 349; reversed [1982] 3 All ER 432 CA; appeal dismissed [1983] 2 All ER 93 HL.

rejected New Zealand's standing and claim and refused to accept that the forfeiture clause immediately and automatically, by operation of law, transfers ownership to the state upon export. Actual seizure at the time of the illegal export (actual possession) was a prerequisite to forfeiture.

In 1973, in response to the decision, the Historic Articles Act 1962 was amended to declare state ownership. This case also created the impetus for the proposed Commonwealth Scheme for the protection of cultural heritage.

4.2 Canada

Canadian practice in cases of illegally exported cultural objects being brought into Canada suggests a strong preference for criminal proceedings against the alleged importer. However, civil rights of the accused under common law and under the Charter of Rights and Freedoms, procedural safeguards and presumptions, as well as the higher standard of proof in criminal cases have made convictions difficult to achieve. In fact, these factors have prevented convictions thus far.

In the Canadian case *R v Heller, Zango & Kassam*[105] American art dealers imported a 2 500 year old terra-cotta sculpture created by the ancient Nok civilisation, from territory that now forms part of Nigeria, in violation of Nigerian export regulations. The defendants were charged under section 43 CPEIA, which provides that it is an offence to import or attempt to import into Canada any foreign cultural property that has been illegally exported from a country party to the Unesco Convention. Both Canada and Nigeria were parties to the Unesco Convention. The court held that the Canadian legislation was intended to give effect to the Unesco Convention, but accepted evidence that the illegal export and the purchase occurred before Canada signed the Convention (28 June 1978). The accused were discharged, as a 'cultural property agreement' between the two countries only came about in 1978. Since the implementation act could not be given retroactive effect, and there was no proof that the object had been exported from Nigeria after 1978, the civil suit by the Attorney-General of Canada on behalf of the Nigerian government for possession was also abandoned. The case illustrates the extent of immunity from prosecution on account of non-

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[105] (1983) 27 Alta. Law Reports (2d) 346 (P.C.J.); (1984) 30 Alta. Law Reports (2d) 130.

retrospectivity and the problems flowing from the fact that actions for return of cultural materials that were beyond the signatory's borders previous to signing are not covered by the Unesco Convention.

If this interpretation is accepted, the CPIEA does not apply to cultural objects illegally exported from a source country prior to 1978, or the date on which the source country subscribed to the Unesco Convention, whichever is later in time.[106]

In 1988 the US Cultural Property Advisory Committee found that an emergency situation existed regarding Bolivian ceremonial textiles. Litigation also indicated that a crisis existed when Yorke was charged in 1990, under the CPEIA, with unlawfully importing Bolivian textiles into Canada. When he moved to quash his committal for trial on the basis that he was denied his constitutional rights to cross-examine various Crown witnesses at the preliminary inquiry, the Appeal Division showed sympathy with the logistical problems facing the prosecutors.[107] During the 1992 trial the accused successfully challenged the admissibility of evidence seized at his residence by relying on his right to be secure against unreasonable search and seizure under the Charter of Rights and Freedoms. The peculiarities of offences against cultural objects could not convince the judiciary that customs and police procedures ought to be evaluated any less strictly. However, the Nova Scotia Supreme Court regarded the evidence to be admissible, even if illegally obtained. The Supreme Court of Canada has upheld this view, but a decision from the new trial court is being awaited. The process of weighing up the constitutional rights of the accused against the policy behind export controls is bound to cause policy arguments to take a backseat.

The option of instituting criminal proceedings is questionable for a number of reasons: the length of the proceedings may put the object at risk of deterioration; the police are generally unfamiliar with such objects; experts are unwilling to testify at the hearing and may not be available at all stages of the proceedings.

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[106] Paterson 1995 *UBC Law Review* 252.

[107] *R v Yorke* [1991] N S J No. 368 (QL) (NSSCAD).

5. EVALUATION

Utilitarian arguments dismiss the notion of (compulsory) recognition and enforcement of foreign legislation, denounce public domain legislation and ascribe the growing black market to national restrictions on the sale and export of cultural materials.[108] Market nations have a high stake in opposing blanket prohibitions of export of cultural objects. Refusal of mutuality in application of foreign rules prohibiting exports and controlling excavations could rely on the argument that mutual recognition amounts to a form of wealth tax, leads to a stifled market and depreciation in the value of cultural objects. As a consequence, two-way trade in art may be considered to have greater cultural advantage.[109]

Some authorities link their opposition to recognition and enforcement of foreign laws to the context and type of object under consideration. For example, recognition and enforcement of these laws in respect of objects fortuitously located in a modern state – items found within the territory of a nation that pertain to a civilisation with no descendants in that territory – are unacceptable to Church. To her, market forces ought to decide the movement of archaeological materials found within the territory of a nation which pertain to a civilisation with no lineal descendants in that territory. She points out that materials do not necessarily have a stronger relation to the territory (state) or the original location than to the people who made the discovery or the purchase. In Turkey's case, she proposes joint government and private sector initiatives to develop sites and train locals in excavation techniques, and the sharing of benefits of the objects recovered.[110] Church's view favours different treatment of undocumented material from an earlier civilisation, found inside the geographic territory inhabited by lineal descendants of that civilisation.[111] These kinds of materials should be governed by national ownership laws, but only if a number of variables such as the following are taken into account by courts having to decide on the effect of vesting laws –

- the extent of a national collection in the country of origin;

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[108] Bator 'An Essay on the International Trade in Art' 1982 *Stanford LR* 275, 267.

[109] Merryman 'Two Ways of Thinking About Cultural Property' 1986 *AYIL* 831, 844; Merryman 'Review' 1991 (85) *AJIL* 737, 739.

[110] Church 1992 (30) *Columbia Journal of Transnational Law* 225-8.

[111] See the European Convention on Offenses Relating to Cultural Property, Explanatory Report (1985) 16.

- the degree to which the culture has been studied; and
- previous dispersion of antiquities to other nations.[112]

Kenety emphasises the non-binding nature of foreign rules that regulate the export of cultural objects and of foreign vesting laws that extend to archaeological finds on non-government-owned land in general.[113] Paterson emphasises that not all national cultural property export laws justify recognition on the same policy basis. If a supportive international public policy consensus exists, it exists only in respect of laws that restrict export of a limited number of objects.[114]

Cultural objects designated by a state as of intrinsic importance to its people's heritage and prohibited from export should be amenable to restitution in fulfillment of this right.[115] In fact, Strati argues that a universal rule obligating states to return illicitly exported cultural property is in an advanced state of positivation. She sees the principles of self-determination and unjust enrichment as contributing to the crystallisation of this new customary rule.[116]

The 'property for grouphood' model proposes the suppression of market forces in respect of those cultural objects that promote the group identity of surviving peoples.[117] Consistent with the 'property for personhood' theory, it delineates circumstances in which the law ought to disallow or render someone's attempt to relinquish a cultural object voluntarily, void.[118] Intergenerational fairness would also argue against validating a sale, the benefit of which is enjoyed only by the

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[112] Church 1992 (30) *Columbia Journal of Transnational Law* 179, 225-6.

[113] Kenety 1990 (23) *Cornell International Law Journal* 1, 35.

[114] Paterson 1995 *UBC Law Review* 249-250.

[115] Strati (1995) 357 with further reference.

[116] *Ibid.* 356.

[117] Moustakas 'Group Rights in Cultural Property: Justifying Strict Inalienability' 1989 (74) *Cornell Law Review* 1179.

[118] Radin states –

> [T]he more an object seems to be personal, the more one might scrutinize the "voluntariness" of the transaction by which it is relinquished. The analysis becomes entwined with arguments in favour of the distribution of wealth, since some theorists would not consider choices motivated by dire economic necessity "voluntary" enough to validate a transaction relinquishing a clearly personal item.

Radin 'Property for Personhood' 1982 (34) *Stanford Law Review* 957, 986 n 100.

present generation, while all generations bear the cost of a culture-barren existence.[119]

The attitudes taken by certain courts prompt us to ask whether courts display an awareness of the legal rules governing cultural heritage and of the problems with these rules. Are they respectful of claims for the return of items considered by cultures and tribes to be vital for their survival? Do they provide redress when property held in public trust has been diverted to inconsistent uses? Are the court decisions consistent with the aim of promoting present and future group development?

The model Moustakas designed, assists in identifying the nation with the most significant relationship to the contested object where traditional conflicts analysis does not lead to a decisive choice of one or other country's laws. His model identifies 'significant' or 'precious' artefacts as including, but not confined to, items created and used by living cultures or tribes in religious and ceremonial activities. Items these cultures consider to be vital for the survival of their culture, traditions and tribal sovereignty, are likely to be used in 'customary public activities'.[120] Ceremonial regalia made by primitive ancestors is a case in point. The intention of the artist or his express designation of a work of art to a specific site or place may be significant. The model recognises this and classifies as inalienable, property held in public trust, and property dedicated to the public as an enduring monument, held by the owner as a fiduciary of the public without any power to divert the property to inconsistent uses.[121] Claims to 'property for grouphood', whether self-created or not, deserve imposed reciprocal import restrictions.

Since the model relates to objects that are aligned with the aim of promoting present and future group development, it diminishes the role of the traditional private/public distinction in ownership disputes.

American case law places a high premium on *forum*, and not foreign, public policy in ownership

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[119] Moustakas 1989 (74) *Cornell Law Review* 1211-14.

[120] *Ibid.* 1218, 1223-4 n 184.

[121] *Ibid.* 1217-8.

disputes, despite the existence of legislation for international treasures. The 1990s did not signal the advent of an unequivocal policy in America. Case law, legislation and regulations attempt to address the international problem while the traditional support for free trade and the free exchange of ideas through art continues. Authorities longing for a more substantial domestic policy regarding American cultural objects, and for more limited consideration of 'non-binding' foreign rules, may conclude that the US is too strongly committed to the enforcement of foreign laws and policies.[122] The Peru court did not consider reciprocity, mutuality and comity enough to allow application of certain *lois de police*. It would appear as if the cultural pluralism in America is still embodied in Jekyll, but that Hyde is waiting in the form of 'cultural imperialism'. The fact that American judicial doctrine has avoided a *Danusso*-type approach[123] has made commentators realise that it would be foolish to pin all hopes on judicial doctrine as the means to put an end to the illicit trade in cultural objects. Several authorities feel that the courts are not the most appropriate *fora* for settling the complex issues and comity questions involved in return cases.[124]

The next section investigates the legislative changes required for return strategies to apply, and the desirability of amending existing legislation to increase chances of return in future.

6. AMENDING DOMESTIC LEGISLATION

American courts, seized of ownership disputes over an antiquity in the possession of an American citizen, are particularly sensitive to foreign laws that speak as vaguely as the Delphic oracle. In making an effort to ensure that constitutional due process and standards of clarity and notice are observed in cases against *bona fide* purchasers, these courts are liable to take note of deficiencies in foreign legislation as measured by American constitutional standards. A clear and exclusive declaration of national ownership is required to restrict the power of private parties to

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[122] *E.g.* Merryman 1986 *AJIL* 850-2; *id.* 1989 *Cal. Law Review* 352; Kenety 1990 *Cornell International Law Journal* 1.

[123] In the *Danusso* case the court acknowledged that it is within its power to safeguard the national heritage of a friendly foreign state and that a foreign *ordre public* will be accepted as a basis for restitution to the country of origin if the governmental interest of the foreign sovereign is shared, if there is an ostensible reciprocity of interest, and if both the *lex fori* and the *lex causae* have extended categories of things or recognise certain cultural objects as *res extra commercio*. A foreign enactment which expresses a policy with which the *forum* has solidarity, and the recognition of which may contribute towards solving a global problem, ought to be applied.

[124] See *e.g.* Church 1993 *IJCP* 47, 54; Kenety 1990 *Cornell International Law Journal* 41.

possess and transfer artefacts. Beyond a legislative declaration, courts insist on an effort to exercise dominion or control, or evidence of the exercise of ownership rights in the objects, in the absence of actual possession of the materials concerned. Identification and proof that certain objects belong to a specific site within its territory are required. This was borne out, once again, by the dismissal of the claims brought by Hungary and Croatia to the 'Sevso treasure'.[125] The sentiment is that law ought not to overreach resources. Objects that are redundant may be classified as inalienable national patrimony and export totally prohibited. Yet, if the resources for proper excavation, preservation, study and display are not provided, such a law becomes ineffective. Terms of the foreign law are submitted to an in-depth inquiry before finds procured by clandestine excavation and not properly documented within the jurisdiction of the sovereign state that discovered the object, are returned. The *Peru* case demonstrated a willingness to concede title only to the sovereign that knew of the existence of particular cultural objects on its territory, made an effort to document them and provided notice through national legislation stating such cultural objects belonged to the state. Foreign declarations of ownership that rely on severe foreign penalties (*e.g.* confiscation) have been regarded as an infringement of the property and the liberty of foreign nationals in their own country.[126] That there is no rule of international law to the effect that an expropriating state does not get title to goods in terms of a law without first taking possession of those goods, has not aided recovery. That an export prohibition may purport to affect title, and that it may even purport to constitute a mandatory rule, has, likewise, made little difference.

The Canadian CPIEA supersedes the considerations of public policy that are so important in the common law. It eliminates the confusion over the issue of ownership or possession by the foreign government by concentrating on illegal export. This tendency is pursued in legislation at European Union level. Enforcement of foreign export control laws in Canada will not require the source state to claim title, nor that its laws must be similar to Canadian export controls in every way. A Canadian court may order return and payment of compensation to a third party, whether residing in Canada or not. However, the Canadian model has not been duplicated widely.

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[125] Blake 1994 *IJCP* 289 with further reference.

[126] Church 1992 (30) *Columbia Journal of Transnational Law* 213; Kenety 1990 *Cornell International Law Journal* 35, 39.

It is not a foregone conclusion that state ownership by pre-existing national law regarding discovered or undiscovered artefacts, or an act of expropriation, would withstand constitutional review.

7. CONCLUSION

As part of government or government-controlled authorities, funding agencies to a large extent define what is deemed relevant for study, while the perceived needs of national development, tourism and potential effects on local communities often determine conservation activity, site protection and site-recording.

This comparative analysis reveals the need for the utmost care to be taken with the drafting of domestic legislation. A good argument against legislative amendment is that no country can be expected to re-align its position and the particular arrangements it has for the protection of cultural heritage solely to try to satisfy the precepts of ownership professed by a foreign system. Such a re-alignment is liable to distort the local cultural tradition of dealing with these objects and may be unacceptable for historical reasons and impossible to reconcile with general policy. A claim made for the sheer benefit of a foreign audience, would be empty formalism.

The discovery of artefacts and the documentation of archaeological items and threatened sites pose tremendous challenges. Significant legal consequences may attach to these challenges. Expensive scientific testing, thorough documentation of sites and pre-disturbance surveys are required not only to facilitate criminal conviction of those engaged in the unlawful recovery of artefacts, but also because they are crucial elements of any effective protection scheme. Discovery must precede documentation. Legislation that claims undiscovered artefacts for the state may be far cheaper, but can be extremely ineffective and therefore costly in the long run.

Most source nations do not practice art collecting, and are unwilling to repeal their vesting laws. They do not wish to sell their national patrimony for the vague benefit of halting the illicit trade.

The impact of import restrictions imposed by the US on source countries has varied. Bans may

have diverted the illicit traffic to other art-importing countries, which find these objects all the more attractive.

Progress towards a licit trade in cultural objects and controlling illicit traffic has been slow. The international initiatives referred to in chapter 3 at least create the hope of achieving some degree of consonance in the decisions of domestic courts in international questions. Accession to the Unidroit Convention, or support for the Commonwealth Scheme, at least provides a procedure for making a request for return. They might mitigate the threats faced by the cultural heritage of communities and nations. Their comparative suitability will be commented on in chapter 11.

> I do not want my house to be walled in on all sides and my windows to be stuffed. I want the culture of all the lands to be blown about my house ... freely ... [b]ut I refuse to be blown off my feet by any.
>
> Mahatma Gandhi

PART II

CHAPTER 7

THE SOUTH AFRICAN CONTEXT

1. INTRODUCTION

In Part II, we are concerned with the South African context. The South African society comprises ethnic groups with a wide variety of languages, traditions and customs. Made up of a number of minorities, it is typically multicultural and multilingual in nature, further subdivided along political and religious lines.[1]

In Part I, culture was identified as touching on the essential identity of individuals and their chosen social affiliations. Several definitions of culture refer to the form of life of an ethnic community, a national community or of society as a whole. The relationship between culture, race and ethnicity in the South African context now requires clarification and will be discussed.

Cultural heritage was described in Part I in terms of what is believed to be crucial for defining a people, community or country: the forms of expression that consciously distinguish and determine it. The conservation of historical objects, the commemoration of significant events and ceremonial activities reveal something of the identity and affiliation of a people, community or

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[1] The relationship between culture and religion is not explored in any depth in this study. Nonetheless, it seems useful to separate culture from religion. Religion has been regarded as a component of culture on occasion. Controversy developed around the literary prize which the ATKV bestowed on Madeleine van Biljon, only to withdraw it after she disclosed that she questions Christian teachings. *Beeld* 4 May 1998, 1-2.

country. Harbouring a deep symbolism and being closely associated with the person and with 'grouphood', cultural objects are recognised as fundamental to well-being.

The struggle for cultural identity continues to compete with uniform notions of liberty and equality. The 1993 Constitution entered into force in May 1994. The year 1994 was a political and constitutional watershed. The period between May 1994 and 4 February 1997 – the date the 1996 Constitution entered into force – may be referred to as the interim phase. This phase evidenced important shifts in the constitutional order.

Chapter 8 deals with these shifts and with the provisions of the 1996 Constitution concerning culture. As a necessary background to chapters that follow, this chapter highlights aspects of old order statutory law, intellectual property rights and the rules pertaining to property, ownership and treasure (including the rules of prescription).

2. CULTURE : SEARCHING FOR CONTEXT AND DEFINITION

Culture originally connoted a neutral moulding of human society and the institutions for which humans are responsible.[2] However, contemporary use of the term in anthropological study leaves room, for example, for investigating how big business and other large economic stakeholders benefit from policies based on a theory that associates culture with some definition of 'taste'.[3]

The lifestyle of the entire society (or nation) has been regarded as the proper context for true democratic culture based on a constitution protecting the rights of individuals and of ethnic communities.[4] However, culture used in the sense of 'lifestyle' and 'taste' leaves no scope for tradition and custom, and does not indicate how cultural objects would relate to this meaning of culture. Lifestyle may be shaped by and be rooted in precisely the main challenge to tradition:

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[2] Strydom 'The International and Public Law Debate on Cultural Relativism and Cultural Identity: Origin and Implications' 1996 *South African Yearbook of International Law* 1 ff.

[3] Very different from this approach is that of the Contemporary Cultural Studies Unit of the University of Natal, which became part of the HSRC. The Unit defined its role as conducting 'research concerning how to nurture and raise children in ways that enable them to contribute to an industrial society'.

[4] Degenaar 1993 (12) *South African Journal of Philosophy* 51; Stavenhagen 'Cultural Rights and Universal Human Rights' in Eide, Krause & Rosas (eds) *Economic, Social and Cultural Rights* (1995).

modern technology and specialisation.[5] Using the term 'culture' to depict lifestyle implies that it cannot foster the harmonious development of the whole person or nation.

If the form of life of the nation is regarded as the proper context for true democratic culture based on fundamental rights, the term assumes a normative sense at the level of the nation to overcome collective differences that may endanger individual and cultural rights. In reality, cultural identity may co-incide with ethnolinguistic identity and may be built around experience, identification and association. Race and culture no longer have to share a common meaning.

3. THE OLD APARTHEID ORDER

3.1 Constitutional order

Prior to 1994, Parliament was sovereign in a unitary state. In general terms, the Constitution reflected this as the will of the state and provided the means to enforce it.[6]

Ever since a relative separation of powers existed, there were checks and balances in the system.[7] Accountability used to be limited in certain very important senses. Testing the validity of Acts of Parliament was limited, for example, to mere 'manner and form' issues. Power was not distributed among various tiers of government and as such, one of the checks on the concentration and abuse of power was completely absent. There was no bill of rights. The competency of the state to limit the rights of the individual was virtually unchecked. Judicial control of the legislature was absent, and the only control over the exercise of government power was through the highest authority of Parliament, in a highly centralised governmental system.

3.2 Culture, race and ethnicity in the constitutional order

The concept 'culture' first found expression in section 14(1) of the South African Constitution, 1983 (Act No. 110 of 1983). It was used both as a 'marker' for 'own affairs' and to classify art

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[5] Hartman (1997) 31.

[6] In general, see Booysen & Van Wyk *Die '83-Grondwet* (1994); Erasmus 'The New Constitutional Dispensation: What Type of System?' 1994 *Politikon* 5.

[7] In the narrow sense, these checks and balances refer to different branches of government having control over one another to prevent the concentration of government power. In the widest sense, they refer to democratic techniques that ensure the accountability, responsiveness and transparency of government.

and culture that could be linked to primarily one group as 'own affairs' (Schedule 1 item 3). Essentially, the 1983 Constitution was concerned with the constitutional co-operation between different ethnic groups.

The concept 'culture' was used regularly in South Africa's constitutional debates of the past.[8] However, 'culture' was used as a means to bolster arguments for racial separation. Anthropologist Emile Boonzaier noted that the apartheid state actually 'created greater scope for ideological manoeuvre' by replacing the idea of 'race' with that of 'culture'.[9]

To this day, race, culture and ethnicity remain intertwined and the relationship between these is not readily ascertainable. There is a general tendency to conflate 'ethnicity' with 'race'.

3.3 Linguistic nationalism

In South Africa, the language reality is such that there is almost no co-incidence between language and territory. All groups are minorities in relation to language.

A shared language may contribute to the promotion of a shared national identity. South Africa has been a bilingual country since 1925. All official sources had to be printed in both English and Afrikaans and the two languages were compulsory in white schools. Language attitudes showed a predilection for English as the language with greater pan-African relevance.[10] Linguistic policies belonging to the old order had far-reaching consequences and did not assist to develop a common national identity; on the contrary, compulsory teaching of Afrikaans in African schools resulted in the Soweto riots of 1976, instituted against Afrikaans as medium of instruction. The amount of emphasis on Afrikaans threatened African languages, but paradoxically, the apartheid state also insisted on the greater use of indigenous languages in education and a greater recognition of

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[8] *E.g.* South African Law Commission, *Working Document on Group and Human Rights*; (1983); constitutional guidelines and draft constitutions of a number of political groupings. See Van Wyk 'Kultuur, Staat, Reg – Kultuurstaatsreg?' 1991 Stellenbosch Law Review 180 ff; Kruger 'Regstaat, Kultuurstaat, Welvaartstaat: Bestanddele van 'n Nuwe Staatsmodel?' 1994 *Stellenbosch Law Review* 15.

[9] *South African Keywords* (1988); Background by Currie 'Minority Rights: Education, Culture and Language' in Chaskalson *Constitutional Law in South Africa* (1998) 35-1.

[10] Mazrui & Mazrui *The Power of Babel: Language and Governance in the African Experience* (1998) 15.

African cultures. The reasons for the insistence were mainly racist, however. The linguistic nationalism of the Afrikaner was absorbed into apartheid. Ironically, the opportunity and power the apartheid state used to embrace, practice and enforce its linguistic nationalism also meant that it could bring an end to the system by choice. The Afrikaans community could relinquish nationalism only because they had experienced it in all of its manifestations.[11]

Ironies continue to linger around the reaction to cultural oppression even after the Constitution set out to remove previous discriminatory practices. Liberation movements have opposed Afrikaans, have adopted English as the language of liberation, and have failed to promote the indigenous languages. Today, the South African government perpetuates many of these language practices. Fortunately, language is dynamic and sociolinguistic patterns respond to changing politico-economic stimuli.[12]

In the next section, the attention shifts to the legal framework in terms of which cultural heritage was managed, and then to the constitutional framework that represented the commencement of a new order in South Africa.

4. OLD ORDER (PRE- 1994) CONSERVATION LAWS

The most important, and for a long time only, direct statutory measure for conservation of the cultural and historical heritage was the National Monuments Act, 1969 (Act No. 29 of 1969 – NMA).[13] Together with the NMA, various other measures served as a basis for the promotion of effective conservation of the cultural environment including architecture and other forms of material culture and figures of historical significance.[14] Equivalent legislation was promulgated and administered by the KwaZulu Monuments Council, the Ciskei Historical Monuments Board and the Transkei Department of Education. Among these, the KwaZulu Monuments Council was

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[11] *Ibid.* 39.

[12] *Ibid.* 32, 35.

[13] This Act was *inter alia* preceded by the Boesman-overblijfselen Beschermingswet 22 van 1911 and De Natuurlike en Historiese Monumentenwet 6 van 1923.

[14] See Van der Walt's assessment of *inter alia* provincial ordinances, exemptions from levies and rebates, planning, development control and pollution control measures. Van der Walt 'Possibilities for the Conservation of the Built-up Environment in Current South African Statutory Law' 1987 XX *CILSA* 209.

especially effective in mustering state support to bring back significant objects that had left the country.[15]

The NMA was recently repealed when the National Heritage Resources Act, 1999, entered into force.[16] This Act is discussed as part of the new legislative framework in chapter 9.

Under the now outdated NMA, the National Monuments Council of South Africa (NMC) served as the traditional active regulatory body. As a statutory body, the NMC embodied the national or public concern for the conservation of the cultural heritage. The objective of the NMC was –

> to preserve and protect the historical and cultural heritage, to encourage and to promote the preservation and protection of that heritage, and to co-ordinate all activities in connection with monuments and cultural treasures in order that monuments and cultural treasures will be retained as tokens of the past and may serve as an inspiration for the future.[17]

4.1 Protected objects

Apart from the main directory principle of the NMA underlying action, old order legislation did not refer to 'cultural property' or 'cultural heritage'. Various sections of the NMA referred to and defined categories of property worthy of conservation on the grounds of their historic, cultural, aesthetic or scientific interest.[18] Forms and degrees of protection were granted to particular categories of objects such as 'cultural treasure', 'monument', 'conservation area', 'historical site', 'national gardens of remembrance', 'wrecks', 'voortrekker graves' and 'burial grounds'.[19] The list of categories of objects identified by the NMC as unfit for export on account of being of cultural, historical, aesthetic and scientific significance, was based on the extensive list of the 1970 Unesco Convention on the Means of Prohibiting and Preventing the Illicit Import, Export

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[15] In 1994, 215 pieces of 19th century Zulu beadwork were bought back from a British art and antiques dealer by the KwaZulu Monuments Council after the KwaZulu Heritage Foundation had managed to raise funds enabling them to improve their original offer. The adornments were flown back by British Airways and Customs and Excise waived most of the importation duties. Expert classification has shown them to be representative of the art of several tribes and regions. There were exceptionally rare Khoekhoe (Hottentot) pieces among them.

[16] Regulations published in *GG* No. 21051 of 31 March 2000. The NHRA entered into force on 1 April 2000.

[17] Section 2A National Monuments Act (hereinafter referred to as NMA).

[18] Section 5(1)(cC); section 10 NMA.

[19] See the definitions section of the National Monuments Act. An historical site, for example, is defined as 'any identifiable building or part thereof, larker, milestone, gravestone, landmark or tell older than 50 years'.

and Transfer of Ownership of Cultural Property. Although comprehensive, the list could not pre-empt the difficulties caused by the onus which the Act placed on the NMC to prove that any item taken out of the country had been in South Africa for longer than 50 years if it was made of ephemeral material such as paper (*e.g.* old documents, paintings), or more than 100 years if made of any other material.

The NMC operated as supervisor in a permit system that was designed to prevent damage to cultural objects and to render offences relatively easy to prove. The Act enabled the NMC to ensure that scientific standards were adhered to when archaeological and palaeontological materials were collected and researched. The NMC could declare any movable object to be a cultural treasure by notice in the *Government Gazette* (hereinafter *GG*) after consultation with the owner.[20] This type of object could include 'cultural treasures', which related to paintings, prints, documents, deeds, seals, stamps and manuscripts. Collections of *objets d'art*, once declared, had to be retained in their entirety and had to be kept together. Even regarding objects and collections not housed in musea, destruction, damage or exportation was supposed to be prevented by the permit procedure. Movable property known or believed to have been in the Republic for longer than 50 years could also be declared a national monument.[21] Declaration had no direct impact on ownership as such, as the item or collection might still have been bought or sold. It implied keeping record of where the item or collection was housed.

Rock paintings are found in many regions. There are in the vicinity of 15 000 known rock art sites in the Republic. Old order conservation law extended protection to certain classes of artefacts unique to the national history of the country.[22] The NMA permit system provided for the automatic protection of certain Bushman and other relics,[23] all palaeontological material and archaeological sites, all rock art, meteorites and fossils without regard to the relative importance

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[20] Section 5(1)(cD) NMA.

[21] Section 10(3)(c) NMA.

[22] Compare the special legal protection which New Zealand law extends to the art of Maori and other Polynesian inhabitants, and Australian law extends to Aboriginal places, objects and folklore in Victoria. See in this regard Wright 'Aboriginal Cultural Heritage in Australia' 1995 *UBCLR* 45 51 ff.

[23] Implements, ornaments, structures made by these people, anthropological or archaeological contents of graves, caves, rock shelters, middens, shell mounds, or other sites used by them.

of each particular item. Other scientific treasures, archaeological relics and historical sites enjoyed similar automatic protection.[24] No declaration was required. Under the NMA, it was an offense to destroy, damage, excavate, alter or remove from its original site, except under authority of a permit, a drawing or a painting in stone, or petroglyph, known or commonly believed to have been executed by Bushmen, or by any other people believed to have inhabited or visited the Republic before the settlement of the Europeans at the Cape.

'Declaration' as a national monument[25] or a cultural treasure[26] implied that certain objects or collections could not be excavated, altered, disfigured, removed or exported, destroyed or damaged, unless under authority of a permit. This rule governed monuments, ephemeral objects (such as paintings and manuscripts that have been in the country for longer than 50 years) and durable objects (such as porcelain that has been in the country for longer than one hundred years), cultural treasures, burial grounds, wrecks and portions of wrecks in South African territorial waters.[27]

The procedure for exportation of cultural materials that had to be followed, entailed submitting applications to the NMC's Head Office. Antiques experts or members of the Palaeontology, Archaeology, Cultural Treasures and Shipwrecks Committee reviewed these applications. Both permanent and temporary export permits were issued free of charge. The criteria for denying permission to export included –

- the closeness of the connection between the object and the history of South Africa and its national life;
- outstanding aesthetic importance; and
- outstanding significance for the study of some particular branch of art, science, learning or history.

The fact that a work belonging to a South African collection was the creation of a non-South

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[24] Section 12(2); (2A); (2B) NMA.

[25] Section 5 (b), (c); sections 10, 10A; section 12(2)(a) NMA.

[26] Section 5(1)(cD) NMA.

[27] Section 12(2B)(a)-(e) NMA.

African was never a material consideration in the decision whether or not to deny export. In 1988, the NMC was involved in a battle to regain an oar, used as a ceremonial mace and symbol of authority in the colonial courts of Vice-Admiralty in the previous century. The oar, not the work of a South African silversmith, was exported without proper authorisation. It had been used in the Vice-Admiralty Court of the Cape of Good Hope for close on a century, before passing into the possession of South Africa's first Chief Justice (at the time also judge of the Admiralty Court), Lord John Henry de Villiers. His heirs had it sent to Christie's in London, under authority of an export permit. This permit was obtained from the then NMC director only after the oar had reached the UK. Lady De Villiers threatened to institute action, and the oar was withdrawn from auction. The South African Museum of Culture and History acquired it through a private sale, and it was finally declared a cultural treasure.[28]

The claim of the Netherlands government to title and interest in all VOC wrecks lying in South African territorial waters will certainly necessitate negotiation from time to time.[29] A case in point was the diplomatic and private agreement entered into with Britain concerning the apportionment of the cargo of the wreck of the HMS Birkenhead.[30]

Conflicting views exist as to what the core government functions in relation to culture are. Some authors feel that the state ought to regard itself as the primary institution for the conservation or distribution of culture, but government officials have issued statements that disclaim this responsibility. Arguably, the state's responsibilities centre on regulation, planning and monitoring in the cultural sector.[31] Of particular interest is the position that prevailed if private property was declared to be 'conservation-worthy'.

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[28] *GG* No. 12178 of 17 November 1989.

[29] Statement of the Ministry of Foreign Affairs of the Netherlands, 2 July 1979.

[30] The HMS Birkenhead was a British war ship that sank in 1852 in the territorial waters of South Africa. It was believed to have carried 240 000 gold sovereigns. Salvage operations had been under way with the required support of the local authorities, when the British government approached the Department of Foreign Affairs through their embassy, claiming ownership.

[31] See Van Wyk 1991 *Stell LR* 180 ff.

4.2 Public ownership and private property

The system of administrative control of private property was exemplified by the NMC's insistence on notification of transfer of ownership in what was being declared a national monument.[32] Furthermore, if the NMC had obtained control over a 'declared' object or site, private excavation could continue only under joint control.[33] The NMC could acquire real rights in movable or immovable property or gain control over archaeological sites in the ordinary ways in which ownership was established.[34] The NMC was authorised to –

- acquire limited real rights in someone else's cultural property. The notice of declaration of a property as a monument and particulars of the survey of the land were endorsed as a servitude upon the title deed of the land *i.e.* as a restrictive condition in the title deed (section 13); and
- confer (permit) real rights, by sale, donation or exchange, as well as rights relating to the use of cultural property. It could grant the *ius possidendi* (right of use) over any monument under its control to any museum or other public institution in terms of a contract for *commodatum* (lease-lend).[35]

Nothing prevented the NMC from acquiring personal rights, *ex contractu*, conferring capacities in respect of land. Thus, it could hold pre-emptive rights or options, which constituted restrictions in the form of personal rights resting on the land. Finally, it could have a right *in personam*[36] against a person to maintain or repair a monument, or to recover the costs from him or her for repairs effected by the NMC.[37]

4.3 Indirect control of certain objects

Fiscal control of goods moving beyond the territorial boundaries of the Republic is exercised in terms of the Import and Export Control Act, 1963 (Act No. 45 of 1963), and regulations issued in

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[32] Section 12(1) NMA.

[33] Section 10A (4) NMA *re* the declaration of a wreck to be a monument; section 12 (2C) *re* the permit requirements to disturb, remove or export a wreck older than 50 years. Among other conditions, the applicant has to provide written proof of affiliation with a museum approved by the Council. Deacon 'Protection of Historical Shipwrecks through the National Monuments Act' *Conference Proceedings of the Third National Maritime Conference*, Durban 1993; also Lighton 'A Question of Abandonment' 1964 (27) *THRHR* 138.

[34] Section 5(1)(e) NMA.

[35] Section 5(1)(h) NMA.

[36] A personal right is the right to claim from a particular person, either that he or she deliver a thing, or perform a certain act, or refrain from performing a certain act.

[37] Section 12(6)(a) & (b) NMA. The NMC may, for example, order the perpetrator to restore the damage done to a building.

terms of the Act.

Under section 2 of this Act, the Minister of Trade and Industry is authorised, when he or she deems it necessary or expedient in the public interest, to prescribe by notice in the *GG* that no goods of a specified class or kind shall be exported from the Republic, or shall be exported from the Republic in the absence of a permit stating the conditions for export. In terms of the 1961 Exchange Control Regulations,[38] certain restrictions apply on export of capital. Payment for goods exceeding a certain value and sold to a person outside the Republic is to be received in the Republic. A report is required regarding goods that have been exported, but that could not be sold abroad within the usual period of six months from the date of shipment.

This system of state control becomes relevant when cultural objects that are particularly valuable in monetary terms, are exported.

Problems under the old order included the basic powerlessness of the NMC. This aspect is dealt with below.

4.4 Past difficulties with regard to protection

Past instances of export and smuggling of culturally significant works flew in the face of established export policy. The NMC was powerless to prevent the subtler forms of pillage of the cultural heritage. A highly valuable 17th century Japanese statuette and Chinese vase were stolen, for instance, from the Groot Constantia State Estate in 1991 and illegally exported to Japan, where the contact person reneged and another buyer had to be found in haste. The purchaser has never been traced. Due to the cultural boycott against South Africa at the time, Interpol was reluctant to assist with the search.

The lack of sophisticated knowledge and well-trained specialists was to blame for other important losses. Treasured art works have been auctioned for ridiculously low prices and exported under private loan agreements with foreign institutions, the loan standing only for as long as it takes for

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[38] *GG* No. R1111 of 1 December 1961 issued in terms of section 9 of the Currency and Exchanges Act, 1993 (Act No. 9 of 1933).

the market to become 'receptive'. Early in 1994, a Victorian oil painting by Tissot entitled 'Woman with Crysanthemums', which had been missing for more than 100 years, fetched a fortune for the Zimbabwean widow who inherited it. Local dealers had told her that it was 'a rather good Victorian painting, not of very much value'.[39] In another incident with a more positive outcome, the 1834 George Scharf picture depicting the House of Commons after the fire, which disappeared in the 1860s, was repurchased for an undisclosed price from a shop in South Africa at the end of 1993. A bargain price was negotiated with the shop owner.

The beadwork of tribes such as the Tsonga, Swazi and Zulu are purchased by overseas dealers and are leaving the country in a steady stream. Ndebele beaded pieces have proven especially desirable.[40] The NMC supervised compliance with licence requirements, yet had to admit that it lacked the means and the powers to enforce and police the permit system.

As indicated previously, the NMC could declare a movable to be a national monument only if it was known or believed to have been in the Republic for longer than 50 years.[41] Judging from the wording of this condition and the intention of the legislature to prevent illegal exportation of objects worthy of conservation, this period did not have to be uninterrupted. However, this interpretation was not always followed.[42]

A case in point concerned 'The Ten Virgins', a painting by Sir William Blake Richmond (1842-1921). The quest to relocate this prize piece, intended by the artist to be housed in the Tatham Art Gallery in Pietermaritzburg, took the best part of 20 years. In a short-sighted move, this piece was sold at a public auction. A 1981 amendment to the NMA could not prevent its export, although it was an ephemeral object that had been in the country for longer than 50 years. The

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[39] Tissot was a French pre-Raphaelite painter noted for his portraits of late Victorian society. See *Sunday Life* 25 June 1995, 7.

[40] *E.g. Weekly Mail* 22 March 1989, 24, after the disappearance of three Ndebele beaded pieces from an African arts and crafts shop in Bellevue's Rocky Street. Regarding forgery of artworks of artist Stanislav Kors, see *Beeld* 11 May 1992, 1.

[41] Section 10(3)(c) NMA.

[42] Doct 9/3/5/5 NMC indicates that the NMC used to attach a literal, and stricter, interpretation to section 12(2B)(a) NMA, at least until the tragedy surrounding the painting 'The Bridegroom Cometh' occurred.

combined force of the mysterious circumstances under which export of the painting was accomplished, together with the conservative interpretation of the 50 year requirement by the NMC at the time – namely that the object had to be present uninterruptedly for this length of time – ultimately resulted in the loss of the painting.

Laws effecting controls on the export of cultural objects form part of many national protective strategies. While most source countries and even many market states have controls in place,[43] many of these measures are generally regarded as ineffective, principally because of the difficulties involved in enforcing these laws once an object has left the source country. In terms of the NMA, the NMC could direct a person convicted of a contravention of the export prohibition on certain categories of properties, to set right the result of the act of which he or she had been found guilty.[44] Nevertheless, the NMC had always been relatively powerless if, in the event of locating an object, it were to order a person to bring it back to this country or if it were to seek to prevent further removal of the object from its foreign location.

Exchange control regulations proved particularly ineffective against the outflow of cultural objects.

4.5 General criticism of old order laws

While the old order structures could accommodate different values, including scholarly, educational and economic values, implementation and administration of the official identification process were problematic. In fact, the NMA did not contain an express procedure for the identification of cultural objects, or any objects that are manifestations of history as a process. Many felt that the mechanism for identifying those objects was inadequate. Implementation of the law could not be guaranteed. Individuals continued to remove artefacts from sites where industrial and roads development took place.

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[43] South African customs control regulations are contained in Customs and Excise Tariff 6531 of 22 March 1996 section XXI 'Works of Art, Collectors' Pieces and Antiques'.

[44] Section 12(6)(a) NMA; *See* Beukes 'Geskarrel Rondom 'n Meesterstuk vir 'n Appel en 'n Ei: Of, die Storie van die Duur Mistasting' 1992 (33) *Codicillus* 37.

The conservation laws of the old order were criticised for *inter alia* the following –

- cultural value was commensurate with administrative mechanism: conservation appeared to be a state and establishment interest;[45]
- the onus caused great difficulty regarding objects for which permission to export could be refused;[46]
- planning legislation (provincial ordinances and town planning schemes of local authorities) and conservation legislation were never fully integrated into one system of conservation-related control of development. Consequently, physical and historical context did not receive adequate emphasis;[47]
- management of the environment as a crucial economic resource could not be addressed through 'monumentalisation' policies;[48]
- liaison and decision-making procedures were never spelt out. Co-ordination between conservationists and planners did not provide specifically for instances where the consulting bodies fail to reach consensus on the relevant planning measure;[49]
- the Minister could make a declaration upon the recommendation of the NMC only when he or she was convinced that the object or site belonged neither to the state, nor to the NMC. Real estate that belonged to the state could not always be provisionally declared to be a national monument, except when the Minister had consented. This unfortunate proviso delayed the process leading up to declaration;
- the NMC could apply for state subsidies in order to purchase, restore or maintain a national monument, but was allowed to purchase it only if the property was about to be declared, and if the NMC had the necessary funds at its disposal.[50] In practice, the NMC was severely hampered in its work by the limited resources available to fulfil its mandate and by the lack of well-qualified conservation specialists;
- insufficient financial planning existed in the form of tax rebates, bulk transfers or zoning relaxations to motivate private sector developers to incorporate a conservation element in their development schemes;[51]
- the old legislation was apathetic towards international initiatives; and

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[45] Townsend 'Architectural and Urban Conservation in the Dawning Second Republic' 1993 *Architecture SA* 29.

[46] As indicated above, the onus rested on the NMC to prove that any item taken out of the country had been in South Africa for longer than 50 years if it was made of paper, or had been in South Africa for more than 100 years if made of any other material. Ethnographic material, such as pottery and beadwork, is particularly difficult to date accurately.

[47] Townsend 1993 *Architecture SA* 29-30.

[48] Japha & Japha 'Urban Conservation: "Monumentalisation" or Everyday Planning?' 1993 *Architecture SA* 26.

[49] Van der Walt 1987 *Comparative and International Law Journal of Southern Africa* 228.

[50] Section 5(3) NMA.

[51] Hall 'National Monuments' 1992 (22) *Natalia* 55, 63.

- no effort was made to control the import of cultural objects from other countries.

In what follows, a short overview is given of two aspects of South African law. First, the practical effect of intellectual property rights in South Africa is referred to. Aspects of the new intellectual property framework will be highlighted in chapter 9. A brief overview of title and transfer of title follows, since a certain amount of background on South African law is required in order to appreciate the implications of the rules of conflict of laws in suits for recovery as discussed in chapter 10.

5. INTELLECTUAL PROPERTY RIGHTS

The Copyright Act, 1978 (Act No. 98 of 1978), recognises that the creator of an artwork has certain moral rights. In order for copyright to exist, the work must be original in the sense that the work was the result of the creator's own effort, it must be tangible and the creator must be a citizen, a resident or domiciliary of South Africa.

In 1994 a certain Mr. Armando Baldinelli instituted proceedings against the Barend van Erkom Fund (Pty) Ltd. and Barristers Restaurant for having obscured and damaged a mosaic created by him on a wall in the Thibault Arcade in 1971. As an internationally acclaimed artist, the mural was regarded as having national importance, worth around R150 000 at the time. The work contains some 800 000 tiles, all handmade by the artist. In order to create a mock Tudor façade in front of Barristers, 45 tiles were removed and holes were driven into others.

The Copyright Act, 1978, grants the creator of an artwork the right to claim authorship of his or her work and the right to object to a distortion, mutilation or other modification of that work, where such action would be prejudicial to the author's honour or reputation (section 20(1)). The Act treats any encroachment on that right as an infringement of copyright. Since the application for a mandatory interdict was likely to succeed, the action was eventually settled out of court.

From time to time the government indicates that a review of the Copyright Act, 1978, is planned in order to enhance protection of the rights of creators of artistic works. The mechanisms at the disposal of the owner of an intellectual property right to act against persons involved in

counterfeiting activities used to be limited. Owners of cultural objects, dealers and museums had no direct remedies against dealing in counterfeit goods. The way in which this oversight has been addressed by new legislation, and efforts made to protect the intellectual property rights of local and indigenous communities are discussed in chapter 9.

6. OVERVIEW OF RULES PERTAINING TO TITLE, OWNERSHIP AND TREASURE

In South Africa, landowners used to enjoy private rights. In terms of the statutory apartheid legislation, social interests did not play a major role with regard to ownership. While statutory limitations, personal rights of third parties against the owner, limited real rights of third parties with regard to things, and the law of neighbours have always been recognised, the Western concept of property (discussed in chapter 4) maintained its influence.

6.1 Transfer of title

A comparison between South African substantive law of transfer of title and ownership with the title laws of other jurisdictions reveals that the South African legal situation is typical of the Anglo-common law. A person transfers the title he or she possesses; if tainted, not even a good faith purchaser for value can obtain good title.[52] Successive possessors or transferees of stolen movables cannot rely on good faith and will usually be unable to defeat the ownership claims of the rightful owner in an *in rem* action.[53]

It follows that the return of anything stolen from South Africa through the initiative of a South African citizen, could be considered a legal return to its rightful owner.[54]

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[52] *Wainright & Co v Trustee Assigned Estate Hassan Mahomed* 1908 29 NLR 619 626-7; *Kemp v Roper* 1886 2 BAC 141 143; *Black v Muller* 1910 EDL 400, 404; in general Van der Merwe *Sakereg* (1989) 346 ff. South African law effects a balance between the two relatively innocent persons in the same way that article 11 of the 1974 Draft Convention for a Uniform Law on Acquisition in Good Faith of Corporeal Movables (LUAB) did.

[53] The seller is obliged to guarantee that the purchaser will not be deprived of the object by anyone who has a better title to it. *Kleynhans Bros v Wessels' Trustee* 1927 AD 271 *per* Wessels JA; in general Kahn *Contract & Mercantile Law through the Cases vol. ii* (2ed.) (1985) 19 ff; Van der Merwe & De Waal *The Law of Things* (1993) 86. Occasionally, the *quantum* of damages has been determined by the law governing the contract or the delict in terms of which damages are claimed. However, as a general rule, questions of quantification or calculation pertain to procedure to be governed by the *lex fori*.

[54] See the example of the Aztec Codex brought back to Mexico, quoted in Shelton 'International Protection of Indigenous Peoples' Culture and Cultural Property' in Thompson (ed.) *The Rights of Indigenous Peoples in International Law* (1987) 47, 51.

The rules with regard to free (open) markets have never been accepted as part of South African law and the courts expressly rejected the application of these rules to public auctions.[55]

6.2 Lost or abandoned objects

Legal systems have different understandings of the status of lost and abandoned objects. The classification of abandonment is a particularly elusive legal concept. This explains why 'finders keepers' laws, based on possessory rights, have become relatively complicated in many municipal systems.[56]

Under South African law, if there is no owner in respect of an object, or no one has put forward a claim, the Roman and Roman-Dutch legal principles regarding property without owner apply.[57] The Roman law principles gained currency in South Africa, when at the turn of the century, judges failed to realise that most of the royal prerogatives in respect of unowned or unclaimed things were personal servitudes, and therefore private property rights. Associating the royal prerogatives with concessions derived from public law, the judiciary was not prepared to receive them into the law of South Africa. Consequently, South African law did not grant the treasury a right in terms of private law to claim archaeological materials as state property.[58] This position resembles that of jurisdictions under the influence of French law and some common law jurisdictions.

Under Roman-Dutch law, *res nullius* are subject to principles of prescription and *occupatio*. South African law recognises as *res nullius* those things capable of ownership but which are unowned, such as things that have been abandoned by their owners.[59] Certain *possessores* are

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[55] *Retief v Hamerslach* 1884 1 SAR 171.

[56] Prott & O'Keefe *Law and the Cultural Heritage Vol. 1: Discovery & Excavation* 318-321.

[57] Grotius *I* 2.1.50; 2.1.51; 2.1.52.

[58] See Sonnekus *Enkele Opmerkings na aanleiding van Bona Vacantia as Sogenaamde Regale Reg* Inaugural lecture delivered at the Rand Afrikaans University (1984) (or see *id.* 1985 *TSAR* 121).

[59] Grotius 2.1.50; Voet *Comm ad Pand* 1.8.3. Maasdorp & Hall *Institutes of South African Law* (10 ed.) (1976) 2 'The Law of Property' 30-4.

able to establish ownership over abandoned things or *res derelictae* through *occupatio*.[60]

Under South African common law, finding of treasure represents a distinct mode of acquisition of property.[61] No reported case exists in South African law. Valuables, hidden so long ago that ownership is difficult to determine, become the property of either the landowner or the landowner and the finder, upon the finder taking possession. In short, ownership in a *res nullius* will vest in the finder, unless someone can prove a prior claim to ownership.[62] The right to an interest in treasure trove depends on possession, so that ownership is able to vest. The first to possess, acquires.[63] Lost things (*res deperditae*) continue to belong to their owners. *Res sacrae* and *res religiosae* such as temples and churches belong to the state or the congregation concerned. Graveyards belong to the congregation concerned or to private individuals.

6.3 Rules of prescription

After the uninterrupted completion of a period of 30 years, the original owner's action is extinguished, irrespective of whether the possessor has lawful title or not, or of the possessor's *bona* or *mala fides* when he or she acted.[64] The law will not interfere with undisturbed possession for 30 years, be it *mala* or *bona fide,* as it is the primary aim of acquisitive prescription to promote legal certainty.[65]

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[60] *Mills v Reck* 1988 (3) SA 92 (C): salvors failed to separate pipes from a condenser of a sunken ship and take possession of the *res nullius*; the court recognised the right of the first salvor, as most nations do, and granted an interdict against salvor no. 2 and second respondent; also *Underwater Construction & Salvage Co (Pty) Ltd. v Bell* 1968 (4) SA 190 (C).

[61] *De Iure* 2.8.7. Grotius departs from other writers on the state's interest in *res nullius*. Grotius *I* 2 1 54; Van der Keessel *Praelectiones Iuris Hodierni ad Hugonis Grotii Introductionem ad Iurisprudentiam Hollandicam* 2. 1. 54; (tr. UP 1961), with reference to *D* 49 14 10.

[62] See *e.g.* Grotius *I* 2.1.47; 2.1.50 or for a wider use of the concept *res nullius* to include *res divini iuris* and *res publicae*, Voet 1.8.1; 1.8.3.

[63] Carey Miller *The Acquisition & Protection of Ownership* (1986) 102 ff.

[64] Section 1 Prescription Act, 1969; *Bisschop v Stafford* 1974 3 SA 1 (A), 7. The term is the same under the Prescription Act, 1943 (Act No. 18 of 1943). The two statutes are to be applied concurrently in respect of all terms of prescription that commenced before 1 December 1970 and that would be completed by 30 November 2000. The Prescription Act, 1969, is still relevant in all cases where the term for acquisitive prescription started before 1 December 1970. The action of the purchaser against the seller for the debt would become prescribed within three years (section 11(d) Prescription Act, 1969).

[65] Section 1 Prescription Act, 1969. The Act does not require, as its predecessor did, that possession has to be without force, without secrecy and without the owner's consent. Consequently, the distinction between lawful

In terms of section 3(1) of the Prescription Act, 1969 (Act No. 68 of 1969), the running of prescription is suspended where an impediment occurs that is still present three years or less before the prescription period is complete. The state is also bound by the Prescription Act, 1969, except in respect of state land.[66]

7. CONCLUSION

Socio-economically as well as politically, white and black South Africa lived in two different worlds under apartheid. To an extent, apartheid reflected also the relationship the Afrikaner had with their own culture. Apartheid meant that, for some, political identity could be dual in nature: a racial identity that united beneficiaries alongside an ethnic identity that fragmented victims.[67] Implementation of old order legislation was tainted by this world view.

Ethnicity and culture have undergone significant shifts in meaning in the South African context, and the meanings of the old order may be disappearing altogether. Ethnic communities are no longer fixed points of reference. Ethnicity can now be understood as the cultural characteristics of a particular group. The external aspect of these characteristics is just the more easily recognisable aspect. A subject's experience, identity, relationships and association are less obvious components of culture, yet just as real.

Old order legislation failed to answer the question of what is cultural heritage and what is not. In principle, the structures that existed under the old order laws were open to be used for conservation of the contributions of all communities to the cultural mosaic, but this potential was never realised. Declared monuments reflected the history and values of white South Africans. The country needed a new and more effective system.

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possession and unlawful possession has been rendered of little practical relevance. A thief may gain ownership rights through acquisitive prescription unless this is expressly prohibited by statute. Van der Merwe & De Waal (1993) 137-8.

[66] Sections 18 and 19.

[67] See *e.g.* Mamdani 'No African Renaissance without an Africa-focused Intelligentsia' in Makgoba (ed.) *African Renaissance: The New Struggle* (1999) 127.

The NMC has now been dissolved. The Agency that has now been established in its place is discussed in chapter 9, to discover to what extent new order legislation has addressed the weak points of the old conservation laws. Chapter 12 contains an evaluation of this aspect. However, before the new structures are discussed in any detail, the new constitutional dispensation must be considered.

CHAPTER 8

THE 'NEW ORDER'

1. INTRODUCTION

The place and the role of culture in constitutional law may partly explain why few South African lawyers have given cultural heritage law much consideration.[1] Multiculturalism enjoys constitutional protection in South Africa but it is not always clear how the relevant provisions of the Constitution must be read, understood and applied.

This part of the study is dedicated to the relation between culture, state and law in South Africa. Where culture is referred to, it is cultural heritage and cultural objects that are relevant.

By way of introduction, we may acknowledge the profound relationship that exists between culture, state and law. Culturally sensitive constitutional law has to reflect the cultural existence of humanity in a way that protects the ability to create material objects and to conceptualise the immaterial culture. Human rights constitute a mechanism for the protection of these values. The extent to which the South African constitutional dispensation reflects this synergy forms part of the current discussion. Reference is made to the 1993 Constitution only where it contrasts strongly with the new order, or cannot be ignored.

During the 1990s, South African lawyers and academics started to consider afresh whether, expressly and deliberately, to draw 'culture' into the constitutional process or whether to leave it to private institutions to protect, care for and promote. Fundamental reflection on the concept 'culture' and its relation to state and law have grown steadily among South African lawyers since.

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[1] Beukes *Kultuur: 'n Staatsregtelike Perspektief* LLD-thesis UNISA (1991) 136-155; Van Wyk 'Kultuur, Staat, Reg – Kultuurstaatsreg?' 1991 *Stellenbosch Law Review* 180 ff; Kruger 'Regstaat, Kultuurstaat, Welvaartstaat: Bestanddele van 'n Nuwe Staatsmodel?' 1994 *Stellenbosch Law Review* 15.

A unique political-constitutional negotiation process followed in the wake of the unbanning of the liberation organisations and the release of Nelson Mandela and other political prisoners. The 'African renaissance' or the 'reawakening of Africa' theme, for which Oliver Thambo and Thabo Mbeki[2] often receive credit, initially embodied everything the new South Africa aspired to: freedom, independence and an opportunity to forge a fresh agenda. The African cultural value system was recognised as the embodiment of what is good. African customs and indigenous knowledge systems were recognised and regarded as instruments of socio-economic development.

Today, the renaissance touches on broader themes such as the revitalisation of the continent through political stability, and the aspiration of a war-torn continent to reposition itself as peaceful.[3] Those affected daily by poverty and ethnic division are bound to find the promises of 'culture', if limited to the forms of art and poetry, too luxurious and remote. South Africa is expected to set the pace and tone of the renaissance into the 21st century. One hopes that the rich linguistic heritage and South Africans' capacity for responsible decision-making will be allowed to influence the outcome. The view that the preservation of cultural objects and monuments is a state responsibility, as defended by Grégoire two centuries ago, will hopefully also remain intact.

The desire on the part of the state to remove conflicts between the cultures of people who find themselves clustered together in one geographical area, may lead to the desire to forge a common culture.[4] From time to time, the political ideal of a 'common culture' surfaces in South Africa. The issue can throw us into a vicious circle. In a multicultural state, consistency and stability are vital in the area of government. At the same time, the constitutional state standard means that

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[2] Thabo Mbeki *Africa: The Time Has Come* (1998) 296. Most of the selected speeches in this volume were delivered after 27 April 1994. See also Stremlau 'African Renaissance and International Relations' in Makgoba (ed.) *African Renaissance: The New Struggle* (1999) 101-102. There is support for the contention that pan-Africanism is the true origin of the African renaissance; see Mamdani 'There Can Be No African Renaissance Without an African-focused Intelligentsia' in Makgoba (ed.) (1999) 125.

[3] The Minister of Foreign Affairs will be introducing the African Renaissance and International Cooperation Fund Bill in the National Assembly in the second half of the year 2000. The Bill is aimed at enhancing international co-operation with and on the African Continent and confirming South Africa's commitment to Africa through the promotion of good governance, prevention and resolution of conflict, socio-economic development and integration, humanitarian assistance and human resource development. *GG* No. 21514 of 29 August 2000.

[4] Dlamini in Van Wyk *et al* (eds) 'Culture, Religion and Education' in *Rights and Constitutionalism* (1994) 567.

government cannot afford to freeze the past consequences of difference, but must continue to explore options to accommodate differences.

In this chapter, consideration is given to –

- State and culture in South Africa
- The 1993 Constitution
- Legislative reform during the interim period (1994-1996), particularly the White Paper on Arts, Culture and Heritage
- The 1996 Constitution and bill of rights, with specific reference to the right to culture
  - International human rights law
  - Section 31 and its traces
- The National Action Plan.

2. STATE AND CULTURE IN SOUTH AFRICA

Constitutions, legal science and the cultural sciences are forces in synergy, the ultimate effects of which require planning and therefore also study. South African contributors to the field of culture and state have considered Häberle's views and have analysed the meaning of the concept *kultuurstaat*.[5] Culture may be regarded at once as an autonomous building block in education that cannot be given its content by either political or administrative measures of the state, or technical aspects executed by officials or cultural organisations. The cultural state fulfils its true role only if it refrains from 'making' culture or making value judgments on the quality of culture.

Habermas refers to the *Kulturnation*, which is a nation defined by its culture. In Germany, this idea represented an imaginary unity that had to seek support in a shared language, tradition and ancestry in order to transcend the reality of the existing small German states.[6] The *Kulturnation* bases its self-understanding on citizenship and not on ethnicity.[7]

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[5] Taken from the German term *Kulturstaat*; see Van Wyk 1991 *Stellenbosch LR* 180; Kruger 1994 *Stellenbosch LR* 15, 22-25.

[6] Habermas 'Struggles for Recognition in the Democratic Constitutional State' in Gutmann (ed.) *Multiculturalism: Examining the Politics of Recognition* (1994) 146.

[7] *Ibid.* 147-8.

The strength and resilience of the state to maintain its essential features will reveal much about the nature of the state. Consideration of the core functions of the state means that the directions the state may take must also be taken into account. The state may remain neutral as between different conceptions of the good, or the state may be committed to the accommodation of different cultural communities.[8]

Some authorities have noticed the paradox that presents itself in the relation between state and culture: while the state, government, politics and administration are all expressions of a culture or cultures, in a pluralist society the state and its organs cannot be the dominant or even the primary channels for the regulation of the cultural life of a society.[9] This paradox is borne out in analyses of the content of nationhood and of the measure of recognition accorded to plurality. It has also been illustrated against the backdrop of the concept 'cultural state'.

On the other hand, the fundamental principles of equality and non-discrimination may require the state to forsake its liberal notions of neutrality regarding cultural diversity, and to demonstrate its recognition of diversity by strengthening and developing elements that define the identity of a particular group.[10] National unity can be the guiding principle, or plurality may enjoy precedence, but this view emphasises that unity would likely remain unattainable until cultural diversity is recognised and faced up to.

Kruger[11] regards elements of national unity and elements of plurality as essential in a cultural state. In support of plurality, a vibrant civil society[12] is required to prevent a political democracy from becoming authoritarian. If churches, universities, civic associations, social movements, trade unions, sports and arts organisations do not take up their role fully, and the citizen is

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[8] Davis *et al* (eds) *Fundamental Rights in the Constitution: Commentary & Cases* (1997) 283.

[9] For example Venter 'The Protection of Cultural, Linguistic and Religious Rights: The Framework provided by the Constitution of the Republic of South Africa, 1996' 1998 *SAPR/PL* 438, 443-445.

[10] Strydom 'Minority Rights Protection: Implementing International Standards' 1998 (14) *SAJHR* 373, 375.

[11] Kruger 'Regstaat, Kultuurstaat, Welvaartstaat: Bestanddele van 'n Nuwe Staatsmodel?' 1994 *Stellenbosch Law Review* 15.

[12] Defined by Chaskalson *Constitutional Law of South Africa* (1998) 35-23 as referring to the private and unofficial associations of the citizens of the state.

hesitant in the struggle towards emancipation, there remains a real danger that the state may become a dictator of culture. While minority groups seek wider political and economic goals than cultural and linguistic rights, civil society ought to monitor the participation of the state in cultural matters, to ensure that political planning does not degenerate into control and supervision.[13]

Several conditions qualify the duty of the South African state as a constitutional state. It may not –

- identify itself with any one particular culture (as happened when apartheid was official government policy);
- hide behind a wide 'umbrella' conception of culture or let up in its search for answers to problems;
- prevent transformation from taking place, yet may also not use governmental power as symbolic reinforcement of differences;
- effect vague rainbow jurisprudence; or
- hide behind practical considerations to escape its constitutional mandate.

The arts and culture ministry wishes to steer clear of an official culture, and has described its task on occasion in terms of the development of 'a complex, inclusive and non-prescriptive notion of what constitutes the national culture'.[14]

Whilst indicators exist for the extent to which a state fits the model of the cultural state, no arithmetical or statistical test can measure this. The leaders and the citizenry must show that they have the capacity and will to deal with cultural conflict within the ambit and scope of the constitutional state.

3. THE 1993 CONSTITUTION

Between 1990 and 1993, the constitutional entrenchment of white rule started making way for a supreme, justiciable constitution and bill of fundamental rights. The 1990-1994 negotiation

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[13] Hartman *The Fateful Question of Culture* (1997) 51 refers to the 'creative *dirigisme* of the state in cultural matters'.

[14] *The Sunday Independent* 26 May 1996, 24.

process rejected the approach of the 1983 Constitution to 'own' and 'general affairs', and focused on the difficult task of determining which powers should be allocated to the various levels.[15] A new legal order was introduced in South Africa when the sovereignty of Parliament was abolished.

The 1993 Constitution provided for an executive consisting of different interest groups or political parties to govern in a consensus-seeking spirit.[16] It also limited the exercise of Parliamentary power, *inter alia*, through constitutional checks and balances such as –

- provincial powers,[17] and more complex amendment procedures in respect of Provincial boundaries and competences of Provinces;[18] and
- Constitutional Principles (CP or CPs hereafter) that embody the pact that was made to govern constitutional negotiations.[19]

Provisions in the 1993 Constitution that were of obvious relevance to the concept of culture included language and cultural and linguistic minorities.

Whereas the 1983 Constitution retained Afrikaans and English as the official languages of the Republic, the 1993 Constitution contained clauses that embedded language rights and established the Pan South African Language Board (PANSALB). Under section 3, PANSALB was charged with the promotion of conditions for the development and for the promotion of the equal use and enjoyment of all official languages, and with the promotion of respect for other languages used.[20]

The chapter on Fundamental Rights and the list of Constitutional Principles accorded protection to minorities in a number of ways. In fact, the issue of minority rights was extraordinarily

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[15] Discussion by De Villiers *The Institutionalization of Intergovernmental Relations* 1 July 1995 Working Document prepared for the Commission on Provincial Government 21-26.

[16] Section 89(2).

[17] Sections 61, 62, 155, 156 and 157.

[18] Section 62; CP XVIII regarding the Final Constitution.

[19] Schedule 4; section 232(4).

[20] Khoe and San languages and South African Sign Languages were not referred to as such.

prominent during the interim phase.[21] The right to education clause made reference to educational institutions based on a common culture, language or religion. Another example was CP XXXIV, which authorised constitutional provision for the right to self-determination by any community sharing a common cultural and linguistic heritage. The package of guarantees offered at the time included collective rights of internal self-determination in establishing linguistic, cultural and religious associations (which became CP XII[22]) and qualified recognition to a right to external self-determination (which became CP XXXIV).[23]

4. LEGISLATIVE REFORM DURING THE INTERIM PERIOD (1994-1996)

With the commencement of the interim phase, it had to be faced that the appetite for and availability of cultural objects had certain important implications for the legislative framework. It was apparent by then that culture can be made to serve political or sectional ends rather easily.

The old order legislation contained no reference to 'living heritage', heritage agreements or heritage planning. These gaps in government regulation, amongst others, became untenable. The Minister of Arts, Culture, Science and Technology appointed the Arts and Culture Task Group ACTAG in November 1994. It comprised artists, arts educators and cultural administrators, and was mandated to consult widely to formulate recommendations for a new arts and culture dispensation that would be consistent with the democratic ideal. ACTAG submitted its report to the Minister in July 1995.[24] Until then public support for creative arts not supported through the Performing Arts Councils (PACs) had been catered for by the Foundation for the Creative Arts (FCA). The 1996 Plan to restructure the four PACs sought to preserve the performing arts infrastructure built up over decades, but also to cater for the artistic needs of regions,

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[21] Claims to the right to self-determination in its wide, external sense (where exercise of the right entails changes to the international personality of the state) began to dominate the constitutional negotiations. White right-wing organisations proliferated, but the ideal of an independent Afrikaner state, a *Volkstaat*, drew them together. At the time, the Inkhatha Freedom Party found the idea of an independent region equally attractive and espoused secession.

[22] CP XII provided that –

> Collective rights of self-determination in forming, joining and maintaining organs of civil society, including linguistic, cultural and religious associations shall, on the bases of non-discrimination and free association, be recognised and protected.

[23] Schedule 4; section 184 A and 184 B of the Constitution Act, 1993 (Act No. 200 of 1993).

[24] ACTAG *Draft Report for the Ministry of Arts, Culture, Science and Technology*, April 1995.

communities and individuals not served in the past. The Plan is indirectly relevant to cultural heritage protection, as it was meant to be included in the 1996 White Paper on Art, Culture and Heritage and to direct the 1996/7 allocation of the cultural budget.[25] The transformation of these PACs includes the appointment of representative boards, right-sizing the budget and infrastructure and opening the facilities to a broader spectrum of arts practitioners.[26] This process is expected to be concluded by the end of the year 2000.

South Africa has felt overwhelming pressure to focus on developmental undertakings. For present purposes, the most important document emanating from the interim phase is the 1996 White Paper on Arts, Culture and Heritage, which must be considered against that background. The attention now turns to the substance and impact of this document.

4.1 1996 White Paper on Arts, Culture and Heritage

The White Paper on Arts, Culture and Heritage was developed and finalised in June 1996. Its finalisation more or less co-incided with the finalisation of the 1996 Constitution. The 1996 White Paper contains a combination of ACTAG's proposals, Departmental investigations, input from the authors of the White Paper, its Reference Group and the Ministry's own investigations as well as that of international experts.

The 1996 White Paper is rooted in a framework of equity laid out in the Reconstruction and Development Programme for South Africa and based on the rights enshrined in the Constitution.[27] The document recognises the 'healing and recreational potential of arts and culture in a period of national regeneration and restoration',[28] and encourages innovation in the form of experimentation and artistic renewal. It contains the expectations artists, interested parties and the nation may have of the ministry. Broadly speaking, the 'minimum standards' DACST enunciates

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[25] Information concerning national and provincial budgets, previous funding distribution and guidelines regarding applications is available to the public through Van Graan & Du Plessis (eds) *The South African Handbook on Arts and Culture* (1998).

[26] DACST *White Paper on Arts, Culture & Heritage*, 4 June 1996, Chapter 4 'Arts and Culture' 22.

[27] *Id.* Chapter 4 'Arts & Culture' 21.

[28] *Id.* Chapter 2 'All Our Legacies' 14.

for its policy in relation to culture covers personnel management, financial management, operational management, infrastructure, business and education. It refers specifically to a policy that ensures –

- human resource development;
- survival and development of all art forms and genres;
- cultural diversity with mutual respect and tolerance;
- heritage recognition and advancement;
- education in arts and culture;
- universal access to funding; and
- equitable promotion and development of cultural industries.[29]

The document mentions accountability in the context of provincial spending of budgetary allocations[30] and of arts bodies and institutions that receive public funds.[31] Allocations to state-funded museums are to become subject to performance measures.

The 1996 White Paper contains the firm resolve that South Africa must become a signatory to various international conventions.[32] The progress made in respect of this ideal is discussed in chapter 10.

The approach adopted by the 1996 White Paper in respect of development, culture, diversity, human rights and heritage is discussed below.

4.1.1 Development

The 1996 White Paper assumes that arts, culture and heritage have a vital role to play in development.[33] Specific reference is made to –

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[29] *Id.* Chapter 3 'New Policies and Institutional Frameworks' 17 *et seq*.

[30] *Id.* Chapter 2 'All Our Legacies' 14, 17, 18.

[31] *Id.* 18.

[32] *Id.* Chapter 6 'International Cultural Co-operation' 37.

[33] *Id.* Chapter 1 'Introduction' 13.

- a fair dispensation that requires integration of arts and culture into all aspects of socio-economic development; and
- adoption of a development philosophy that confirms the possibility of cultural diversity and the valuing of local knowledge.

Development presents huge challenges for heritage conservation. Not only are the gaps that exist between means and ends vast, but our methods of identifying and interpreting our heritage are also still imperfect. The 1996 White Paper does not recognise that social and cultural heritage (*e.g.* the tribal system or indigenous tenure) can, in and of itself, retard development.[34] It seems to rely on the truism that development assistance must take the fullest account of local circumstances and make full use of flexible and adjustable strategies to succeed.

As stated in chapter 3, economic and community development as such are not in conflict with the concept of the constitutional state. However, the constitutional state becomes endangered if upliftment does not occur in accordance with constitutional guarantees and procedures or encroaches on the interests of minorities.

4.1.2 Culture and cultural diversity

The 1996 White Paper sheds some light on the view of government regarding the relationship between state and culture. The 1996 White Paper states that DACST 'supports the arts, culture and heritage by valuing diversity and promoting economic activity'.[35] Under the heading 'Process' it is stated that –

> [c]ultural expression and identity stand alongside language rights and access to land as some of the most pressing issues of our times. Unsurprisingly, the dominant themes which characterise these fields have commonality with themes elsewhere: governance, access and finance are the major challenges ...[36]

Chapter 1 of the 1996 White Paper expresses culture in the singular, and contains the following definition of culture –

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[34] Oosthuizen 'Africa's Social and Cultural Heritage in a New Era' 1987 *Africa Insight* 107; Maritz 'Africa's Social and Cultural Heritage in a New Era' 1987 *Africa Insight* 120.

[35] *White Paper* Chapter 1 'Introduction' 11.

[36] *Id.* 12.

> Culture refers to the dynamic totality of distinctive spiritual, material, intellectual and emotional features which characterise a society or social group. It includes the arts and letters, but also modes of life, the fundamental rights of the human being, value systems, traditions, heritage and beliefs developed over time and subject to change.[37]

The definition of culture used in the document expressly includes 'value systems', and the following is stated about the approach to culture –

> ...premised on international standards in which culture is understood as an important component of national life which enhances all of our freedoms. Culture should not be used as a mechanism for exclusion, a barrier between people, nor should cultural practices be reduced to ethnic or religious chauvinism.[38]

Under the heading 'Understanding Ourselves', reference is made to 'subtle cross-pollination of ideas, words, customs, art forms, culinary and religious practices'.[39] Government sees its role as ensuring that diversity is expressed in a framework of equity and commitment to redressing past imbalances and developing all people.[40]

The cultural differences of the South African people are recognised in the 1996 White Paper, and immediately qualified as unacceptable should they threaten national unity. The paper addresses itself to 'the essence of national reconciliation and nation-building'.[41] Among other requirements for a limitation on rights, it must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.[42] Whether or not it is justifiable for the state to limit minority rights by the necessity to promote national unity in South Africa, remains an open question.[43] In essence, such a limitation would mean that state intervention in constitutionally protected aspects of cultural life is authorised in the name of nation-building.

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[37] *Id.* 13.

[38] *Id.* 13.

[39] *Id.* Chapter 2 'All Our Legacies' 14.

[40] *Id.* 16.

[41] *Id.* Chapter 7 'Our Common Future' 38.

[42] Section 36(1) of the Constitution.

[43] Kruger implicitly adopts national unity as the vehicle for drawing culture into the constitutional process. To his mind, the reconciliatory role must receive emphasis, and the role that little-known indigenous cultures could play must be identified. He is adamant that cultural differences be underplayed. Kruger 1994 *Stell LR* 25.

Under 'Inheritance' the following statement is found –

> The culture whose emergence and growth is consistent with the goals of our young democracy would be an inclusive, and even an eclectic one.[44]

Chapter 2 shows little appreciation of the link between cultural specificity and uniqueness and the larger system, expressed by a dynamic dialectical relationship in space and movement.[45] Here the 1996 White Paper expresses the ideal of unity of being and of overcoming collective differences almost to the point of prescribing a single acceptable culture. The guiding and operational principles take cognisance of diversity, but do not foresee the sharp edges or conflict of this dialectic.[46] In as far as references to 'all our legacies' presuppose a transpersonal common culture, this culture is likely to be the group culture of the political leadership. The call for 'Africanisation' is commendable where it is designed to promote greater inclusivity, and more interaction with the riches of the identity, culture and history of Africa. However, where it is employed to emphasise the unity of the nation or the preoccupation with nationalist sentiment at the expense of group or local diversity, it fosters new forms of intellectual apartheid.

At least the arts and culture ministry appears to be aware that a single uniform culture is not desirable, and that it would be a huge mistake to play off nation-building against ethnic identity.[47]

4.1.3 Human rights

The 1996 White Paper follows the principle that the right to culture is fundamental to other human rights and their enjoyment. 'Human rights' appears as an item under operational principles,[48] referring to culture as the component of national life that enhances all our freedoms. The document does not state that standards and values are relative to the culture from which they derive, and no reference is made to the right to culture or the right to cultural self-determination of communities.

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[44] *White Paper* Chapter 2 'All Our Legacies' 15.

[45] *Per* Breytenbach in *Rapport* 28 November 1999, 3.

[46] *Id.* 'Daardie "dialektiek" en "wisselwerking" kan skerp kante hê, kan konfliktueel wees. Móét selfs'.

[47] *The Sunday Independent* 26 May 1996, 24.

[48] *White Paper* Chapter 3 'New Policies and Institutional Frameworks' 18.

4.1.4 Heritage

The 1996 White Paper defines 'heritage' as –

> the sum total of wildlife and scenic parks, sites of scientific and historical importance, national monuments, historic buildings, works of art, literature and music, oral traditions and museum collections and their documentation which provides the basis for a shared culture and creativity in the arts.[49]

The definition and function of heritage and cultural objects underwent significant adaptation and change from 1994 to 1996. The 1996 White Paper echoes some of the criticism against the old order conservation laws by stating, for example, that the term 'monuments' was found to be narrow and that 'heritage resources' is preferred. It also states that –

> [t]he imbalance regarding what counts as a national monument must be corrected. National monuments should not be seen in isolation, but should be identified in a systematic programme for 'cultural mapping'.[50]

The 1996 White Paper regards recording and conservation of living heritage (song, dance, story-telling and oral history) to be of paramount importance in South Africa. It views heritage in terms of the forms of expression that are crucial for defining the country. Reference to heritage as that which consciously determines and identifies a people or a community, tangible and intangible, is made almost accidentally, when the responsibility of communities to audit their heritage sites is touched upon.[51]

4.1.5 Conclusion

The impact of the 1996 White Paper has been noticeable. A large number of laws have been redesigned and amended since 1996, among these –

- the Cultural Institutions Act, 1998 (Act No. 119 of 1998);
- the Culture Promotion Act, 1983 (Act No. 35 of 1983);
- the National Heritage Council Act, 1999 (Act No. 11 of 1999) (NHCA);
- the National Heritage Resources Act, 1999 (Act No. 25 of 1999) (NHRA).

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[49] *White Paper* Chapter 1 'Introduction' 13.

[50] *Id.* Chapter 5 'Heritage' 32.

[51] *Id.*

The extent to which those laws selected for discussion reflect the content of the 1996 White Paper is commented on under § 6. below. At the provincial level, the KwaZulu-Natal Heritage Act, 1997 (Act No. 10 of 1997) stands out. *Amafa aKwaZulu-Natali*, or 'Heritage KwaZulu-Natal' took up where the KwaZulu-Natal Monuments Council left off. Most Provinces adopted arts and culture legislation, not providing for the administration of heritage conservation as such. Aspects of these initiatives are discussed in chapter 9.

The 1996 White Paper expresses significant support for cultural diversity. It addresses national reconciliation and nation-building even more pertinently. The intention to strengthen and develop elements that will define the identity of groups whose heritage has been neglected and marginalised, is clear.

5. THE 1996 CONSTITUTION

The process of constitutional reform was completed when the Constitution of the Republic of South Africa Act, 1996 (Act No. 108 of 1996), was adopted. As in many a culturally heterogeneous society, this occurred after significant delay.[52]

The Constitution uses the concept 'culture' in a number of different senses. The Constitution also embodies values that may be regarded as common, or applicable to a variety of different cultures.

Structurally, the Constitution sets in place a new dispensation that grants the Provinces specified competencies and designates 'provincial cultural matters' as a functional area of the governmental competence of Provinces. It sets standards for co-operation in the exercise of those competences. To protect culture, the Constitution –

- contains bill of rights protections (sections 30 and 31);
- contains provisions relating to the use of official languages and other languages;
- requires the establishment of a Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (sections 181, 185-6); and

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[52] Van Wyk 'Introduction to the South African Constitution' in Van Wyk *et al* (eds) *Rights and Constitutionalism* (1994) 131 ff.

- repeats the wording of CP XXXIV[53] in section 235.

Devices designed to deal with divergent cultural forces and conflict in the South African state include the Human Rights Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Pan South African Language Board and mediation procedures, *e.g.* those contained in section 11 of the Pan South African Language Board Act, 1995 (Act No. 59 of 1995).

Being a written instrument, the language, meaning and purpose of the rights and freedoms within the Constitution play a guiding role in statutory interpretation. It is therefore necessary to take a closer look at those aspects which mark the context in which culture provisions must be read and applied.

5.1 Culture in the Constitution

The Constitution does not define the term 'culture' anywhere. Sections 30 and 31 of the Constitution describe the right of participation in 'cultural life'. Neither section uses the word 'culture' in its broadest sense, but rather use it to describe 'a particular way of life of an identifiable group of people'.[54] The way of life would include tradition, custom, folk-ways; that which confers an identity; that which distinguishes groups of people on the basis of characteristics such as their beliefs, knowledge, language, kinship rules, educational methods or societal relations.

Schedule 4 and 5 of the Constitution use the term to denote creative and intellectual activity and the fruits of that activity, such as music, literature and sculpture. The sense is not dynamic human culture itself, but rather the 'formal products' of culture: the 'meaningful expressions of a particular community or of man in community'. Chaskalson argues that the activities of artists

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[53] CP XXXIV provided:

> This schedule and the recognition therein of the right of the South African people as a whole to self-determination, shall not be construed as precluding, within the framework of the said right, constitutional provision for a notion of the right to self-determination by any community sharing a common cultural and language heritage, whether in a territorial entity within the Republic or in any other recognised way ...

[54] Chaskalson *Constitutional Law in South Africa* (1998 Rev Ser) 35-19. Compare Part I, chapter 1.

and writers may contribute to the cultural life of a community, but that these activities cannot be constitutive of that culture. As noted in Part I, chapter 1, he regards the field of reference of culture as actions, *e.g.* to conserve historical objects.[55]

While the cultural is present throughout the Constitution, it is more prominent in certain parts. Sections 31, 185 and 186 concern cultural, religious and linguistic communities and persons belonging to these communities. Section 235 refers to any community sharing a common cultural and linguistic heritage. Chapter 12 (dealing with traditional leaders and customary law), section 15 (recognition of marriages) and section 143 (traditional monarchs in the Provinces) all display cultural undertones although the term is not used anywhere. In addition to these varied meanings, Venter highlights the consistent use in the Constitution of the term 'culture' as referring to something that one enjoys, shares and in which one participates.[56] The many layers or subdivisions of the term 'culture' as used in the Constitution include objects, actions, products and conditions of conduct.

5.2 Values incorporated in the Constitution

5.2.1 Foundational values

It is the function of a Constitution to protect those interests and instrinsic features associated with a constitutional state against electoral outcomes. For example, the Constitution proclaims the supremacy of the rule of law as a foundational value referred to in chapter 1 of the Constitution. Other founding principles are equality, equal citizenship and dignity. In interpreting the provisions of the bill of rights, a court must promote the foundational values as values that promote an open and democratic society based on human dignity, equality and freedom.[57]

5.2.2 Core values

Core values are those values in the field of potential common understanding, or the

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[55] *Ibid.*

[56] Venter 1998 (13) *SAPR/PL* 438-9.

[57] Section 39; *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998(6) BCLR 726 (W) at 741C-G; *Larbi-Odam v Member of the Executive Council for Education* 1996 (12) BCLR at 1612(B); 1622J-1623A; *S v Williams* 1995 7 BCLR 861 (CC) at 874C; 878E-G.

'constitutional sanctuary'.[58] Venter describes the Constitution as the pivotal and most legitimate component of the common domain of the South African nation, as well as a highly likely space for the expansion of common ground. He adds that government ought to display consistency and stability especially where culture tends to be diverse.[59] The common field is given its characteristic quality by the values expressed. Whether unassuming or assertive, values differentiate a formal vision of the law from a substantive or moral one, and guide the process of constitutional interpretation.

Culture, language and religion are value-laden concepts and as such, may give rise to deep conflict in a multicultural and multilingual society.[60] Core values include reconciliation, nation-building and *ubuntu* as reflected in the 1993 Constitution.[61] The *Makwanyane* judgment[62] and other constitutional court cases refer to indigenous values as a source of values in the interpretation of the Constitution.

The 1993 Constitution did not define the term *ubuntu*. It has been defined as 'humanity'; 'motho ke motho ka batho'; 'a person becomes a person through others', or the collective urge for compassion.[63] In the *Makwanyane* judgment,[64] Langa J[65] identifies three elements of the concept –

- recognition of a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from fellow community members;

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[58] Venter 1998 (13) *SAPR/PL* 445.

[59] *Id.* 443-5.

[60] On the meaning of, and relationship between culture, language, religion and education, see Dlamini 'Culture, Education and Religion' in Van Wyk *et al* (eds) *Rights and Constitutionalism: The New South African Legal Order* (1994).

[61] The concept of 'humanness' and the recognition afforded to minority protection present further examples of values closely associated with culture. *Ubuntu* is a term used in the post-amble to the 1993 Constitution, where it is stated that '... there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation'. *S v Makwanyane & another* 1995(3) SA 391 CC.

[62] *S v Makwanyane & another supra.*

[63] The original *isiZulu* maxim is 'umuntu ngumuntu ngabanye' or 'one is a person through others'. See Teffo 'Moral Renewal and African Experience(s)' in Makgoba (ed.) *African Renaissance: The New Struggle* (1999) 149, 153.

[64] *Supra.*

[65] *Supra* § 224.

- a corresponding duty to give the same respect to each member of that community; and
- regulation of the exercise of rights by placing the emphasis on mutual enjoyment of rights.

Promoting *ubuntu* implies promotion of the interests of peace, friendship, humanity, tolerance and national unity. It is best understood as a necessary incident of self-knowledge and as part of the evolving process towards a more encompassing humanity.

The values of the Constitution prevail over the values inherent in any specific culture, where such values are inconsistent with the Constitution.

Many of the rights contained in the bill concern the interests of minorities, particularly in relation to the expression of their identity through culture, religion, language and education.

Since the legal protection of languages is relevant to the legal protection of culture(s), the constitutional norms for language require closer consideration.

Section 6 embodies the constitutional directive to advance multilingualism, which is among the founding provisions of the Constitution. The paradigm has shifted from one of equal treatment of languages to one of equitable treatment of languages and a striving to accomplish parity of esteem. Section 6 lists the official languages of South Africa and expects the state to take positive measures to elevate the status and advance the use of indigenous languages. This section also contains norms concerning the use of language and spells out a number of considerations.[66] The norms are –

- the use of multilingualism in government. The national and provincial governments, by legislative and other measures, must regulate and monitor their use of official languages (the regulation scheme is supposed to link up with both core and peripheral aspects of official business);
- that all languages must enjoy parity of esteem. They must be treated equitably (with equal respect); and
- that the use of indigenous languages must be advanced and their status must be elevated.

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[66] For a discussion of the content of language rights, see Davis *et al* (1997) 277 ff.

Section 6(5) states that a Pan South African Language Board must be established, in order to implement the binding constitutional directive to promote multilingualism, foster parity of esteem and equitable treatment of all the official languages, and foster respect for those languages used without official status in the Republic. Parliament established the Pan South African Language Board (PANSALB) as a regulatory agency to carry out the constitutional mandate on language, with the adoption of the Pan South African Language Board Act, 1995 (Act No. 59 of 1995).

Section 29 of the Constitution provides for a language choice in public education; section 30 refers to the right of everyone to use the language of their choice; discrimination on the basis of language is proscribed and language rights in relation to the criminal justice system are contained in section 35.

Authorities on language matters have expressed particular concern for the ability of minorities to maintain their cultural identity in a state where those groups exist within a dominant culture. The task of implementing multilingualism in South Africa is particularly challenging since all linguistic groups are minorities.[67]

5.2.3 National unity and cultural diversity

Both 'nation-statism' and the principle of diversity receive emphasis in the Constitution. Various sections refer to the South African nation and its people,[68] including section 235, which concerns 'the right of the South African people as a whole to self-determination'. On the other hand, diversity underlies all the provisions in the Constitution concerned with culture, language and religion, and a number of others.[69]

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[67] Sacks *Can Law Protect Language? – Law, Language and Human Rights in the South African Constitution* Report submitted to Kingston University (1999) 9.

[68] Preamble and section 37(1)(a); section 41(1)(a),(b) and (d); section 42(3); section 195(1)(i); section 198(a); section 200(2).

[69] The Preamble speaks of being 'united in our diversity' and in section 192 it enjoins the independent broadcasting authority to ensure 'fairness and diversity of views broadly representing South African society'. The right of freedom of association (section 18) does not refer to communities but is indispensible for the collective expression of identity. The same is true for the freedom of expression (section 16), the right to freedom of religion (section 15) and the possibility of legislative recognition of religious or traditional law.

The Constitution encourages the development of a new national identity. The South African nation cannot seek support in a shared language, tradition and ancestry, but has to come to terms with the reality of the cultural diversity and multilingualism. The Constitution identifies 'nation-building' as an appropriate mechanism for managing cultural difference. In practical terms, this national identity could be linked to local culture, language and minority status.

A group is unlikely to adopt a nationalist stance if its distinct identity and practices are accommodated within the institutions of the larger community, linguistic differences are negligible or no history of discrimination exits.[70] A group may be likely to do so if it is capable of forming a viable society on its own.

Nationhood *per se* has an indeterminate nature, yet in its traditional sense, strongly connotes congruence between state, culture and language. If the 'nation' in the description 'nation-state' is regarded as a mere synonym for the terms 'citizenry' or 'denizens',[71] nationhood connotes an imaginary unity with limited cultural content. This reduces the chance of using nation-building to create a contrived official culture.

5.2.4 Multilingualism as a value

Generally speaking, language is a vehicle for the transmission of culture, ideas and information. Language also distinguishes a culture's expression, thus constituting cultural heritage. Language is the means by which citizens access the institutions and processes characteristic of the modern state. A state's practice and preference in the official use of a language affects the level of enjoyment of services and access to public sector jobs. It may also cause ethnic tension. Section 6 is one of the features of the Constitution which provides targeted protection of minority rights.

In deciding which languages to use for official business, national and provincial governments may take into account the following considerations: usage, practicality, expense, regional circumstances and the balance of the needs and preferences of the population in a Province.

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[70] Kymlicka & Marín 'Liberalism and Minority Rights: An Interview' 1999 *Ratio Juris* 133, 141.

[71] Venter 1998 (13) *SAPR/PL* 445.

Separately, the language policy norms and the considerations point in opposite directions, and leave scope to apply the constitutional principles in a way that serves political interest alone. However, if a legal meaning is given to all the terms in the Constitution, and the importance of both equity and diversity is recognised, it becomes plain that the considerations are there to assist the government in its choice of languages. They are not excuses for failing to respect languages.[72]

5.2.5 Cultural pluralism and equality in terms of race

Non-racialism is among the founding provisions and core values of the Constitution. The equality clause in the bill of rights prohibits unfair discrimination on the basis of race.[73] The guarantee of freedom of expression does not extend to the expression of hate based on race, ethnicity or religion.[74]

Section 31 seeks to protect cultural pluralism and tolerance. Its links with article 27 ICCPR are treated in detail below. This section embodies the aspiration to enable a community to preserve its distinct existence in the face of the forces of discrimination or assimilation, which it would otherwise be vulnerable to.[75] Equality is at the centre of the bill of rights, and frames the exercise of the limitation of rights. As such, difference is relevant to the extent that it is dissociated from racial or political inequality and domination.

At the occasion of the ANC's 88th anniversary, President Mbeki described the single greatest task facing Africans and the world at large, as solving the problem of the colour line.[76] It would seem that, to an extent, self-understanding continues to hinge on race.

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[72] Pretorius & Strydom *Local Governments and the Implementation of the Constitutional Directives on Multilingualism* Report on a Joint Project of the Centre for Human Rights Studies (UOFS) and the Free State Centre for Conflict Resolution and Citizenship Education (June 1999).

[73] Section 9(3).

[74] Section 16(2)(c).

[75] Chaskalson (1998) 35-16.

[76] *Citizen* 10 January 2000, 9.

5.3 Allocation of powers

The new Constitution introduces a new conceptual framework. Parliament and provincial legislatures have concurrent legislative competence in the area of cultural matters (Schedule 4). This means that legislation concerning these matters may be enacted in both the national and provincial spheres. A stricter separation between the levels of government may have been problematic. Libraries and museums other than national, as well as 'provincial cultural matters' are listed under the functional areas of exclusive provincial legislative competence.

According to section 104 of the Constitution, provincial legislatures have the power to pass legislation on any matter within a functional area listed in Schedule 4, Schedule 5 and any matter for which a provision of the Constitution envisages the enactment of provincial legislation. Provinces may proceed with legislation regarding these matters in the absence of national legislation. Provinces may also pass legislation on any matter outside these functional areas, which is expressly assigned to a Province by national legislation. As soon as national legislation is promulgated, it may be necessary for Provinces to amend their arrangements accordingly.

5.3.1 Relationship between levels of government

While the formal distribution of powers does not reflect fully and accurately the true relationship between those levels of government, the system nevertheless holds potential for considerable provincial initiative. Each Province can pass legislation in respect of provincial cultural matters that differs entirely from that of another Province.

Venter predicts that the manner in which authority for cultural matters has been distributed, is bound to produce conflict in the legislative and executive spheres. He attributes this to the problematic meaning of the concept 'culture', and the vague criteria for distinguishing between provincial cultural matters and national cultural matters.[77] Thus far, little has come of the prediction.

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[77] Venter 1998 (13) *SAPR/PL* 458.

5.3.2 Provincial structures established thus far

During the transitional phase, the culture structures of all the racial groups underwent transformation. All of the Provinces have developed, or are in the process of developing, provincial laws concerning culture. The following provincial public entities have already been established[78] –

- Gauteng Arts and Culture Council;[79]
- *Amafa aKwaZulu-Natali*;[80]
- North West Arts Council;[81]
- North West Mmabana Cultural Foundation;[82]
- Western Cape Cultural Commission and Cultural Councils;[83]
- Mpumalanga Arts and Culture Council;[84] and
- Free State Centre for Citizenship Education and Conflict Resolution.[85]

Currently, all government levels have both a mandate and an obligation to protect, care for and promote culture. Legislation enacted at both levels is in danger of a lack of co-ordination or different norms and standards, but the most serious peril is that of over-identification with a particular culture.

5.4 Co-operative governance and intergovernmental relations

Co-operative governance and the fostering of intergovernmental relations constitute mechanisms designed to counteract the negative effects that could result from separate levels of government

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[78] Eastern Cape Provincial Arts and Culture Council Bill, 1999; Free State Arts and Culture Council Bill, 1998.

[79] Gauteng Arts and Culture Council Act, 1998 (Act No. 11 of 1998). An interim Gauteng Arts and Culture Council and an interim Gauteng Heritage Council have been in existence since more or less June 1996.

[80] KwaZulu-Natal Heritage Act, 1997 (Act No. 10 of 1997).

[81] 1995 amendment of the North West Arts Council Act (Act No. 37 of 1988); North West Arts and Culture Council Bill, 1998 *GG* Notice No. 5327 of 25 November 1998.

[82] Mmabana Cultural Foundation Act, 1987 (Act No. 15 of 1987); Mmabana Arts, Culture and Sports Foundation Bill, 1998 *GG* Notice No. 5346 of 29 January 1999.

[83] Western Cape Cultural Commission and Cultural Councils Act, 1998 (Act No. 14 of 1998).

[84] Mpumalanga Arts and Culture Council Act, 1999 (Act No. 2 of 1999).

[85] Free State Centre for Citizenship Education and Conflict Resolution Act, 1996 (Act No. 10 of 1996).

passing differing legislation with regard to 'culture'. The Constitution devotes a whole chapter to the concept of co-operative government.[86] Co-operative government has to do with the legal and constitutional framework for facilitating partnerships between spheres of government and non-governmental role-players. The Constitution obliges all spheres of government to co-operate, and exchange information and support. It does not provide a blueprint for the manner in which intergovernmental relations should be conducted, but allows the full range: informal, *ad hoc* or statutory co-operation. One of the principles of co-operative government requires that all spheres must co-ordinate their actions and legislation. The allocation of powers by the Constitution to the different government spheres and the nature of these powers, influence the form that intergovernmental interaction takes.

In respect of human rights, two co-ordinating bodies have been established –

- the National Consultative Forum for Human Rights (NCFHR); and
- the Forum for Independent Statutory Bodies (FISB).

The NCFHR was established under Government's National Action Plan for the Promotion and Protection of Human Rights (discussed below under § 6.), and was approved by Cabinet at the end of 1998. The purpose of FISB is to share information in order to promote best practice, conduct similar activities to share resources where possible and make common representations to government on matters of common interest.[87]

The aspect of co-operative governance renders the Constitution comparatively progressive among federal systems, even among the so-called co-operative federations.

Co-ordination is a pre-requisite of the new legislative framework. Two new statutory bodies have been established –

- the NHC is a co-ordinating body in heritage management, and its activities are focussed on the national heritage and living culture; and

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[86] Chapter 3 is entitled 'Co-operative Government'.

[87] Code of Practice of the Forum of Independent Statutory Bodies, adopted on 15 November 2000.

- the SAHRA Council must promote co-ordination of policy formulation and planning for the management of the national estate at national and provincial levels.

Under the NHRA, each state department and supported body must report to SAHRA. Provincial heritage authorities have a general duty to co-operate and co-ordinate with, and assist local authorities.

Practical conflict management is a true indicator of a well-functioning political system. For this reason, the conflict resolution mechanisms of the Constitution are considered below.

5.5 Conflict resolution under the Constitution

In order to strengthen constitutional democracy in the Republic, chapter 9, section 181 lists a number of state institutions that are meant to function independently and subject only to the Constitution and the law. The Commission for the Promotion and Protection of the Rights of Cultural, Religious, and Linguistic Communities is listed among the institutions designed for these purposes, as socio-economic divisions may undermine democracy.[88] The South African Human Rights Commission and the Commission for Gender Equality comprise the primary tier of rights institutions and have also been listed.

In the area of language, the Pan South African Language Board (PANSALB), while not listed in chapter 9, features prominently in the very first Chapter of the Constitution. PANSALB serves on FISB and attends meetings of the NFCHR as an observer.

The primary role of the constitutional institutions set up in chapter 9 is to support Parliament in its traditional functions. They are to call government to account, strengthening and promoting respect for the Constitution and the law. Together with Parliament, they act as watch-dog bodies over government and organs of state, and they support Parliament in its monitoring function by providing it with information that is derived from a source other than the executive.

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[88] The Department of Constitutional Development approached the HSRC to conduct stakeholder interviews. The HSRC drafted four reports in working draft form and a final report on debates and submissions (22 September 1998).

The relationship between the various statutory bodies outlined in chapter 9 of the Constitution ought to be determined by their main function as mechanisms for conflict-resolution. Constitutional institutions need to work fast to clearly demarcate their roles in relation to one another. The main aspects of the two bodies responsible for conflict resolution are reviewed briefly below.

5.5.1 The Commission for the Promotion and Protection of the Rights of Cultural, Religious, and Linguistic Communities

5.5.1.1 Constitutional provisions

The Commission for the Promotion and Protection of the Rights of Cultural, Religious, and Linguistic Communities provides an institutional framework for protecting the rights to the expression of community identity through culture, language and religion. The constitutional provisions providing for the establishment of this body were included to accommodate the concerns (voiced while the constitutional negotiations were under way), that the rights of cultural, religious and linguistic communities should be directly addressed. Rights of cultural communities include the right to the protection of cultural heritage, which explains the potential relevance of this new structure to the present discussion.

Section 185 describes the Commission as having the following primary objectives –

(a) to promote respect for the rights of cultural, religious and linguistic communities;

(b) to promote and develop peace, friendship, humanity, tolerance and national unity among cultural, religious and linguistic communities, on the basis of equality, non-discrimination and free association; and

(c) to recommend the establishment or recognition, in accordance with national legislation, of a cultural or other council or councils for a community or communities in South Africa.

The Commission may recommend the establishment or recognition of culture-specific councils for cultural communities in accordance with national legislation (section 185(c)). In principle, it would be possible for the Commission to leave the real institutional focus of section 185 to subsidiary councils.

Section 185(4) stipulates that additional powers and functions of the Commission should be

prescribed by national legislation. In February 1998, the President committed Parliament to passing legislation to implement sections 185 and 186 before the end of 1998. This ideal has not been attained, and the process lags more than two years behind schedule.

5.5.1.2 The process

On 4 August 1998, a debate on the implementation of section 185 took place in Parliament. All Provinces held similar debates. The Minister of Constitutional Development requested all Provinces to debate the constitutional requirement for a Commission to be established in order to enrich the legislation. These debates focused on the possible functions and composition of the Commission.[89] The annual national consultative conference was held on 24 September 1999. The Department of Provincial and Local Government was responsible for a first draft of the legislation.[90] The issue of recognition of cultural councils caused significant delays. The last follow-up conference before tabling the Draft Bill was planned for middle April 2000, but was postponed and eventually called off. During April 2000, a Technical Committee consisting of 15 persons was appointed by the Minister for Provincial and Local Government in consultation with the President to assist the Department to finalise the Bill. The Technical Committee concluded their work and handed their Draft Bill to the Minister in June 2000. Further consultations may be decided on, and seem necessary, before submitting it to Cabinet.

One of the primary concerns regarding the Draft Bill[91] is the overlap that exists between Commission functions and the functions of other institutions –

- The Commission to be established has an education function regarding matters concerning the rights of cultural, religious and linguistic communities. In the extent to which these functions co-incide with the Human Rights Commission's function to run information programmes on the Constitution and the bill of rights,[92] the possibility for duplication of functions exists. This need not be regarded as serious, however, since each institution's information programmes are bound to focus on its own work. Most of the Human Rights Commission's programmes have been developed already so that the Commission to be established may supplement that which already exists where necessary.

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[89] *Id.*

[90] Cult. Com Draft 3 (20/9/99).

[91] Cult. Com Draft 5 (15/5/00).

[92] Section 7(1)(a) Human Rights Commission Act, 1994 (Act No. 54 of 1994).

- In respect of complaints concerning the alleged violation of religious and cultural rights, an overlap exists with the work undertaken by the Human Rights Commission. Jurisdictional demarcation will be required regarding investigation of complaints.
- Clause 21(a)(v) of the Draft Bill grants the new Commission the power to facilitate the resolution of conflicts of an inter-cultural, inter-religious or inter-linguistic nature. In terms of clause 21(a)(vi), the Commission may investigate complaints of a cultural, religious or linguistic nature against any person or organ of state. Since this latest draft attributes to the Commission a mechanism to protect the needs and aspirations of communities, careful dovetailing is required with PANSALB's role regarding the investigation of alleged language rights violation complaints.

The Draft Bill does not stipulate what is supposed to happen upon completion of an investigation by the Commission, except for stating that recommendations may be made to Parliament, the President, Provincial Legislatures etc.; and that a legal duty rests on the Commission to consult with PANSALB and to co-ordinate its activities with those of PANSALB. In terms of the Draft Bill, should the Commission decide to investigate complaints of a linguistic nature, PANSALB must be consulted on each new case. Consequently –

(a) where a complaint is lodged with both PANSALB and the Commission, PANSALB will be able to set conditions for collaboration;

(b) in the case of complaints that are lodged with the Commission only, PANSALB will have to share its experience and expertise, which may have a bearing on the matters at hand, with the Commission; and

(c) the possibility exists that complaints lodged with PANSALB may be referred to the Commission for a recommendation by the Commission.

In respect of the Commission's proposed role as facilitator in the case of a conflict arising between different linguistic communities, the potential for overlap is less direct.

The Draft Bill proposes in clause 22(1) that the Commission should have the power –

- to enter into an agreement with another constitutional institution or an organ of state to assist the Commission in the performance of its functions and the exercise of its powers, and
- to delegate to such an institution or organ of state any of its powers, the delegation of which is necessary for the rendering of the agreed assistance.

The first two possibilities mentioned above, namely (a) and (b), have implications for the resources available to PANSALB. PANSALB itself indicated at the beginning of 2000 that it has

a need to strengthen the capacity available in its 'Language Rights and Mediation' focus area.

The investigation of alleged language rights violations is integral to PANSALB's functions. As explained in more detail below, all matters related to language rights, be they on an individual or on a group basis, are the responsibility of PANSALB. The proposed bill therefore ought to steer clear of provisions concerning the investigation of language rights violations, unless those provisions –

- earmark certain types of complaints for investigation by the Commission, or
- effectively support or fill gaps in the investigation procedures of PANSALB.

Currently, the proposed Bill does neither.

In respect of (c) above, findings or resolution of conflict may be accelerated (or delayed) if the Commission takes responsibility for a portion of complaints lodged with PANSALB. The differences between the draft proposal and the Pan South African Language Board Act, 1995, are certain to influence the way in which complaints are handled by the institutions involved. Firstly, no legal duty exists for the Commission to publish its recommendations, as is the case with PANSALB. Secondly, differences exist in the respective provisions concerning the implementation or enforcement of findings. As a remedy for non-implementation of the recommendations of the Commission, the Draft Bill provides that the Commission may hand in a report to Cabinet and the Parliamentary Committee concerned. Contrary to the Pan South African Language Board Act, 1995, the Draft Bill does not refer to –

- the role of the courts; or
- decisions the Commission may take regarding assistance to complainants.

In principle, overlaps in the functions of different constitutional institutions are undesirable, since confusion may arise and effectiveness may be compromised. PANSALB has all the powers in relation to language rights violations spelt out in the Draft Bill for the Commission in the area of complaints of a linguistic nature. However, the Technical Committee proposal differs in many important respects from the provisions in the PANSALB Act on language rights violation complaints. PANSALB and the Commission would be able to co-ordinate their activities, but the

outcome of a specific complaint would differ depending on which institution took charge of the investigation. These differences may ultimately impact on the choice of the institution with which a complaint is lodged.

The criteria for the composition of the Commission will be important. The Draft Bill contains no criteria for the identification of cultural, religious and linguistic communities. A cultural or other council applies to the Commission for recognition, but the Commission only recommends recognition to the President. This is a positive feature of the Bill, since competing cultural councils (established in terms of section 185) within a single culture, or politicised councils, would be utterly defeatist.

The Draft Bill does not attempt to define culture, yet does not subsume religion and language under culture. According to clause 36, in establishing and recognising cultural councils, the Commission must prevent duplication and must liaise with PANSALB, the NAC and 'the NHA', among other institutions. Communities may establish their own councils without the recommendation of the Commission and councils may, but need not, apply for recognition. The council will 'monitor, investigate, research, provide education on, solicit support for and advise and report to the Commission ...' (clause 38). A council may formally request that certain functions of state be devolved upon it.

The relationship between the section 185 Commission and the recognised cultural councils is one in which the cultural council provides a basis for real understanding of the interaction between diverse cultural expression. The role of these councils should be to foster respect for differences as much as for commonalities, realising the differences and working through them so that they can allow us to surpass our limitations.[93]

5.5.2 The Pan South African Language Board

The nature and functions of the Pan South African Language Board (PANSALB) have already been referred to. Amending legislation, which took effect in August 2000, brought PANSALB in

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[93] *Rapport* 28 November 1999, 3.

line with the final Constitution and in particular with section 6. Having several official languages, the actual status of different official languages is determined by subsequent legislation and practice. Also, the exact scope of the right to use an official language may be subject to limitations.[94]

The Board[95] must make recommendations with regard to any proposed or existing legislation, practice or policy dealing directly or indirectly with language matters. It may request information from organs of state[96] and advise them on the implementation of any proposed or existing legislation, policy and practice. Its functions include –

- preventing the use of any language for the purposes of exploitation, domination or division;
- actively promoting conditions for the development and use of all the official languages and of the previously marginalised languages;
- initiating studies and research aimed at reaching the above-mentioned objectives, and *inter alia* also at the non-diminution of rights relating to language and the status of languages;[97] and
- advising on the co-ordination of language planning.

The Board may monitor –

- the observance of any advice given to an organ of state;
- applicable standards (determined by the Board itself) regarding language facilitation services;
- observance of constitutional provisions regarding the use of language; and
- the contents and observance of existing and new legislation, practice and policy dealing directly and indirectly with language matters at any level of government.

In terms of its Act, PANSALB is supposed to oversee the formation and establishment of

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[94] Section 240 of the Constitution already confers a hierarchy on South Africa's languages. A gap has existed with regard to a governmental language policy. An Advisory Panel to the Minister developed a National Language Policy and Plan for South Africa during 2000 and is expected to finalise the Plan and draft legislation associated therewith in the course of 2001.

[95] The Board comprises between 12 and 15 members plus a chief executive officer, who does not have the right to vote in meetings of the Board.

[96] See section 239 of the Constitution.

[97] PANSALB may initiate studies and research and make funds available under section 8(1) of the Pan South African Language Board Act, 1995, subject to the conditions that the Board may determine.

provincial language committees (PLCs)[98] and national language bodies (NLBs).[99] PLCs are provincial structures recognised by the Board, which act as advisory bodies to the Board regarding language matters in, or affecting a particular Province or part of a Province. The Western Cape PLC enjoys legislative backing in the Western Cape Provincial Languages Act, 1998 (Act No. 13 of 1998),[100] but in other Provinces, the provincial laws still await finalisation. The PLCs will have to play a key role in ensuring the implementation of the proposed national language plan and policy.[101]

PANSALB is in the process of establishing national language bodies (NLBs) where the need exists.[102] The PLCs and NLBs are important examples of advisory bodies that may promote parity of esteem and equitable treatment of all official languages through a higher measure of co-operative governance.

PANSALB is furthermore charged by its Act with establishing national lexicography units (NLUs) for each of the official languages of the Republic as section 21 companies (companies not for gain, generally established for a social, cultural or religious purpose). PLCs and NLBs must nominate some of the directors of these companies.[103] In the case of commercial companies, the members are the owners of the capital of the company, and usually make that capital available to the company. In the case of NLUs, the members are the speakers of the language concerned, the 'owners' of the intangible cultural heritage, and the object of the companies is to record the

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[98] The relevant procedures are set out in Board Notice 120 of 1997, *GG* No. 18554 of 15 December 1997.

[99] The relevant procedures are set out in Board Notice 121 of 1997, *GG* No. 18554 of 15 December 1997.

[100] Section 14 of this Act refers to the PLC's obligation to advise PANSALB on language matters in or affecting the Western Cape. This body has a dual reporting obligation: to PANSALB, where PANSALB has provided funding for projects, and to the MEC or the Provincial Parliament, where the provincial department has funded projects.

[101] See *Final White Paper on Language* (9 December 1999) and the *National Language Policy and Plan for South Africa*, prepared by the Advisory Panel to the Minister (29 February 2000). These documents were presented at a Language Indaba held in Durban, 29-31 March 2000. DACST presented a draft Language Policy Bill on that occasion. A subsequent draft was also developed.

[102] The establishment of an NLB for Afrikaans has pertinent implications for the *Suid-Afrikaanse Akademie vir Wetenskap en Kuns*, which exists in terms of the 'Wet op die Suid-Afrikaanse Akademie vir Wetenskap en Kuns, 1959 (Wet No. 54 van 1959)'.

[103] This process has pertinent implications for the 'Wet op die Woordeboek van die Afrikaanse Taal, 1973 (Wet No. 50 van 1973)'.

language of a particular linguistic community. The relative level of development of languages is considered in the establishment of structures.

The Board, the provincial committees, language bodies and lexicography units could make a real contribution to the development and use of the indigenous languages. However, limitations in respect of powers, budget and access to government could render the language bodies mere tokens.[104]

The measure of historical disadvantage or privilege of a language is an important factor in the Board's overall planning, and also affects the 'Language Rights and Mediation' focus area.

In monitoring language policies, practices and legislation, PANSALB must counter deep-seated attitudes in government that financial cost or administrative burden constitutes a reason not to investigate and take language preferences in a particular region into account. The Board considers language statistics and the geographical distribution of languages in its decisions on language rights violations.

5.6 Content of language rights

Language rights are a key instrument in the realisation of other human rights. Human rights conventions proscribe language discrimination because language is considered crucial to the exercise of rights.[105] In South Africa, language rights are based on the individual human rights tradition of ensuring equality and non-discrimination to all in accessing their rights.[106] It is also grounded in the following needs –

- the need to show respect to existing cultural and linguistic communities;
- the need to protect the cultural heritage of linguistic communities; and

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[104] Sacks *Can Law Protect Language? – Law, Language and Human Rights in the South African Constitution* Report submitted to Kingston University (1999) 7.

[105] UDHR; Article 26 ICCPR.

[106] Not everyone agrees that language rights form an essential part of a democratic society. The so-called Africanists in the ANC would disagree, and there are individuals within the Afrikaans-speaking community who also hold this conviction.

- the need to enable citizens to be active and equal and to take part in an open and democratic political and legal process.

A linguistic community is free to choose to protect its language through the complaints system of PANSALB. PANSALB is legally obliged to investigate all written complaints concerning alleged language rights violations,[107] and has the power make findings regarding language rights violation complaints.[108] Practical conflict management is possible under section 11 of the Pan South African Language Board Act, 1995.

In a significant decision from the perspective of language rights in South Africa, *S v Pienaar,*[109] the accused's right to legal representation was defined. The accused and his legal representative (provided by the state) spoke different languages. The accused's right to legal representation was held to include the right to be informed that the state can and will make available a legal representative who is proficient in the language spoken by the accused. Since this crucial information was not provided, the accused had to go free.

The *Pienaar* case provides support for the discourse of language rights. Much depends on the claims and demands of the speakers themselves.

5.6.1 Enforceability of language rights findings

The Pan South African Language Board Act, 1995, does not grant coercive powers to enforce the findings of the Board nor does it spell out the types of relief the Board may seek from a court of law. The legislation does refer, however, to the rendering of financial or legal assistance when a case is brought to court. In principle nothing prevents the Board from approaching Cabinet, Parliament and the President with regard to the implementation of its findings. Cabinet and

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[107] Section 11(4)(a) of the Pan South African Language Board Act, 1995.

[108] Certain 'jurisdictional requirements' must be met, namely that of section 9(3) and 11(5) of the Pan South African Language Board Act, 1995. See *e.g. A.E. van Nierkerk/the Premier and Speaker of the Northern Cape Legislature GG* No. 20592 of 5 November 1999; *Various/Municipality of Bloemfontein, Glover et al/ESKOM and Radio Pretoria/International Broadcasting Authority GG* No. 21115 of 28 April 2000. In general also Mischke 'Diversity and the Silencing of Languages: What Effect Will the Decisions of PANSALB have on South African Workplaces?' 2000 (10) *Contemporary Labour Law* 15.

[109] Unreported decision by Buys J, Rev. No. 77/00 NCD 18 May 2000.

Parliament are not the only, or even the primary mechanisms for enforcement of its decisions. Proposals for extending PANSALB's enforcement powers are currently serving before Parliament.

5.7 The right to self-determination

Section 235 of the Constitution[110] allows, among others, for the recognition in terms of national legislation of the notion of self-determination of a community sharing a common cultural and linguistic heritage 'within a territorial entity in the Republic or in any other way'. Section 1.1 ICCPR and ICESCR both contain this idea.

Cultural associations and institutions may affect the efficiency with which the cultural heritage is protected.[111]

Authorities agree that the implication of section 235 is that any ethnic minority may claim legislative provision for self-determination in a territorial entity inside the Republic. Self-determination in its internal sense is permissible. However, there are diverging opinions regarding entitlement to external self-determination.[112] Arguably, a minority will only be entitled to the right of secession if the government prevents it from participation in the democratic process.

5.8 Bill of rights

Many of the rights enunciated in the bill of rights are indirectly concerned with the expression of identity through culture, language and education. Three sections are specifically aimed at minority protection and the right to a community identity –

- section 29 contains a right to education in the language of the individual's choice;

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[110] When the final Constitution was drafted, CP XXXIV was repeated in section 235. Chapter IIA provided for the establishment of a *Volkstaat* Council to enable proponents of a *Volkstaat* to constitutionally pursue its fulfilment.

[111] *Certification of the Amended Text of the Consitution of the Republic of South-Africa, 1996* 1997 (1) BCLR 1 (CC) at 14A. Self-determination in the context of CP XII was considered to be related to what may be done by way of the autonomous exercise of associational individual rights in the civil society of one sovereign state.

[112] Chaskalson (1998) 35-34; Venter 'Die Betekenis van die Begrip "Selfbeskikking" in die Grondwet en die Implikasies Daarvan' 1994 *Tydskrif vir Geesteswetenskappe* 268, 269.

- section 30 restrains interference (by the state or by private individuals and institutions) with an individual's right to use the language of his or her choice;
- section 31[113] accords a similar protection to persons belonging to a cultural, religious or linguistic community.

Close links exist between culture and other recognised fundamental rights as central elements in the construction of personal identity: among others, the right to education, the right to freedom of religion, belief and opinion, the right to freedom of expression and the right to property. Notably, the bill of rights classifies the 'freedom of artistic creativity and scientific research' under the right to freedom of expression (section 16) and not under the right to culture. It is not immediately apparent where the protection of the tangible cultural heritage and the right to patents and copyright of the author or artist to benefit from the moral and material interests resulting from a scientific, literary or artistic output, fit in.

5.8.1 The right to culture

Due to what was considered to be 'politically palatable', collective rights for minorities were not otherwise guaranteed in the bill of rights. The right to culture (in the sense described in sections 29–31) was accepted in most of the draft proposals for a bill of rights[114] and is elaborated on in the 1996 Constitution.

The bill of rights entrenches a right to free cultural activity. It focuses on the individual. The language and culture clause (section 30)[115] is no exception. Section 30 contains a qualification clause and states that –

> **Language and Culture**
> Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.

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[113] Compare section 27 ICCPR.

[114] Clause 18 of the SA Law Commission's draft Bill of Rights, prepared after concluding its report on recognition and protection of group rights. SALC Working Paper 25: Project 58: *Group and Human Rights* (1989) 1; background in Chaskalson *Constitutional Law in South Africa* (1998) 35-3 to 35-4.

[115] Section 31 of the 1993 Constitution reads: 'Every person shall have the right to use the language and to participate in the cultural life of his or her choice'.

Section 31 highlights the community-related aspects of culture, capturing the dimension of group-forming. The three categories of community (cultural, linguistic, religious) mark the section as the rights component of section 185 in chapter 9 concerning institutions supporting democracy. The Commission to be established in accordance with sections 185 and 186 of the Constitution may be seen as one of the ways of claiming the protection of the right, but also as the implementation agency of the right, which could be rendered meaningless otherwise.

Section 31 states that –

> **Cultural, Religious and Linguistic Communities**
> 1. Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community –
> (a) to enjoy their culture, practise their religion and use their language; and
> (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

Section 30 of the 1993 Constitution and section 31 of the 1996 Constitution follow the language of the ICESCR, the Banjul Charter and the UDHR in granting a right to participate in a cultural life. The collective dimension of the right is clear.[116] The right protected is the right of an individual to speak his or her language, to hold a religious opinion or to engage in a cultural practice in concert with others. As such, the right seeks to protect the 'very bonds which constitute a defined community'.[117]

5.8.2 Standing of the right to culture in South Africa

Any firm commitment to the anti-discrimination principle, as evidenced in the South African bill of rights, implies that irrational classifications on the basis of immutable personal characteristics need to be erased. However, recognition and protection of the rights of ethnic minorities may stand in direct opposition to this commitment.

The standing of the right to culture in South Africa is linked to the question of when 'cultural

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[116] Individuals can only exercise these rights in association with 'others of like disposition' according to the decision in *In Re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (1) BCLR 1 (CC) § 24.

[117] Davis *et al* (1997) 291.

membership' becomes legally relevant in a society.[118] One may ask whether the right not to be discriminated against is not sufficient to accommodate the right to cultural identity?

The UN Charter and the UDHR both focus on human rights for individuals, and not on group rights for minorities. The approach was that whenever someone's rights were violated or restricted on account of a group characteristic, *e.g.* culture, the matter could be taken care of by protecting the right of the individual mainly through the principle of non-discrimination.[119] The purpose of the non-discrimination and equality guarantee is, after all, to protect disadvantaged groups, including cultural minorities. The implication of this approach is that the complement, or bulwark, of a collective approach is not necessary.[120]

The structure of international minority rights protection indicates that effective protection requires measures aimed at protecting minority identity. Some minorities seem to need group autonomy for development. Lip-service to non-discrimination leaves scope for unfavourable treatment of the culture of certain groups or interference with their culture.[121]

In the constitutional court judgment *EP Gauteng Provincial Legislature*,[122] Sachs J recommended that the principles of equality and cultural diversity should be harmonised in the interest of both. In reaction, other authors have pointed out that a so-called 'rainbow jurisprudence' is not always realistic.[123] Some cultural practices or the practices of some cultural institutions are not only different, but also prejudicial to individual rights and objectionable to outsiders, in that they allow or promote inequality and discrimination. Protection of equality and non-discrimination may undermine the autonomy and identity of a cultural institution. The right to culture may relate to the equality clause in a way that essentially subjects it to the equality clause, but this may be

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[118] Brest 'In Defence of the Anti-Discrimination Principle' 1976 (90) *Harvard Law Review* 1; Davis *et al* (eds) (1997) 283.

[119] Sachs J in *EP Gauteng* 1996 (4) BCLR 537 (CC) [59] F.

[120] Beukes 1995 *SAYIL* 141.

[121] Dlamini in Van Wyk *et al* (eds) (1994) 573.

[122] *In Re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC); 1996 (4) BCLR 537 (CC).

[123] Cockrell 'Rainbow Jurisprudence' 1996 *SAJHR* 1, 35.

necessary if the Constitution is to be applied coherently.[124]

To insist on noticing cultural pluralism in a South African context is to risk labelling people. Labels are certain to separate us from truth; to ignore differences in the South African context strips unique identity and democracy of all meaning. 'A state committed to cultural pluralism cannot simply remain neutral as its cultural patrimony fades into a dull uniformity'.[125]

Individuals have the option to participate in the broader society, as well as the option to seek solidarity with their cultural groups without being penalised for that choice. The linguistic structure of the Constitution and the historical context of its adoption seem to underscore that individual choice stands above cultural identification. The right to culture must be construed in a context that 'includes the history and background to the adoption of the Constitution, other provisions of the Constitution itself and in particular, the provisions of the bill of rights of which they are part'.[126] The internal limitation operative in respect of the right to culture means that it does not enjoy priority among fundamental rights.[127]

5.8.3 Content of the right to culture in South Africa

The UN human rights committee argues that positive measures are required and will be permissible for minority rights protection as long as they are aimed at correcting conditions that prevent or impair the enjoyment of the rights of members of communities.[128]

What is the meaning of the right to culture in the South African context? We must remain aware that the particularities of culture can conflict with the political rhetoric of nation-building and *ubuntu*. The value-driven injunctions of the Constitution are varied and in many instances, inconsistent. Nonetheless, an objective and consistent interpretation of the values in the Constitution is imperative in a multicultural constitutional state. The values and content of

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[124] Chaskalson *Constitutional Law of South Africa* (1998) 35-24.

[125] *Ibid.* 35-18.

[126] *S v Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (4) BCLR 665 (CC) at § 10.

[127] See Venter 1998 *SAPR/PL* 455-456.

[128] Chaskalson (1998) 35-10.

particular cultures must necessarily bow to the values of the Constitution. Yet, even if the right to participate in the cultural life of one's choice is low down on the hierarchy of rights, the state cannot escape from the wide range of obligations regarding culture imposed on it by the Constitution.

Is the right to practise culture a right to be allowed or tolerated to engage in minority activities, or does the right presuppose a right to active support for those activities? Can the liberal state continue to remain neutral or is it insufficient to merely provide an opportunity for cultural communities to pursue their own interests? The UN Human Rights Committee's interpretation of Article 27, if transplanted to section 31, would require non-interference with a community and its initiatives to develop and preserve its culture. It may also require positive measures in support of vulnerable or disadvantaged communities that do not have the resources for such initiatives. Other proponents of the recognition of identity or diversity have also argued for a firm public policy actively securing the future of cultural communities.[129]

To balance out the various interests of different minorities (not protecting any one group against another),[130] cultural pluralism must be recognised. Recognition may be formal or implicit, but may never view 'groups' as 'defensively separated from each other'.[131] Sachs J stated that when rights are by their very nature shared and interdependent, striking appropriate balances between the equally valid entitlements or expectations of a multitude of claimants should be seen as defining the circumstances in which the rights may most fairly and effectively be enjoyed, and not as imposing limits on those rights.[132]

Balancing cultures in protecting, promoting and realising universal human rights, raises the

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[129] Strydom 'The International and Public Law Debate on Cultural Relativism and Cultural Identity: Origin and Implications' 1996 *SAYIL* 1, 22-23 with reference to Taylor and Walzer; see also Taylor 'The Politics of Recognition' in Gutmann (ed.) *Multiculturalism* (1994) 25 ff.

[130] *EP Gauteng Provincial Legislature: In Re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill 1995*, 1996 (3) SA 165 *per* Sachs at [81] D.

[131] Currie in Chaskalson *et al* (eds) *Constitutional Law of South Africa* (1998) 35-3.

[132] *Soobramoney v Minister of Health (KwaZulu-Natal)* 1997(12) BCLR 1696 [54] E.

question whether cultural rights are directly enforceable. In the noteworthy *Soobramoney*-case,[133] the constitutional court continued with the interpretation that the protection, promotion and fulfilment of socio-economic rights cannot imply direct supply of funds. No right exists to require a benefit or positive assistance from the state where the availability of resources serves as a qualification.[134] The state would, however, be obliged to take reasonable legislative and other measures to realise the right progressively.[135] The programmatic-type provisions define objectives for the state to pursue through policies and legislation at national level. The state must plan and prioritise and may not interfere with membership of a cultural group. The internal limitation in respect of socio-economic rights implies that the state cannot completely and immediately fulfil all those rights. In fact, the effective implementation of socio-economic rights may undermine the human rights dispensation.[136] The obligation of the state covers the promulgation of laws that grant individuals the legal status, rights and privileges required to ensure them of the protection of the right and the ability to create and conceptualise. Positive measures taken by the state to protect the identity of a minority and the rights of members to enjoy and develop their culture will not violate the non-discrimination clause, provided these measures are aimed at correcting conditions that prevent enjoyment.

It probably comes closest to the real sense of the state's duty to state that the state must allow members of minorities the right to practice their culture, their language, and their religion without assistance, without hindrance, without oppression and without interference from any source. Ensuring that there is no interference may impose a positive obligation on the government, and may even require it to actively secure the future of a particular community or employ resources to develop a particular culture.

If government is committed to cultural pluralism, it may have to surrender its neutrality from

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[133] It was decided that the applicant, a kidney-patient, had no right to regular dialisis, given the demand on the state's health budget and its responsibilities in areas such as housing and social security.

[134] Medical treatment to prisoners diagnosed as HIV-positive was considered and ordered in *Van Biljon v Minister of Correctional Services* 1997 4 SA 441 (C). For a comparison between the *Van Biljon* and *Soobramoney* cases, see Mdumbe 'Socio-economic Rights: Van Biljon versus Soobramoney' 1998 (13) *SAPR/PL* 460.

[135] See De Vos 'Pious Wishes or Directly Enforceable Human Rights' 1996 *SAJHR* 67.

[136] Kruger 1994 *Stell LR* 28.

time to time and do more than allow people to practice their own culture. An entrenched right to cultural activity may not always be enough for constitutional and legal purposes.

International experience emphasises the activity, practised together with other members of the community and the right to engage in that cultural activity or event or service, in institutions such as schools, libraries, museums, historical monuments and places of worship.[137] International jurisprudence concerning 'the right to participate in a cultural life' will continue to exert a measure of formative influence on South African law.[138]

The South African Constitution prevents the state from embarking on programmes calculated to destroy the physical and cultural existence of particular groups.[139] It may not, for example, pass legislation that would prevent the use of a particular language in public places.

5.8.4 International human rights law

Section 39 of the Constitution gives an interpretative role to public international law in relation to Chapter 2. It orders a court, when interpreting the bill of rights, to consider international law.[140] Effectively this means that the approach to culture in public international law and international human rights documentation must inform the interpretation of the bill of rights. Comparable foreign case law may be referred to, but since it forms an essential part of international human rights law, there is scope for the argument that it would have to be studied (but not necessarily followed). The underlying reasoning in these cases indicates that the norms that apply in other open and democratic societies are available as a repository of principles that may be adopted or rejected on substantive grounds.

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[137] Davis *et al* (1997) 293.

[138] *Ibid.* for a discussion of relevant case law.

[139] Sachs *EP Gauteng* [70] I.

[140] Dugard 'The Role of International Law in Interpreting the Bill of Rights' 1994 *SAJHR* 200; Botha 'International Law and the South African Interim Constitution' 1994 *SAPR/PL* 245. Booysen argues that the executive is also bound by the duty to consider international law, and that there is no duty to consider customary international law, but a duty to comply with it. Booysen 'The Administrative Law Implications of the "Customary International Law is Part of South African law" Doctrine' 1997 *SAYIL* 46, 55. Further references are contained in Keightley 'Public International Law and the Final Constitution' 1996 (12) *SAJHR* 405.

While not necessarily a safe guide to the interpretation of Chapter 2 of the Constitution, international human rights instruments play a significant role in the development of South African human rights jurisprudence in view of the constitutional interpretation clause and section 233. Section 233 requires that courts, when interpreting legislation, must prefer a reasonable interpretation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

5.8.5 Section 31 and its traces

Section 31 of the Constitution can be traced to the text of Article 17 of the Banjul Charter, which, in turn, is reminiscent of Article 27 of the ICCPR. Its inclusion appears to have been the result of a last minute compromise between dominant political parties in the Constitutional Assembly, but further developments in the European standard-setting process augur increased significance thereof in the South African context.[141]

Section 31 contains specific minority protection.[142] Both section 31 and Article 27 ICCPR contain a negative formulation of collective community rights. However, marked differences also exist. Section 31 –

- protects *cultural communities*, not ethnic minorities. As such, it avoids numerical quantification and emphasises the protection of cultural/religious and linguistic diversity instead of minority or ethnic protection.[143] Section 31 avoids identification of a distinctive group of right-holders to convey that the Constitution protects 'connectedness', not division and fragmentation;
- specifically includes the right to form, join and maintain community or linguistic associations and other organs of civil society;
- contains an 'inconsistency' qualification not found in Article 27 ICCPR;
- binds not only the state but also natural and juristic persons; and
- qualifies the right by rendering it subject to the other rights in Chapter 2.

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[141] Strydom 'Minority Rights Protection: Implementing International Standards' 1998 (14) *SAJHR* 274.

[142] Chaskalson (1998) 35-5; 35-19.

[143] *Ibid.* 35-15.

Article 27 ICCPR does not recognise minorities as collective entities with legal personality and rights. It grants an individual right, which is not to be confused with the collective right of peoples to self-determination. Its enjoyment, however, presupposes a community of individuals and association with that community with similar rights. This view is in line with the General Comment issued by the UN Human Rights Committee on Article 27. The comment states that rights protected under Article 27 ICCPR are individual rights, the exercise of which depends on the collective ability of the minority group to maintain its culture, language or religion.[144]

The formulation of section 31 remains very similar to that of Article 27 ICCPR. The emphasis is on protecting ties of affinity rather than genealogy.[145] The individualistic phrasing of the right in section 30 and its careful avoidance of any mention of 'minority' or 'community' ensured that no controversy arose over its inclusion. The inclusion of the section 31 right to tolerance and support of practices of communities means that section 30 provides merely an additional basis for an individual's interest in joining or maintaining links with a particular cultural community.[146] The section 31 right attaches to a collective. The individual expression of a collective right may differ, of course, from the collective expression thereof.

While recent years have seen an expansion of cultural rights from the individual to peoples, the communal cultural right of section 31 seems to be subordinate to the right to equality.[147] Interpretation and implementation of section 31 requires the balancing of the interests of the community with those of the individual.[148] In order not to prejudice an individual's right to participation in a cultural institution, section 31 requires the state to refrain, at least, from threatening the existence of that institution.

The interpretation of Article 27 ICCPR through the reports of Special Rapporteurs that

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[144] *Ibid.* 35-13.

[145] See, *e.g. Lovelace v Canada* (Communication no. R.6/24), (1985) 68 ILR 17; *Kitok v Sweden* (Communication no. 197/1985), 96 ILR 637. Also the HSRC Report on Debates and Submissions concerning the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (1998).

[146] Chaskalson (1998) 35-25.

[147] Davis *et al* (1997) 292.

supplement international instruments and academic treatises, is certain to continue to affect the interpretation of section 31.

6. THE NATIONAL ACTION PLAN

The Government developed a National Action Plan for the Promotion and Protection of Human Rights (NAP)[149] in response to the recommendation of the *1993 Vienna Declaration and Programme of Action*[150] adopted by the World Conference on Human Rights in Vienna, Austria.[151] The 1998 NAP sets out what has been done so far in relation to sections 31, 185, 186 and 235 of the Constitution. It lists the Universal Declaration of Human Rights, the ICESC and the Banjul Charter as the principal international obligations in the area of the freedom of culture, religion and language.

The NAP assesses the current measures (policies, legislation and administrative steps) in place and identifies areas that require improvement. The section on legislation and administrative steps covers the following structures –

- the Pan South African Language Board;
- the Council of Traditional Leaders; and
- statutory bodies established by DACST to advance cultural rights, namely –
  - the National Arts Council;
  - the National Heritage Council; and
  - the National Film and Video Foundation.

No reference is made to Provincial Arts Councils. The NAP identifies as major challenges, the enactment of a National Languages Act and providing PANSALB and the Council of Traditional Leaders with adequate resources.

The National Consultative Forum for Human Rights (NCFHR) was established under the NAP

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[148] Chaskalson (1998) 35-15.

[149] December 1998.

[150] See Part I chapter 2.

[151] See Part I chapter 2.

'to integrate human rights across government'. Its terms of reference include monitoring the implementation of the NAP, co-ordinating human rights training and establishing a mechanism for treaty-reporting on human rights instruments. Detail in respect of treaty law and the Constitution follows in chapter 10.

7. CONCLUSION

The new order brought with it a clear distinction between race and culture. Equality and the commitment to a non-racial society constitute foundational values, but cultural characteristics and diversity are recognised. The particular way of life of an identifiable group of people or meaningful expressions of a particular community are both recognised and protected in the Constitution. Both national unity and cultural pluralism receive emphasis. The Constitution also embodies values that transcend the differences between cultures. Among these is the value of regulating the exercise of rights by placing the emphasis on mutual enjoyment of rights.

One of the widely shared values embodied in the Constitution is the promotion and protection of culture, language and religion in the interest of peace, friendship, humanity and tolerance. Culture needs to be, and can be, squared with the concept of *ubuntu*, which requires application not only within an own culture but also in multicultural situations.

A common African culture is not yet a reality in South Africa.[152] The original vision may have been lost, and political and ideological meanings of 'culture' may explain why this is so. The insistence upon 'Africanisation' may mean that politics is no longer a means to a richer life for all, but that culture is instrumentalised to serve political ends. The danger exists that art could be reduced to an instrument in the political struggle. A common culture has a chance to develop only through a genuine striving to deal with conflict within human culture.

Conflict resolution is an important theme of the Constitution. Conflict may be generated and exacerbated by the very pressure for consensus and harmony. Many a one-party state in Africa has shown up the lie of values designed to tame political differences. Conflict is the spark that

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[152] Beukes *Kultuur: 'n Staatsregtelike Perspektief* LLD-thesis UNISA (1991) 34.

sets the constitutional state in motion.[153]

Provision of adequate resources is a special challenge in respect of the implementation of cultural and linguistic rights. Nonetheless, proper planning goes a long way in ensuring that a difference is made. A uniquely South African approach must be forged on the basis of constitutional values. The NCFHR ought to assist and contribute to the protection of cultural heritage. However, at present, its terms of reference cover only reporting on human rights instruments.

In modern society, the state cannot distance itself from culture. The state cannot have an overpowering presence in the cultural life of society either. This is the balancing act to be performed in a cultural state. Its path will not follow a simple straight line. A balance of involvement and restraint will have to be sought and found in the values upon which the Constitution rests, from one moment to the next.

The right to culture may be described as fundamental to the enjoyment of other fundamental human rights, such as the right to equality and human dignity. It is an individual right with collective dimensions. The protection of the right to culture extends to 'community adhesion'. This interpretation of section 30 does not pose a threat to diversity. It takes account of the interest of individuals in the recognition and protection of the cultural integrity of the communities to which they belong. The collective interests of groups are recognised, and the right to language and culture is available to groups.

Individual rights and group interests are not mutually exclusive concepts. A dialectic relationship exists, however, between negative cultural freedom and positive cultural participation of citizens. Individual and group interests in cultural integrity, for example, may diverge.

Section 31 seeks to protect the same values that are protected in Article 27 of the International Covenant of Civil and Political Rights –

- cultural pluralism;

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[153] Wiechers 'Grondslae van die Moderne *Rechtsstaat*/Foundations of the Modern *Rechtsstaat*' *WA Joubert Commemorative Lecture* Unisa, 1998.

- tolerance; and
- enabling a community to preserve its distinct existence against the forces of discrimination or assimilation to which it would otherwise be vulnerable.[154]

Tolerance and the balancing of rights require that South Africa, a popular destination market for cultural objects, expresses its regard for the diversity of its cultures, by desisting from acting as a clearing house for unlawful trade. In doing so, it has to consider foreign and international legal developments that affect rights to cultural heritage.

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[154] Chaskalson (1998) 35-16.

CHAPTER 9

THE NEW LEGISLATIVE FRAMEWORK

1. INTRODUCTION

As soon as the existence of severe real and potential political conflict was recognised and the mechanisms to deal with that conflict found expression in the Constitution, new statutory measures in the sphere of culture and heritage became inevitable. Measures were developed to fulfil institutional needs, address technical requirements and provide procedures designed to facilitate co-existence, exchange, and interaction of cultures. New national and provincial structures were set up during the transition, and these were granted specific cultural powers, competencies and mandates for participation on different levels.

Since the introduction of a representative system of government in 1994, numerous pieces of old order legislation that related directly or indirectly to the organisation of culture,[1] had to go or be amended. New legislation, meant to be in line with the 1996 White Paper on Arts, Culture and Heritage and the constitutional dispensation, was adopted by Parliament in 1998 and 1999. Where old order legislation still exists, it is either in the process of being redrafted or it is now interpreted to be fully congruent with the new constitutional order.

Commentaries on cultural heritage legislation are not widely available in South Africa.[2]

The most important principle of legislative interpretation is to ascertain and apply the purpose of all legislation in the light of the Constitution. The purpose of the legislation must be determined with the aid of all the factors and considerations that have a bearing on the legislation, including

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[1] The Archives Act, 1962 (Act No. 6 of 1962), and Heraldry Act, 1962 (Act No. 18 of 1962) are examples of legislation concerned with conservation of the material culture.

[2] Readings include Van Blerk 'Law and Art' 1984 *De Rebus* 120; Richings 'Historical Monuments' in *LAWSA vol. 11* WA Joubert (ed.) (1981) §§ 1-30; *LAWSA Cumulative Supplement* Part 1 (1993) Faris (ed.) 711 ff; Teurlings *Guide to Legislation concerning the Cultural Environment* (1993); Van der Walt 'Possibilities for the Conservation of the Built-up Environment in Current South African Statutory Law' 1987 *Comparative and International Law Journal of Southern Africa* 209 ff.

intra- and extra-textual aids. Ultimately, as *S v Makwanyane* instructs, an interpretation should give expression to the underlying values of the Constitution.[3] This approach forms a stark contrast compared to the 'literalist-cum-intentionalist approach'[4] that prevailed before 1993.

Property theory has formed part of law reform initiatives after the new dispensation took effect,[5] but the conceptual framework suited to the evaluation of property rights is not explored in detail.

One of the ironies of Africa's cultural heritage is that, with few exceptions,[6] the best examples are in Europe and America. Museums are being transformed to promote the heritage of all South Africans. Zimbabwe and Kenia are among the few countries on the continent where museums exist. In South Africa, museums are becoming increasingly cash-strapped and resource-deprived, and regular thefts from cultural institutions and general neglect are not improving the outlook.

Recent examples of losses include the Cape silver collection of the National Cultural History Museum, Royal Doulton from the Sammy Marks Museum and paintings from the National Gallery in Cape Town.[7] Suspensions and forensic audits regularly become necessary when lax security, non-existent records and inventories at some museums contribute to losses of valuable stock.[8] Historic artworks and photographs of the Free State provincial legislature were badly damaged and destroyed through inadequate storage.[9] Most recently, R500 000 worth of coins was noticed to have gone missing from the Cultural History Museum in Pretoria between 1990 and

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[3] *S v Makwanyane & Another* 1995(3) SA 391 CC § 9; also *Soobramoney v Minister of Health (KwaZulu-Natal)* 1997(12) BCLR 1696 (CC) [16]-[17].

[4] Du Plessis 'Constitutional Interpretation in South Africa: Taking Stock' Paper read at a conference on *Interpreting a Bill of Rights* Potchefstroom University for CHE (9-11 April 1992) 6.

[5] See chapter 12.

[6] *E.g.* the Mapungubwe-find, the precurser to the Great Zimbabwe culture, dates from the period 1000 – 1300 A.D. For the first time since its discovery in 1932, it is on display at the University of Pretoria. See *Beeld* 8 February 2000, 10; *Sunday Times Lifestyle* 8 October 2000, 4.

[7] *Pretoria News* 30 November 1999, 18.

[8] In January 2000, the whole Police Narcotics Museum disappeared, but prosecution is hampered by the fact that no inventory was kept. The Museum was intended to educate social workers and those involved in the fight against drugs. *Mail & Guardian* 7-14 January 2000, 2.

[9] *Sunday Times* 10 October 1999, 19.

1999.[10]

Since this chapter puts the emphasis on the heritage aspect of the new legislative framework, the arts and culture aspects are treated very briefly. The following laws are given more detailed treatment –

- the National Heritage Council Act, 1999 (Act No. 11 of 1999) (NHCA);[11]
- the National Heritage Resources Act, 1999 (Act No. 25 of 1999) (NHRA);[12] and
- proposed language legislation.

More particularly, the following aspects are discussed –

- Structures responsible for 'heritage resources' under the heritage legislation
- The new system for heritage resources management
- Heritage resources legislation at the provincial level
- Legislation pertaining to intellectual property rights
- A new framework for language.

Provincial legislation will be referred to only where particularly significant to the themes under discussion.

2. ARTS AND CULTURE LEGISLATION

2.1 National level

A large number of arts and culture laws have been promulgated by national government to give shape to the policy framework. These include –

- the Cultural Institutions Act, 1998 (Act No. 119 of 1998),[13] which provides for the payment of subsidies to certain cultural institutions and establishes a National Museums Division;

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[10] *Pretoria News* 14 April 2000, 2.

[11] The National Heritage Council Bill was published in 1999 [B 23-99].

[12] The National Heritage Bill appeared in the course of 1997 and was published for comment in 1998 [B139-98].

[13] This Act entered into effect on 1 April 1999. DACST carried out a review of Declared Cultural Institutions to revise the conceptualisation of national museums and promotion of co-operation with provincial museum structures. Whereas funding allocations were intended to become subject to performance measures or performance indicators, the Act merely states in section 2 that the National Minister responsible for culture must pay a subsidy to a declared institution for the purpose, on the basis and subject to the conditions, which the Minister determines in consultation

- the Culture Promotion Act, 1998 (Act No. 35 of 1983),[14] which is concerned with bursaries and the promotion of cultural relations with other countries;
- the National House of Traditional Leaders Act, 1997 (Act No. 10 of 1997),[15] in terms of which the National House of Traditional Leaders may advise the government on the customs of communities observing a system of customary law; and
- the National Arts Council Act, 1997 (Act No. 56 of 1997),[16] which establishes the National Arts Council as government's primary channel for distributing public funds for the arts.[17]

Under the Culture Promotion Act, 1983, regional councils have the following functions –

- to preserve, develop, foster or extend culture as it finds expression in the region for which it has been established; and
- to make recommendations as to how culture may best be preserved, developed, fostered or extended in particular by means of non-formal education of adults and the youth.

The infrastructure of the arts and culture economy is poor. Among the causes for the poverty are mismanagement and corruption, which also impede the African Renaissance.[18] A forensic investigation at the State Theatre in Pretoria, instituted to 'put an end to improper financial

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with the Minister of Finance. The Public Finance Management Act, 1999 (Act No. 1 of 1999), will compensate for this lack of focus.

[14] In terms of the Culture Promotion Act, 1983, the National Minister responsible for culture may take a variety of steps in order to develop and promote arts and culture in the Republic (*e.g.* bursaries and grants for study tours to foreign countries) and to develop and promote cultural relations with other countries (*e.g.* bursaries to foreigners for study or research in the Republic). The Act empowers the Minister to establish regional councils for cultural affairs. The Minister appoints all the members of these councils. The Act was last amended in 1998 by the Culture Promotion Amendment Act, 1998 (Act No. 59 of 1998).

[15] National House of Traditional Leaders Act, 1997, section 7(2)(1)(iv).

[16] The National Arts Council Act, 1997, came into operation on 1 November 1999. Its funding priority is 'organisations or projects of national importance with national implications or as part of nation-building' (Regulation 12(2)). The general criteria include the national impact of the project, and the reconstruction and development criteria include the 'extent to which the organisation or project contributes to culture as a means of reconciliation, which will contribute towards national unity'. The Regulations were promulgated in *GG* No. 20591 of 1 November 1999 and contain a code of conduct for Council members.

[17] The FCA's infrastructure and resources have been incorporated by and transferred to the National Arts Council (NAC). One of its principal tasks is to advise the Minister on the allocation of core funding to declared cultural institutions. While it will make grants to promote and develop national heritage activities, it will not distribute public funds to artists, cultural institutions, NGOs and CBOs itself, nor will it provide bursaries to practitioners, administrators and educators. Opportunities exist for private sector involvement in discipline-based panels to advise on the merits of funding applications and policy matters in committees established by the Council to assist it in the performance of its functions. The National Arts Council allocated 628 bursaries in the course of the two year period 1997-1999. *Beeld* 15 May 1999, 7.

[18] *Per* President Mbeki; *Citizen* 10 January 2000, 9.

management' resulted in restructuring during the first half of 2000[19] and a decision to close down the Theatre in June 2000. Its existing deficit was R29 million.[20] The Minister of Arts, Science, Culture and Technology plans to reopen the Theatre in April 2001, after a new Council has been appointed to manage it.

2.2 Provincial level

As indicated previously, some Provinces have adopted their own legislation on Arts and Culture Councils. Among them are –

- The Gauteng Arts and Culture Council Act, 1998 (Act No. 11 of 1998), which creates a Council comprising seven members.[21] The Arts and Culture Council must keep the MEC informed, and report to communities on the criteria it uses for processing applications for funding;
- The Mpumalanga Arts and Culture Council Act, 1999 (Act No. 2 of 1999), which creates a Council of not more than ten members. The Council may grant bursaries and loans, conduct research, conduct arts and culture workshops and initiate projects (section 11); and
- The Western Cape Cultural Commission and Cultural Councils Act, 1998 (Act No. 2 of 1998), which creates a Council of not less than ten and not more than 14 members, who must work with prevailing cultural and linguistic realities. This body is empowered to consider the registration and deregistration of cultural councils (section 11).

The definitions of culture in the provincial legislation are not prescriptive and generally subsume 'heritage' under the definition of 'culture'. For example, the Western Cape Cultural Commission and Cultural Councils Act, 1998, defines culture as –

> the dynamic totality of distinctive spiritual, material, intellectual and emotional features which characterise a society or social group. It includes the arts and literature, but also modes of life, the fundamental rights of the human being, value systems, traditions, heritage and beliefs developed over time and subject to change.

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[19] *Pretoria News* 11 April 2000, 1; *Beeld* 19 April 2000, 7.

[20] *Rapport* 18 June 2000, 5; *Naweek Beeld* 24 June 2000, 6.

[21] During the interim phase, an Interim Arts Council was established for Gauteng to support forms of high art which were believed to be integral components of our South African heritage, and to provide significant public support to cultural development in historically marginalised communities, artists and groups who did not receive public funding in the past. However, it did not operate on the basis of any acceptable guidelines or legislation.

3. HERITAGE LEGISLATION

3.1 National Heritage Council Act, 1999

Under the National Heritage Council Act, 1999 (NHCA), representation in the Council is both heritage specific (*e.g.* with representatives of the Heraldry Council and Board of the National Library) and provincial (each MEC nominates one individual to represent the interests of the Province concerned). The Minister appoints at least five additional members, who are appointed for fixed terms that do not coincide with the election cycle. In terms of section 5, a number of chairpersons from other culture bodies form part of the Council. These include chairpersons of the SAHRA Council, the National Archives Commission, the Heraldry Council and the Board of the National Library.[22]

This inclusive approach to the constitution of the National Heritage Council (NHC), underscores the varied and extensive co-ordination functions captured in the legislation. Advising the Minister on national policies in respect of heritage matters is by no means the only task of the Council. The Council must heighten co-operation, consultation and co-ordination on a variety of matters, including the transformation of the heritage sector. Section 10 provides that the Council must co-ordinate the activities of public institutions involved in heritage management in an integrated manner to ensure optimum use of state resources and consult and liaise with relevant stakeholders. An important function of the NHC is to investigate ways and means of effecting the repatriation of South African heritage objects presently held by foreign governments or institutions and individuals outside South Africa.

An arms-length agency may be able to prevent cultural structures from coming under threat of majority rule and will ensure that politicians and bureaucrats do not become the arbiters of cultural taste. This was the hope expressed in the 1996 White Paper. Art practitioners generally felt that government ought to maintain an arms-length relationship with the arts.[23] Maintaining a distance between the government and the institution that is authorised to differentiate between culture and non-culture holds several potential advantages –

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[22] *GG* No. 21118 of 28 April 2000.

[23] *White Paper* 13-15; memorandum to the Arts and Culture Council Bill.

- it makes it less likely that culture would be used as a mechanism of exclusion or a barrier between people;
- it makes it less likely that culture would be used as a political strategy; and
- the management of cultural matters and cultural heritage is more likely to be autonomous and transparent.

However, it is vital that certain basic criteria are met. These include the following –

- that the legal mandate of the decision- or policy maker be distinct and free from ministerial control;
- that professional criteria for appointment of the policy maker are prescribed;
- that both the legislative and the executive branches of government are involved in the appointment; and
- that the source of funding be reliable and exempt an agency from civil service salary rules.

The Minister and MECs are responsible for appointment of altogether 14 among a possible 20 members in accordance with 'special competence', 'experience' and 'interest'. 'Interest' is not a professional criterion. Moreover, the legislative branch is not involved in the process of appointment.

The 1996 White Paper[24] envisages that the NHC will be concerned with living heritage projects in Provinces and local communities. The NHCA refers specifically to the oral history and the protection, preservation and promotion of orature. The NHCA defines 'living heritage' as 'the intangible aspects of inherited culture'.

According to the 1996 White Paper, the NHC will act on recommendations for new sites to be declared national monuments, or for objects to be declared cultural treasures.[25] This function of declaring monuments and cultural treasures was ultimately given to a different structure under the National Heritage Resources Act, 1999, namely the NHRA. It is further envisaged by the White Paper that the NHC will liaise with international heritage organisations regarding the World

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[24] *Id.* Chapter 6 'International Cultural Co-operation' 36.

[25] *Id.* Chapter 5 'Heritage' 33.

Heritage List.[26] This is not borne out in the NHCA.

3.2 National Heritage Resources Act, 1999

The National Heritage Bill was first tabled in the first Parliamentary session of 1997 and was passed as the National Heritage Resources Act, 1999 (Act No. 25 of 1999) (NHRA) in March 1999.[27] The NHRA aims to create an integrated framework for the preservation of the cultural heritage, in so far as it caters for management, development, participation and access. It is supposed to maximise co-ordination across all the fields of national heritage conservation.

The NHRA defines 'heritage resource' as 'any place or object of cultural significance'. The concept of the 'national estate' includes the entirety of the non-renewable cultural resources and may include –

- places, buildings, structures and equipment of cultural significance;
- places to which oral traditions are attached;
- historical settlements and townscapes;
- landscapes and natural features of cultural significance, etc.

As is the case with the 1972 World Cultural and Heritage Convention and the 1985 Convention for the Protection of the Architectural Heritage of Europe, the scope of this definition covers monuments, groups of buildings and sites. The reference to oral traditions is original.

Indicators of the significance or value of an object are found in section 3(3). These are –

- its importance in the community, or pattern of South Africa's history;
- its possession of uncommon, rare or endangered aspects of South Africa's natural or cultural heritage;
- its potential to yield information that will contribute to an understanding of South Africa's natural or cultural heritage;
- its importance in demonstrating the principal characteristics of a particular class of South Africa's natural or cultural places or objects;

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[26] *Id.* Chapter 6 'International Cultural Co-operation' 36.

[27] Deacon & Bezuidenhout 'Current and Pending South African Legislation on the Import and Export of Cultural Property' Paper read at a *SAMA Workshop* Durban (20 November 1996)

- its importance in exhibiting particular aesthetic characteristics, valued by a community or cultural group;
- its importance in demonstrating a high degree of creative or technical achievement at a particular period;
- its strong or special association with a particular community or cultural group for social, cultural or spiritual reasons;
- its strong or special association with the life or work of a person, group or organisation of importance in the South African history; and
- sites relating to the history of slavery in South Africa.

Places and objects complying with these criteria are considered to be part of the national estate. The criteria go beyond what the Waverley criteria contain, and are more descriptive of the relationship between the person, community, nation and the object than any of the national systems analysed in Part I. The list furthermore includes most of the criteria referred to by the Commonwealth Scheme.

The term 'heritage resources' used in the Act encompasses the wide variety of places and objects which are valued by society for their cultural significance. A 'heritage object' is described as an object or collection of objects, whether specific or generic, that is part of the national estate and the export of which SAHRA deems it necessary to control, including –

- objects recovered from the soil or waters of South Africa;
- visual art objects;
- military objects;
- numismatic objects;
- objects of cultural and historical significance and of scientific and technological interest;
- books, records, documents, etc.; and
- objects to which oral traditions are attached and which are associated with living heritage.

The rather unique emphasis on oral traditions and living heritage aside, this list brings to mind the categories of movable cultural assets contained in the Mozambique legislation.

3.3 SAHRA and the SAHRA Council

SAHRA and the SAHRA Council are structures established in terms of the National Heritage Resources Act, 1999 (NHRA), and are responsible for 'heritage resources' under the NHRA. SAHRA enjoys wide powers, including the power to identify and manage the national estate. SAHRA can protect items or places of historical importance by declaring them heritage objects or sites. The affairs of SAHRA are under the control, management and direction of the SAHRA Council. While SAHRA has an advisory role in respect of the SAHRA Council, it is the SAHRA Council's duty to advise the Minister.

The SAHRA Council comprises a maximum of 15 members appointed by the Minister. Nine of these must represent the Provinces. The chief executive officer of SAHRA is a member of the SAHRA Council and other members must represent sectoral interests and reflect the cultural and demographic characteristics of the population.[28] The NHC and SAHRA are linked together through the Chairperson of SAHRA who serves as a member of the NHC.

3.3.1 Functions of SAHRA

In terms of section 13 of the National Heritage Resources Act, 1999, SAHRA's general functions are –

- to establish national principles, standards and policy for the identification, recording and management of the national estate in terms of which heritage resources authorities and other relevant bodies must function;
- to co-ordinate the management of the national estate by all state agencies and other bodies and monitor their activities to ensure that they comply with national principles, standards and policy;
- to identify, record and manage nationally significant heritage resources and keep permanent records of such work; and
- to advise and assist authorities responsible for the management of the national estate in the provincial or local sphere.

In terms of the NHRA, the need for consolidation and co-ordination of information on heritage

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[28] Section 14 NHRA.

resources requires SAHRA to compile and maintain an inventory of the national estate.[29] The complete absence of statistical data on theft and trafficking in cultural objects has always been a major difficulty. As in many common law and developing states, no state or official registration of corporeal movables in South Africa has existed to date, nor has an inventory for the reliable documentation of title to serve as a basis for pre-empting illicit export or checking on the provenance of artworks been compiled. The means of checking provenance is not technologically advanced. This explains, in part, why individuals continue to remove artefacts from new archaeological sites, *e.g.* where industrial and roads development takes place.

3.3.2 Functions of SAHRA Council

The main functions of the SAHRA Council are to advise the Minister on heritage resources management and promote the co-ordination of policy formulation and planning for the management of the national estate in the national and provincial spheres.

3.3.3 Preliminary conclusion

The NHRA does not place SAHRA under the authority of the NHC, but under the authority of the SAHRA Council.[30] As such, SAHRA serves under a body that is responsible for policy co-ordination, and not for heritage management, although it is also charged with the management of heritage resources (see above under 3.3.1). The extent to which its mandate will be free from ministerial control remains to be seen.

4. THE NEW SYSTEM FOR HERITAGE RESOURCES MANAGEMENT

The South African Heritage Resources Agency must, in consultation with the Minister responsible for arts and culture and every MEC responsible for cultural matters, establish a grading system for the evaluation of places and objects that form part of the national estate. A three-tier system for heritage resources management has thus been established –

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[29] Section 39 NHRA. Section 32(7) read together with section 39 NHRA set out the requirements in respect of the inventory and relates how it will work. The register contains declared heritage objects. It has two parts. Part I contains heritage objects listed by type and Part II contains specific heritage objects. Specific heritage objects may have been listed in the inventory of a public museum in South Africa, be otherwise displayed or kept in secure conditions, in which case they must be listed in Part IIA of the register. Other specific heritage objects must be listed in Part IIB.

[30] Section 11 NHRA.

- SAHRA is responsible for national sphere functions, for the identification and management of Grade I heritage resources and resources within the ambit of the Act. It co-ordinates and manages the national estate;
- provincial heritage resources authorities are responsible for functions in the provincial sphere, *i.e.* the identification and management of Grade II heritage resources and heritage resources that are deemed to be a provincial competence; and
- local authorities are responsible for functions in the local sphere, *i.e.* identification and management of Grade III heritage resources and resources that are deemed to be a local competence.

The system must distinguish between categories that broadly correspond to national and provincial heritage authorities and local authorities, but the system is open-ended –

(a) Grade I comprises heritage resources with qualities so exceptional that they are of special national significance;

(b) Grade II comprises heritage resources which, although forming part of the national estate, can be considered to have special qualities that render them significant within the context of a Province or a region;

(c) Grade III comprises other heritage resources worthy of conservation.

Furthermore, the system must prescribe assessment criteria for heritage resources, consistent with the criteria contained in section 3(3) NHRA, *e.g.* association with a particular community or cultural group or association with the life or work of a person, group or organisation of importance in the South African history.

4.1 Exportation

In order to prevent illegal exportation of objects 'worthy of conservation', the NMC had decision-making power over what conduct was potentially harmful to cultural objects and enjoyed authority to issue permits to export. It could attach conditions to a particular export, but had to act in consultation with the Minister of National Education. To prevent removal of certain cultural objects, export control was used in accordance with the Waverley criteria, which generally satisfy the GATT standard for valid cultural property export controls.[31] However, the export policy was never focused sharply on highly significant objects in well-defined categories,

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[31] See Paterson 1995 *UBCLR* 244.

and the export control system has now been revised.

Under section 32 of the National Heritage Resources Act, 1999, SAHRA may declare an object to be a heritage object, and the same goes for collections, a type of object or a list of objects. It may make regulations relating to the registration of dealers in heritage objects and the control of trade in heritage objects. An export permit is needed and a process of investigation by expert examiners has been provided for in the event of an application for an export permit. Export permits and any other kind of permit, *e.g.* to reproduce a national heritage site, are now covered by extensive regulations.[32] Owners of and people planning to emigrate with, *e.g.* early silverware or rare Africana, will have to apply for a permit, even if the object is a family heirloom.

The expert examiner and SAHRA must consider whether the object –

(a) is of outstanding significance by reason of its close association with South African history or culture, its aesthetic qualities, or its value in the study of the arts or sciences; or

(b) is of such a degree of national importance that its loss to South Africa would significantly diminish the national heritage.

If the object fulfils both criteria, a permit to export the object permanently may not be recommended or issued. The applicant may notify SAHRA that he or she requires the compulsory purchase[33] of the heritage object concerned, within 30 days after refusal. SAHRA must then do one of the following –

- establish a delay period if it has reason to believe that a person or public authority in South Africa may make a fair offer to purchase;
- offer to purchase for itself or on behalf of another authority; or
- in any other case, issue an export permit.

The unauthorised export of African art, which may or may not have been sold voluntarily, raises

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[32] Regulations in terms of section 25(2)(h) of the National Heritage Resources Agency *GG* No. 21239 of 2 June 2000.

[33] Compulsory purchase has now become possible in terms of section 32(25) NHRA.

complicated issues regarding the limits of the law.[34] For example, preventing the sale of artefacts made Ndebele-style by a non-Ndebele may raise the objection that the Ndebeles do not hold an ethnic monopoly. In the case of the relatively poor communities, strong economic incentives exist for trade, while nationalistic sentiments may be weak. Compulsory purchase is no clear solution, but at least it confers on the owner a right that also serves the quest to retain our heritage.

The legislation must be commended for not having placed a blanket prohibition on sale. Laws designating certain objects as sacred, *extra commercio*, 'indefeasible', 'imprescriptable', 'inalienable' or unavailable for sale, do not always satisfy the enacting government's original aims. Developed nations – which reap significant benefits from the international flow of art – are inclined to deny the full effect of these laws. Domestic legislation on international cultural resources designed to protect foreign materials does not always prevent this tendency. The public law character of a governmental claim for possession of native art treasures and cultural finds may pose an insurmountable obstacle in actions for return instituted abroad. Moreover, the effect of a decision not to return an object may be defended as 'protection' of a certain 'international treasure'. Yet, such a noble intention may come dangerously close to cultural imperialism and neo-colonialism where the integrity of a work is dependent on its setting. The best solution in that situation may require that the object be returned safely and restored and preserved by the source nation.

4.2 Public ownership and private ownership

The earlier drafts of the National Heritage Bill prepared the ground for recognising a government claim to title over palaeontological and archaeological materials and sites, meteorites and fossils. The legislative framework now contains a governmental claim to title of all archaeological objects, palaeontological material and meteorites.[35] Thus, in future, objects found on heritage sites will become state property.

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[34] It has been suggested that the focus of an inquiry as to whether 'permission' was given should be on how customary law views the capacity of a putative transferor to convey title. See Walker and Ostrove 'The Aboriginal Right to Cultural Property' 1995 *UBCLR* 13, 25; also Radin 'Property for Personhood' 1982 (34) *Stanford Law Review* 957.

[35] Section 35(2) NHRA.

South African law never made a broad declaration of state ownership over cultural objects during the old order. Laws of state control or national treasure legislation did not exist. Cultural property was classified as *res intra commercium*, and not as *res communes* or *res publicae*. As explained in chapter 7, South African common law recognised those things that are not owned by anybody as *res nullius*, a term that includes things which the owner has abandoned.[36] The South African legal system relied solely on administrative controls and imposed statutory limitations if private property was declared to be 'conservation-worthy'. Listing a property did not affect ownership rights, control, or decisions to alienate the property in any way,[37] nor did it alter existing rights of access.[38] The tangible memorials of a collective South African past remained within the bounds of commercial intercourse, as *res in commercio*, susceptible of private ownership.

South African case law is familiar with the concept of *bona vacantia*.[39] While royal prerogatives in respect of unowned or unclaimed things have not been received into our law, there is conflicting authority on the accrual of abandoned property to the state. Especially in respect of property abandoned at sea, there is much uncertainty. The Salvage and Wreck Act, 1996 (Act No. 94 of 1996),[40] contains provisions on the protection of wrecks and grants the South African Maritime Safety Authority the power, under certain circumstances, to deal with shipwrecks in the manner it deems fit. The Authority may investigate claims to title of shipwrecks within the territorial waters of the Republic. This law fits into the category 'vesting laws'.[41]

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[36] Grotius 2.1.50; Voet *Comm ad Pand* 1.8.3.

[37] The NMA deferred to private ownership. If the property in question was privately owned, the Minister could make a permanent declaration in respect of movable and immovable property only when the owner had consented. Prescribed procedures are to be followed when consent is not forthcoming.

[38] Declaration did not affect existing rights of access, apart from the fact that the NMC may authorise any person, subject to the provisions of any other law, to enter upon any land or premises at any reasonable time, for the inspection of the property for purposes of the Act (section 14 NMA).

[39] Silberberg & Schoeman *The Law of Property* (2ed.) (1983) 205-7; Van der Merwe *Sakereg* (1989) 225; Van der Merwe & De Waal *The Law of Things and Servitudes* (1993) 118-9. Sonnekus *Enkele Opmerkings na aanleiding van Bona Vacantia as Sogenaamde Regale Reg* Inaugural lecture delivered at the Rand Afrikaans University (1984) 9-15, 25-7 indicates that land attached by the state may become government property through *occupatio*.

[40] The Act incorporates the 1989 International Convention on Salvage into South African law.

[41] Van Meurs expresses reservations over an assertion of state ownership based solely on the physical presence of such artefacts within the state's territorial jurisdiction. See Van Meurs 'Legal Aspects of Marine Archaeological Research' 1986 *Acta Juridica* 83, 100.

South Africa lacks experience with legislation vesting ownership in the state and its legal tradition does not support claims to government title. Under the old dispensation, there was no provision for seizure to transfer ownership upon breach of South African export control regulations or the NMA. Forfeiture and confiscation provisions[42] were not directed at securing the enjoyment of historic articles for the people of South Africa in the territory of South Africa. Used as a penal sanction, confiscation had little chance of securing the return of an object through enforcement of the law in a foreign jurisdiction. Consequently, the old order legislation had almost no chance of success.

Imposition of a penal sanction against an individual by means of civil law (in the absence of a criminal conviction or even a criminal charge) still raises a constitutionality issue.[43] As such, civil forfeiture ordered by a US court, for example, may be open to constitutional attack and US law may not be enforced here.

American courts would not disturb the possession of the current owner in an action for recovery, unless the South African government could show ownership or possession. Excavation laws are certain to complicate matters in so far as they deal with questions regarding authorisation and not with the removal of excavated finds from the territory (except to state that a permit is required). Where the material in question has not yet been 'declared' or where it was in private hands (compare the ceremonial mace before its return to South Africa referred to in chapter 7) an American court will reject a suit brought by an institution for breach of export control. The public character of material is not always apparent. Material may be recovered from sites undiscovered at the time of enactment, the link with the site may be unclear, material may remain undocumented, or the material may reside in private hands or collections after enactment of export control or claim to title.

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[42] For an overview of these, see Pretorius & Strydom 'The Constitutionality of Civil Forfeiture' 1998 (13) *SAPR/PL* 385.

[43] *Ibid.* 400. Procedural safeguards such as, for example, the right to be presumed innocent, the conventional burden of proof, the right against self-incrimination and the 'equality of arms' principle are jeopardised.

4.3 Government regulation of private property rights

Government regulation of private property rights has become more extensive in respect of cultural objects. The new legislative framework places no restrictions on *who may own* cultural objects. State and provincial bodies, state-subsidised or private bodies or corporations as well as private individuals may own and alienate cultural objects. However, the NHRA places a number of limitations on the incidences of ownership. An owner of an object listed in Part II of the register is restricted, for example, in that he or she –

- must notify SAHRA of the new name and address in case of change in ownership;
- may not undertake or allow restoration or repair work without a permit;
- may not remove the object from South Africa without an export permit or certificate of exemption; and
- may have to allow examiners to evaluate the application.

Other obligations on the owner of an object listed in Part II include that he or she –

- must keep the object in good condition and in a secure place; and
- must report loss of or damage to such an object to SAHRA.

The new constitutional order opened a new conceptual framework for private property rights, resulting in a shift in the relative position and value of rights.[44] Private property rights (real and personal) may be more readily limited or circumscribed by the context and society's interests, than what the hierarchical rights theory of Grotius and the pandectists would allow for. Clearly, the statutory law in the area of heritage conservation does not support ownership as an absolute right. Societal interests may limit rights that function in the context of conservation, since property rights can be created for a specific need and a specific context and be supported by legislation.

4.4 Contracts

The National Heritage Resources Act, 1999, relies on the in-built flexibility of contracts for the

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[44] Van der Walt 'Towards a Theory of Rights in Property: Exploratory Observations on the Paradigm of Post-Apartheid Property Law' 1995 (10) *SAPR/PL* 298, 322.

purpose of so-called 'heritage agreements'.[45] SAHRA or a provincial heritage resources authority may enter into an agreement with a provincial authority, local authority, conservation body, person or community in respect of the conservation, improvement and presentation of a heritage resource. The owner of the heritage resource must give his or her consent and may add or delete provisions. The agreement may regulate aspects such as maintenance, management, custody, occupation or use, restriction of rights, access, presentation, notice, financial assistance and payment of expenses.

In principle, this mechanism ought to strengthen the capacity of local spheres for example, to manage their affairs.

The NHRA contains a provision concerning the restitution of heritage objects that form part of the national estate and are held by or curated in a publicly funded institution.[46] The institution is obliged to enter into a process of negotiation with the claimants regarding the future of the resource. If a settlement cannot be reached, there is the possibility of an appeal to the Minister, who must act in a spirit of compromise and must come to a final decision on the safe future of the resource through conditions set for access by claimants, the institution concerned or any other interested party.

4.5 Effectiveness of enforcement powers: do they overreach?

As pointed out before, neither confiscation nor forfeiture of cultural objects exported without a permit, was an option under the NMA, although it was allowed under general customs and penal laws. General customs and penal laws are not sensitive to cultural and historical significance of objects.

Certain statutory provisions authorise the forfeiture of objects used in connection with the commission of a crime to the state by an order of court, in terms of a particular confiscation clause, as *bona caduca*. Forfeiture relates only to the specific objects referred to in the order, and

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[45] Section 42 NHRA.

[46] Section 41 NHRA.

ownership passes to the state when the order is handed down. Forfeiture orders used to be issued only if the finder exported the materials himself.[47]

The new system introduces heritage inspectors as enforcement measures for regulatory bodies. Officials may be appointed as heritage inspectors to monitor compliance with the legislation.[48] Each member of the South African Police Service and every customs officer is deemed to be a heritage inspector. Heritage inspectors are authorised by the NHRA –

- to record information;
- to enter and investigate premises;
- to search and seize, stop and detain;
- to confiscate evidence, or order cessation of work;
- to perform an arrest; and
- to take action to prevent the commission of an offence.

Under section 51 NHRA, a court may order forfeiture to SAHRA of any vehicle, craft, equipment or any other thing used in committing of an offence. Civil forfeiture is a drastic measure and a person facing civil forfeiture enjoys few due process and fair trial safeguards.[49] The constitutionality of this section may require testing.

Local art experts have described the measures as 'draconian'.[50]

5. HERITAGE LEGISLATION AT PROVINCIAL LEVEL

Certain transitional laws at the provincial level establish institutions to take on the role of heritage conservation agencies. Where these structures exist, they could conceivably take on the role of provincial heritage resources authorities provided for under the NHRA, 1999.

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[47] *See inter alia* section 35(1) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), and various nature conservation ordinances. Van der Merwe & De Waal (1993) 185.

[48] Section 50 NHRA.

[49] Pretorius & Strydom 1998 (13) *SAPR/PL* 403.

[50] *Sunday Times* 4 April 1999, 7.

The Western Cape Cultural Commission and Cultural Councils Act, 1998, is a structure for arts, culture and heritage (principally linguistic heritage). The cultural councils represent a community or communities sharing a common cultural and linguistic heritage. They may apply to the Cultural Commission for registration, and work without remuneration. Cultural councils may report to the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (to be established) any matter relating to the constitutional and other rights of the community concerned, and may report any cultural threat to the Cultural Commission for possible investigation and proposed solutions.

In Mpumalanga, two separate pieces of legislation deal with heritage –

- The Mpumalanga Arts and Culture Council Act, 1999 (Act No. 2 of 1999), which defines 'culture' as including 'heritage'; and
- The Mpumalanga Archives Act, 1998 (Act No. 14 of 1998), which is only concerned with the preservation and use of the provincial archival heritage.

In theory, the Mpumalanga Arts and Culture Council has to look after the interests of the provincial heritage, yet the Act does not contain any express provisions in this regard. The Gauteng Arts and Culture Council comprises arts, culture and heritage representatives, and must perform a dual function.

The KwaZulu-Natal Heritage Act, 1997(Act No. 10 of 1997), the Act in terms of which 'Heritage KwaZulu-Natal' is established,[51] contains an extensive list of immovable sites and movable objects under its definition of 'heritage resource'. Traditional building techniques are also mentioned. Thus far, the Free State Province has only passed a Provincial Archives Act, 1999 (Act No. 4 of 1999). None of the other Provinces has adopted heritage legislation.

6. A NEW FRAMEWORK FOR LANGUAGE

Public and private institutions take *ad hoc* language decisions that tend to negate the constitutional requirements relating to language. The use of English is often justified with

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[51] The body is charged with the conservation, protection and administration of the heritage resources of the Province.

reference to what is 'reasonable in South Africa', since 'everyone understands English'.[52] In the absence of national standards, the solution to the challenges of multilingualism is sought in a language policy that discriminates against all other official languages in equal measure. A steady drift to the exclusive use of English is eroding the democratic rights of a large section of the South African population and may impact negatively on the linguistic heritage over a period of time.

For purposes of national legislation, government still uses English and Afrikaans for publication. White Papers and discussion documents are issued primarily in English and Afrikaans. Hansard is published only in English but in theory, any official language may be used in Parliament and any official language may be used for external communication.

Most Provincial governments are proceeding as before, using English and Afrikaans. Only the Western Cape has enacted legislation, which provides that all official communications must be published in English, Afrikaans and *isiXhosa*.[53] The Free State has adopted *Sesotho* as a third language by resolution. More by default than conscious decision, other Provinces have chosen to retain the bilingual system inherited from the old order. PANSALB is currently implementing a strategy devised to empower the Provinces to follow the example of the Western Cape and to strengthen the hands of the Provincial Language Committees (PLCs), to provide the impetus for addressing the language issue in the Provinces.

A study of the implementation of the constitutional directives on language by the courts offers much of interest to the discussion. Traditionally all court proceedings could be conducted in either English or Afrikaans. The Department of Justice declared its intent to use English as the only language of record in the courts in November 1999.[54] The Department has been

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[52] A number of authoritative surveys, the most recent being *National Sociolinguistic Survey of Language Use and Language Interaction in South Africa* conducted by MarkData on behalf of PANSALB (September 2000) indicate that this is not the case. See *Beeld* 8 September 2000, 2.

[53] Western Cape Provincial Languages Act, 1998 (Act No. 13 of 1998).

[54] Sacks *Can Law Protect Language? – Law, Language and Human Rights in the South African Constitution* Report submitted to Kingston University (1999) 20.

experiencing a measure of discomfort on account of its expressed objectives.[55]

In *S v Matomela*,[56] the question of the use of an indigenous language, *isiXhosa*, as the language of record in court proceedings, was raised. The parties were *isiXhosa* speaking and no one present on the day of the hearing spoke a language other than *isiXhosa.* No interpreter was available. Basing his decision on section 6(1), (2) and (4) of the Constitution, the presiding magistrate concluded the case in *isiXhosa*. He also referred to section 35(k) concerning the right to a fair trail, which includes the use of a language the accused understands. Tshabalala J (as he then was) conducted the automatic review of the case. He referred to the necessity to have the record translated for the benefit of the appeal judges, and recommended that the Department adopt one language of both proceedings and record throughout the country, although he acknowledged that 'all official languages must enjoy parity of esteem and be treated equitably'.[57]

In the course of the investigation of an alleged language rights violation complaint by PANSALB, the Department was invited to make submissions. It relied on the *Matomela* case and on *Mthethwa v De Bruin NO and Another*,[58] where the court considered whether it was 'practicable' for the accused to be tried in a language he understood, but it did not prefer for the purpose of the court proceedings. The accused was an *isiZulu*-speaker and a teacher who was also proficient in English. The regional court did not allow proceedings to be conducted in *isiZulu*, and the decision was confirmed on review on the basis that the appointment of judges and court officials does not yet reflect the cultural diversity of the country. The court decided that in regional courts all proceedings should be conducted and recorded in English or Afrikaans, any other language being impracticable. In the circumstances, section 35(k) did not give the accused the right to have the trial conducted in the language of his or her choice.

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[55] *E.g. Sowetan* 25 May 2000, 2.

[56] 1998 (3) BCLR (Ck).

[57] At 342. This was odd, considering that an agreement existed at the time between the Attorney-General and the senior State Advocate (respectively Afrikaans- and *isiXhosa*-speakers) that any record of the proceedings in a language not understood by the judge concerned, be accompanied by a translation of the record in a language that could be understood.

[58] 1998 (3) BCLR 336 (N).

In *S v Mabena*,[59] where 16 co-accused appeared in a transit heist trail, Grobbelaar J denied two of the co-accused the right to have the docket and charge sheet translated into their indigenous languages (*Setswana* and *Sesotho sa Leboa*). The finding was motivated by the delay the translation would cause in the proceedings and the scope of the docket (3000 pages).

The decision to exclude Afrikaans as a language of record in the courts prompts a consideration of factors such as the relationship between official status and the primary functions of government, constitutional recognition of the multicultural nature of the state, and access to justice.[60] Citizens need to access information, public services and resources, and to avail themselves of opportunities that exist.

Various other departments of state follow contentious language practices, but these will not be covered in detail.

The 1996 Task Force Report recommended that an end be put to exclusion through language practices. The next section deals with the action taken on this proposal.

6.1 National Language Policy and Plan

An Advisory Panel was tasked, at the end of 1999, to come up with a language policy and implementation plan for a multilingual dispensation that gives effect to the Constitution's norms on language policy in South Africa. A Language Indaba took place in Durban in March 2000 to consult relevant stakeholders. A Second Draft of the National Language Policy and Plan for South Africa became available in June 2000.[61]

This language policy is intended as –

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[59] *S v Mabena & 15 others* CC 86/99 (TPS) vol. 3 196-7.

[60] Strydom 'Die Grondwetlike Bepalings oor Meertaligheid' Paper read at the *FAK Conference on Language and the Courts* Centurion (21 March 2000)

[61] The Advisory Panel on Language Policy to the Minister of Arts, Culture, Science and Technology *National Language Policy and Plan for South Africa* 5 June 2000.

> an enabling framework for promoting South Africa's linguistic diversity and encouraging respect for language rights within the policy framework of building and consolidating a united democratic South African nation.

The Department of Arts, Culture, Science and Technology (DACST) is supposed to oversee the implementation of the Policy and Plan for South Africa.

In essence, a rotation model is proposed in order to ensure 'parity of esteem and the equitable use of the official languages'. According to the Plan, four categories of languages must be adopted on a rotational basis in relevant government structures, except in instances where –

(i) all 11 official languages have to be used; and

(ii) the availability of document(s) in a particular language is essential for the stable and effective operations of government at any level. In such cases, documents should be translated into the relevant language.

The language categories are –

- Nguni language group (*isiNdebele*, *isiXhosa*, i*siZulu*, *siSwati*);
- Sotho language group (*Sepedi*,[62] *Sesotho*, *Setswana*);
- *Tshivenda* / *Xitsonga*; and
- English / Afrikaans.

Only those departments specifically involved in the implementation of the policy in DACST's view, were consulted after the Second Draft became available. These were the Justice Department, the Department of Public Service and Administration, the Department of Education, the Department of Communications and the Department of Finance. It is not clear why a more comprehensive consultation process was not followed, since virtually all state departments are affected by the implementation of the Plan.

The Policy and Plan was submitted to Cabinet on 19 September 2000, but in November 2000 the Advisory Panel was reconvened to revisit the Plan and the associated Draft Bill and to provide a

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[62] PANSALB decided on 17 August 2000 that *Sesotho sa Leboa* is the correct designation for this language.

cost estimate for implementation thereof. It is highly doubtful that it will be finalised before the end of 2001.

6.2 South African Languages Bill

The Draft Languages Bill was made available on 17 May 2000. The Draft Bill incorporates the four categories of languages referred to in the policy document. The crux of the model is contained in clause 5 of the Draft Bill. It proposes that the national government[63] must use not less than four languages for –

(i) intra- and inter-departmental oral communication in all spheres of government;

(ii) intra- and inter-departmental written communication in all spheres of government;

(iii) oral communication with the public;

(iv) written communication with the public; and

(v) international communication where applicable,

provided that these languages shall be selected by each organ of state from each of the four categories of official languages on a rotational basis, except when it is reasonably necessary to follow an alternative policy in the interest of effective governance or communication.

Any alternative policy adopted must comply with the provisions of section 6(3)(a) of the Constitution.

The rotation principle is an effective mechanism for a political compromise. One of the most important points of criticism, however, is the disparity that arises between national and regional levels in the case of, *e.g.* Northern Province where both *Xitsonga* and *Tshivenda* (one language group as per the proposed model) are used in practice and in Mpumalanga where both *siSwati* and *isiNdebele* (one language group) are used. This model is also open to criticism on the basis of the following –

- only two of the suggested four language groups are recognised language groupings;
- the rotation principle is given unspecified effect across all levels of government, sectors and functions without an understandable link with national, provincial or organisational demography;

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[63] It is clear from subsequent clauses that this policy is meant to be implemented in legislative, executive and judicial functions of government in the national, provincial and local spheres.

- there is insufficient regulation to ensure the optimal use of language resources; and
- an enabling framework for contracting out language services is lacking.

In order to base the model on fixed criteria that will provide benchmarks for monitoring purposes, each level of government could be obliged to use a fixed number of languages. How the choice is arrived at, must be informed primarily by demography or language preference of the target audience. The rotation principle should enjoy limited application, and only between the two indigenous languages with the widest demographic distribution.

6.2.1 Realisation of language rights

The state is obliged to take reasonable legislative and other measures to implement the language policy norms of the Constitution. PANSALB can assist in the development of language policies and monitoring of language practices and legislation, and can play a meaningful role in the realisation of language rights.

Language rights is an area in which expense and efficiency may serve as qualifications. In the absence of national standards, the state enjoys a margin of appreciation in respect of the languages (at least two) to be used, but the choice of languages to be used must be based on the constitutional criteria (referred to in chapter 8 under § 5.2.2). Both the importance and the nature of the right and the needs of the users ought to be taken into account. Cost or administrative burden may not be elevated to the status of a norm; these factors may only influence the speed and extent of provision made to increase the status of a language.

7. NEW LEGISLATION PERTAINING TO INTELLECTUAL PROPERTY RIGHTS

The Counterfeit Goods Act of 1997 (Act No. 37 of 1997), was promulgated to provide a more effective mechanism for the owner of an intellectual property right (defined to include copyright) to act speedily and effectively against persons involved in counterfeiting activities, through a specially created inspectorate. The extension of prohibited acts to dealing in counterfeit goods or controlling such goods in the course of business may ultimately be beneficial to owners of cultural objects, dealers and museums.

The inspectorate may, on the strength of a warrant and under exceptional circumstances without a warrant, do the following: enter any place, premises or vehicle; search and remove counterfeit goods and the tools used in counterfeiting activities; question people and collect evidence and seal off a place, premises or vehicle. A person who hands counterfeit goods purchased by him or her to an inspector with proof of the price paid, may be awarded a compensatory amount payable by the seller upon conviction for the sale. The maximum amount is set at three times the price paid.

The 1996 White Paper on Arts, Culture and Heritage states that the Ministry will encourage the review of the Copyrights Act, 1978.[64] The National Action Plan mentions that DACST is engaged in research into the Copyright Act in order to enhance protection of the rights of creators of artistic works. The Performing Arts Workers' Equity undertook research on protective legislation, but little has come of it so far.

One of the only efforts to protect the intellectual property rights of local and indigenous communities was published by the Chairperson of the Parliamentary Committee responsible for Arts and Culture: the Protection and Promotion of South African Indigenous Knowledges Bill. This Bill is aimed at protecting folklore and proposes the establishment of an Indigenous Knowledges Regulatory Authority. However, it has not had its first reading as yet and did not come before Parliament as a Private Member's Bill in the year 2000 as planned.

South African courts are yet to pronounce on whether the traditional legal concept of intellectual property rights includes indigenous rights.

8. CONCLUSION

At a minimum, South Africa has to ensure that the present state of the law does not endanger relics, vessels, artefacts and languages that have great potential to enlighten, entertain, and bestow economic, historic and scientific benefits.

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[64] *White Paper* Chapter 4 'Arts and Culture' 30.

The National Heritage Resources Act, 1999, is comprehensive and well-structured but idealistic and it is not being implemented effectively.

The NHRA is proving ineffective to combat the levels of corruption in society as yet. There is growing alarm over the theft of heritage objects, the tardy treatment of collections, the neglect of the heritage and suspicion about possible insider involvement. Only declared national objects or sites would be affected by the new heritage resources law. Moreover, concerns exist that agency staff are under-qualified and the agency lacks the ability to enforce the legislation. Media reports indicate that implementation agencies are already failing to be effective.

The new South African legislation provides the means and mechanisms to protect our unique heritage and make these resources accessible to all. The NHRA fills a number of the gaps left by the NMA. It is wholly transformational, and is sure to fare better in an enforcement action. Yet, there are no guarantees that even the most carefully drafted national ownership law will meet American standards for executability, for example. These standards pertain to notice, clarity, exclusivity, exhaustiveness and domestic enforcement of laws against own citizens,[65] and have already proved too much for several countries with rather elaborate vesting laws. Even if the new legislation meets the requirements for the internal legality of an act of expropriation, it would be vulnerable to criticism if it overreaches.

South Africa's new heritage legislation is fairly uncontroversial. The idea of an *officially designated culture* however, appears greatly at odds with modern sensibilities. The very idea of government involving itself in cultural life revises the unwelcome image of censorship on the one side and official propaganda on the other.[66]

It is important that South African export policy identifies the highly significant objects in well-defined categories. Moreover, the material and the human resources that can ensure the effectiveness of vesting laws must be found and deployed. Individuals and staff of institutions

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[65] These are some of the preconditions under the CPIA for the imposition of import restrictions. See 19 USC § 2602(a)(1)(A)-(D).

[66] Sax 1990 *Michigan Law Review* 1142.

such as museums, universities and nature conservation bodies must be appointed as heritage inspectors. It is painfully clear that an assertion of ownership by the state of origin is hardly a guarantee of return of exported material relating to its history. Moreover, on its own, a national treasure law could not go very far in meeting the challenge of diminishing the incentives to traffic in looted, unlawfully exported or, lawfully exported but unlawfully excavated cultural objects. It is vital that South Africa is able to show that it has succeeded in giving effect to its own laws, and has control over its sites, borders and nationals. Retentive legislation simply demands, for its success, effective enforcement and resources with which to fulfil the bureaucratic requirements necessary to preserve, catalogue and display the relics that the state means to protect.

While the vesting clause cannot be supported unconditionally, the positive development is that the legislative reform in South Africa means that hope is no longer confined to a conflicts model, dependent exclusively on foreign courts and their notions of *lois de police* and comity.

Local art experts claim that the new legislation is bound to negatively affect trade and that it infringes on the rights of private collectors.[67] Mr. S. Welz, Sotheby's representative in South Africa, remarked that –

> [t]he state seeks to control privately owned collections, yet it has a dismal record of looking after its own ... People will just trade under the table.[68]

For language rights to become workable and enforceable, South Africa requires language legislation that will contain the benchmarks against which PANSALB will be able to monitor language practice and policy. At present, PANSALB is still operating with the Constitution as only guideline to increase respect for the languages used by communities in South Africa.

Legal frameworks are merely frameworks for administering controls. Even if sufficient goodwill were present, legal frameworks would not be effective on their own. Much remains to be achieved through educational programmes and trust-building within communities. However, sustained recording and cataloguing born of a deep commitment to our heritage is a definite

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[67] *Sunday Times* 4 April 1999, 7.

[68] *Ibid.*

prerequisite for any measure of success. To do less would be to fail in our responsibility to develop the law. When art, culture, heritage or language are used for sectoral interest, the only remaining hope is that it may help South Africans build a sense of community.

In order to move beyond the debate concerning the equal treatment and equality of cultures in respect of tangible heritage, it is necessary to show sensitivity towards the values that underlie the art of cultural diplomacy. If the values embodied in national legislation are conditioned by the very objects that require protection, progress may be made. Non-tangible elements of legends, oral tradition and spiritual belief are equally vulnerable. Fortunately, the new legislation shows a general sensitivity for this. The struggle for language equality and esteem needs to start in all earnesty, but will remain fraught with difficulty if the political will in support of multilingualism is absent.

CHAPTER 10

SOUTH AFRICA'S OPTIONS UNDER PUBLIC INTERNATIONAL LAW

1. INTRODUCTION

Chapters in Part I indicate that international initiatives focus on prevention of illegal export, and for their effectiveness, necessitate national measures that render import difficult. In chapter 9, measures designed to stop the flow of cultural or heritage objects to the outside world (export restrictions or claims to government title) were discussed.

It is necessary to consider the status of measures designed to protect the cultural heritage against the background of options available under public international law. Conventions are extraordinarily abundant in the field of the legal protection of cultural objects. Those that have been signed and ratified by South Africa are given more detailed treatment in this chapter. This chapter also explores how South Africa may benefit from membership of those international conventions that it has not yet signed. In order to do so, restitution mechanisms designed to retrieve objects that have ended up in another country, or that render the flow of movable foreign cultural property into South Africa more difficult, will be reviewed.

The above-mentioned themes are discussed under the following headings –

- Multilateral conventions
- The relationship between customary law and conventions in international law
- Multilateral conventions and the South African Constitution
- The role of conventions in interpreting the bill of rights.

Subsequently, those international initiatives of particular relevance for South Africa are highlighted in the following order –

- The 1972 World Heritage Convention;
- The 1995 Rome Convention; and
- Commonwealth Scheme.

The chapter concludes with a discussion of the need for respect for the protection in terms of the law of foreign states.

2. TREATIES

2.1 Relationship between custom and treaties in international law

The protection of cultural heritage is a subject of international co-operation and agreement. The question of the relationship between treaties and customary law may therefore arise.

In international law theory, a treaty could contribute to the emergence of a customary rule and custom could be embodied in a treaty.[1] The relation between treaty and custom differs in accordance with the legal nature attributed to customary rules. If treaty and custom are viewed as distinct sources of international law, having the same legal value, the later custom will prevail over a written treaty, just as a treaty may modify an earlier customary rule. If treaty and custom are viewed as distinct yet interrelated sources of international law, there is no *a priori* hierarchy between these sources, and relevant norms deriving from a normative treaty[2] will prevail between the parties over norms deriving from customary law.[3]

If these consequences are viewed in the light of the other principles peculiar to each source of law, a treaty may terminate the application of an earlier customary rule as between two or more states. However, the customary rule will not cease to govern the relations between each of these states and third states.[4]

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[1] *E.g.* Article 19 of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, to the effect that in an armed conflict not of an international character occurring within the territory of a Contracting Party, each Party to the conflict shall be bound to apply, as a minimum, the provisions of the Convention which relate to respect for cultural property; see *International Criminal Tribunal for the Former Yugoslavia: Decision in Prosecutor v. Duško Tadic* 35 *ILM* 32 (1996) 54.

[2] Laying down norms of general application. See Starke *Introduction to International Law* (1984) 42-3.

[3] Reuter *Introduction to the Law of Treaties* (1995) 140.

[4] *Ibid.*

2.2 International law and the South African Constitution

The Constitution devotes a separate section, section 231, to 'International agreements'. Section 231 sets out the procedure for the conclusion of international agreements. The negotiation and signing of international agreements is the responsibility of the national executive. An international agreement binds the Republic only after approval by resolution in both the National Assembly and the National Council of Provinces (NCoP), unless the agreement is of a technical, administrative or executive nature, or constitutes 'an agreement which does not require either ratification or accession'. Section 231(4) makes it clear that national legislation is necessary to render an international agreement law in the Republic.

Section 231(4) reads as follows –

> Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

This section and its underlying intention is not very clear, and several interpretations are possible. The only acceptable interpretation, however, is that if Parliament should wish to give domestic effect to a treaty, it will only be able to do so by passing an Act of Parliament to this effect. While the provision was intended to ensure that the process of ratification (an international act whereby parties show their state's consent to be bound by an agreement) goes ahead, government departments have been delaying ratification until existing South African law is aligned with new treaty obligations. To hold back treaties from Parliament for fear that such treaties would be ratified and incorporated into domestic law before the department has had an opportunity to ensure that domestic legislation is in line with the treaty obligations, is against the tenor of the Constitution.[5]

The domestic effect of treaties has also been delayed because section 231(4) does not adequately convey the intention that treaties to which South Africa is a party have automatic application in domestic law. In a sense, section 231(4) merely complicates giving *internal* effect to international obligations. It is clear that Parliament retains the power to assume binding international legal

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[5] Keightley 'Public International Law and the Final Constitution' 1996 (12) *SAJHR* 405, 411.

obligations for South Africa.

2.3 Role of treaties in interpreting the bill of rights

As stated in chapter 9, in interpreting the bill of rights, section 39 of the Constitution requires South African courts to consider international law, which includes all relevant general or multilateral treaties. The obligation to consider international law could mean that South Africa must treat multilateral conventions as part and parcel of municipal law. However, authorities interpret this obligation as referring to treaties ratified by South Africa.[6] In the case of a treaty that constitutes evidence of a customary public international law rule, this obligation would not be limited only to those treaties South Africa has signed. Even where a treaty has not acquired the force of customary law, a court may still invoke its provisions *e.g.* as a guide to the formulation of judicial policy or rules.

Ratification of a convention implies that there is a duty of implementation that rests on the country concerned, and that reports may need to be submitted if so required.

2.3.1 Treaties ratified

South African courts are directed to have regard to international human rights law in interpreting the bill of rights. The 1996 White Paper on Arts, Culture & Heritage contains the firm resolve that South Africa must become a signatory to various international conventions. Thus far, South Africa has ratified the following human rights instruments mentioned in Part I –

- the Banjul Charter on Human and Peoples' Rights;[7]
- the International Covenant on Civil and Political Rights;[8] and
- the International Convention on the Elimination of All Forms of Racial Discrimination.[9]

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[6] Dugard 'The Role of International Law in Interpreting the Bill of Rights' 1994 *SAJHR* 200; Booysen 'The Administrative Law Implications of the "Customary International Law is Part of South African Law" Doctrine' 1997 *South African Yearbook of International Law* 46, 51.

[7] South Africa ratified the Charter on 9 July 1996.

[8] South Africa ratified the Covenant on 10 December 1998.

[9] South Africa ratified the Convention on 10 December 1998.

The International Covenant on Economic, Social and Cultural Rights was signed by South Africa in October 1994 and ratification should follow soon.

A decision by a court that may violate an international law rule on human rights will have an international effect and therefore, the court must consider and apply international human rights law.[10] However, the intent of the signatory parties to human rights instruments is not necessarily that certain protective clauses or individual rights have direct application. The nature of domestic procedures and institutions may also have a bearing on the outcome.

The body of international agreements outside of the category of international human rights law is of more general importance. The duty of a South African court is to avoid violating the international law obligations of the state. One example is South Africa's membership of the 1983 Convention on Agency in the International Sale of Goods (drafted by Unidroit and intended to be aligned with the main Convention). While this treaty is not focused on the protection of the cultural heritage, it may become indirectly relevant when cultural objects are sold on the international market. Other examples in the realm of cultural heritage that South Africa has signed and ratified, include –

- the 1982 United Nations Convention on the Law of the Sea (UNCLOS); and
- the 1972 World Cultural and Natural Heritage Convention.

UNCLOS contains certain provisions focused on the protection of the underwater cultural heritage, but its scope is also much wider.[11] Its incorporation into South African law is not discussed in detail. The 1972 World Cultural and Natural Heritage Convention was incorporated into South African statutory law, and is discussed in the section that follows.

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[10] Booysen 1997 *SAYIL* 53.

[11] The 1982 Law of the Sea Convention changes the geographic division of the sea and imposes this same division on objects of an archaeological and historical nature (OHANS). The Convention expands coastal jurisdiction to cover archaeological and historical objects found within territorial seas, 24 miles from the coast, as opposed to 12 miles. Article 137 UNCLOS 1982 prohibits appropriation of parts of the sea-bed and the ocean floor and its resources. Article 149 refers specifically to the disposal of objects. It encapsulates the principle of common ownership.

2.3.1.1 1972 World Heritage Convention

The World Heritage Convention Act, 1999 (Act No. 49 of 1999)[12] (WHCA), incorporates the 1972 World Heritage Convention into South African domestic law. As explained in Part I, the Convention requires member states to make an inventory of suitable sites and submit this to the World Heritage Committee. The incorporation of the Convention into South African domestic law facilitates compliance with the Convention and its Operational Guidelines. The 1972 World Heritage Convention imposes an obligation on the national government to guarantee its implementation and ensure that legal protection is provided; management plans are developed and implemented; appropriate institutional structures are put in place; periodic monitoring occurs and adequate financial resources are provided to discharge South Africa's obligations under the Convention.

The responsibility to nominate sites for the World Heritage List lies with the State Party. If a site is eventually included in the List, the state becomes eligible for international assistance. South Africa may apply for assistance granted by the World Heritage Fund, in the form of studies concerning artistic, scientific and technical problems, manpower, expertise, training, equipment, loans, subsidies etc.[13]

The WHCA creates a legal framework for the establishment of Authorities designed to oversee the management and development of World Heritage Sites or to strengthen the powers of existing bodies looking after those sites. An Authority established in terms of the Act may exercise its powers and discharge its duties through a Board or an Executive Staff Component, or both, as the Minister of Environmental Affairs and Tourism may determine for each Authority by notice in the *Government Gazette*.[14] The Board oversees the Authority and if an Executive Staff Component has been appointed, it must provide directions to the Executive.[15]

According to section 4(2) WHCA, sustainable development of World Heritage Sites includes the

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[12] South Africa ratified the Convention on 10 July 1997.

[13] Article 22 of the 1972 World Heritage Convention.

[14] Section 10 WHCA.

principle that 'cultural and natural heritage may promote reconciliation, understanding and respect, and contribute to the development of a unifying South African identity'. Cultural and heritage management must guard against the use of this heritage for purposes of threatening a culture based on equality and freedom or for party-political gain.

The Minister is responsible for the procedure relating to the nomination of World Heritage Sites. Recently, South Africa's first three heritage sites were granted recognition by the World Heritage Committee of the UN: the human fossil sites at Sterkfontein, Robben Island and Lake St. Lucia.[16] It is hoped that tourism, job-creation and conservation will be boosted by this status.

The tangible heritage is the life-blood of tourism, but can be so only if the social and economic development of the local community is fostered and if regional and national factors are taken into account. Considerable capital may be generated from tourist attractions and the sustained utilisation of resources. This may benefit both tourism and the promotion of culture (including intercultural understanding). However, cultural heritage is not a commodity to serve tourism. If cultural heritage and tourism are not brought into a mutually supportive relationship, damaging environmental factors, *e.g.* uncontrolled traffic and air pollution, may be the result.

2.3.2 Conventions not ratified

Unlike many South American countries, South Africa is not a party to any treaty based on reciprocity that enforces foreign export prohibitions tacitly. South Africa has not become a party to the 1970 Unesco Convention, and has yet to join the 1995 Rome Convention. Both the 1970 Unesco Convention and the 1995 Rome Convention seek to define international standards for export control laws. The Rome Convention was motivated by the failure of initiatives such as the Draft Convention for a Uniform Law on the Acquisition in Good Faith of Corporeal Movables (LUAB) and the shortcomings of the 1970 Unesco Convention and its forerunners.

As two further options faced by South Africa, it is necessary to consider the potential significance

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[15] Section 15 WHCA.

[16] *Pretoria News* 2 December 1999, 1.

of the 1970 Unesco Convention and the 1995 Rome Convention.

2.3.2.1 1970 Unesco Convention

The 1970 Unesco Convention enjoyed only belated and limited ratification owing to resistance by those states that regard transit as beneficial to local interests. The US and Canada are the only significant importers of cultural objects that became parties to the 1970 Unesco Convention. Australia is the only other market state party. Switzerland has recently announced that it will become party to the 1970 Unesco Convention, adding its support to the 78 party states, 12 of which are Commonwealth states.

The 1970 Unesco Convention suffered from many deficiencies. For example, it contains little by way of procedures for recovery.[17] Similar to other Conventions in the area of cultural heritage law, this Convention does not apply retrospectively.[18]

2.3.2.2 1995 Rome Convention

As stated previously, the 1995 Rome Convention is supposed to address many of the deficiencies of the 1970 Convention. It is concerned with limiting physical damage to monuments and archaeological sites, minimising dismemberment of sculptures, dispersion of frescoes, division of triptychs, preventing disturbance of the stratigraphy or the break-up of a collection or the loss of documentation. The Convention does not refer to a 'country of origin'. It tries to establish a standard for the critical issue of enforceability, and concentrates on the requesting state and its law regulating export of cultural objects or applicable to excavation of these objects.[19]

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[17] Retroactive application of the restitution clauses is excluded in Report no. 18, 9 *ILM* 1040 (1970).

[18] Article 28 of the 1969 Vienna Convention on the Law of Treaties. For text, see App. I in Reuter *Introduction to the Law of Treaties* (1995).

[19] The Unidroit Convention article 5 (1) chapter 3 provides as follows:

> (1) A contracting state may request the court or other competent authority of another contracting state to order the return of a cultural object illegally exported from the territory of the requesting state.
>
> (2) A cultural object which has been temporarily exported from the territory of the requesting state, for purposes such as exhibition, research or restoration, under a permit issued according to its law regulating its export for the purpose of protecting its cultural heritage and not returned in accordance with the terms of that permit shall be deemed to have been illegally exported.

While the 1995 Rome Convention and the Commonwealth Scheme share the characteristic of non-retrospectivity,[20] the Rome Convention contains more specific return procedures.

A revolutionary provision in the 1995 Rome Convention guides national courts towards a significantly more effective role in the settlement of disputes over cultural objects. Return is not a right of the place of cultural or territorial origin. It tries to define appropriate standards to evaluate foreign export control laws in order to facilitate a decision on their enforcement outside the territory of the source state. It indicates when market state proceedings to enforce source state export controls will be possible.

The 1995 Rome Convention makes an effort to balance the spiritual value of the object, the exigencies of international co-operation and protection of ownership. Return must be effected to the requesting state if its laws have been violated, if the object is closely connected with it, and when the object is threatened. Article 5 delineates the circumstances under which a competent court or other authority in a requested state would be compelled to order the return of a cultural object (*i.e.* circumstances under which the authority of the *situs* courts, to deny return, would be limited). Sub-clause 3 requires of the competent authority of the 'state requested' that it orders the return of a cultural object which has outstanding cultural importance for the requesting state (this has to be established), or which has been removed, taken or exported form the territory of the 'requesting state' under circumstances that leave one or more of the following interests significantly impaired –

Article 5(1)(a) and (c) of the 1993 Draft Unidroit Convention substituted the 'compromise' term 'mandatory rules' for the law of the requesting state (presumably also 'states') regulating the export of cultural objects because of their cultural significance and the law applicable to the excavation of cultural objects. The Convention does not refer to foreign mandatory rules, but to the rules of the *situs*. It not only introduces the court of the place where the object is located as a special new ground of jurisdiction in respect of stolen or illegally exported cultural objects, adding it to other grounds existing under national or international law, but the chapter on General Provisions also provides (in Article 8.3) that:

> [r]esort may be had to the provisional, including protective, measures available under the law of the contracting state where the object is located even when the claim for restitution or return of the object is brought before the courts or other competent authorities of another contracting state.

[20] The principle for co-operation concerns objects exported after the Convention has entered into force, thus applying prospectively only. Similarly, the Scheme is intended to deter unlawful export in the future, and does not interfere with existing rights.

(a) the physical preservation of the object or of its context;
(b) the integrity of a complex object;
(c) the preservation of information of, for example, a scientific or historical character; and
(d) the traditional or ritual use of the object by a tribal or indigenous community.

The existence of (a)-(d) has to be established by the requesting or source state.

Article 3.2 chapter II of the 1995 Rome Convention provides that, for purposes of the Convention, an object which has been unlawfully excavated, or lawfully excavated and unlawfully retained, shall be considered stolen. The possessor is obliged to return it. Therefore, excavation counts as theft, and the right of action is not limited to states.

The 1995 Rome Convention is concerned with returning objects still used by living cultures or traditional communities, or that are invaluable to the spiritual life of an existing culture. Yet, the principle of automatic return of illegally exported cultural objects was rejected. The innovative Article 5 expects courts to deal with more than a simple decision on the legality or illegality of a removal. Merryman regards all objects made for use in religious or ceremonial rites as falling into the category of returnable objects. He regards the fact that objects would again be used in religious or ceremonial ways, as a factor that confers on it the status of 'culturally immovable objects'.[21] Objects with spiritual significance to a people or that are used in rituals should be returned or restored to the group that made them or to the linear descendants of the creators. However, the state requesting return bears the burden of proving the 'primacy of the object'.

Under the 1995 Rome Convention, restitution will be possible in the case of –

- objects taken abroad, which are seen as part of a nation's identity;
- large monuments and architectural statuaries dedicated to the public; and
- objects taken from ruins that may be restored with the assistance of modern technology.

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[21] Merryman 'A Licit International Traffic in Cultural Objects' *Licit Trade in Works of Art: 5th Colloquium on Legal Aspects of the International Trade in Art* (1994) 23; *cf* Paterson 1995 *UBA Law Review* 255-256. Paterson emphasises the distinction between objects with religious significance and objects with significance to the whole of the tribe to which the person belongs.

In this respect, the Convention embodies the gist of the model devised by Moustakas, and an important aspect of the fundamental international principle regarding cultural property. However, the source or requesting nation's rights will cease to enjoy preference if present descendants are careless in their attitude towards antiquities of international importance or if hoarding a specific type of art occurs (a type of which there are many duplicates and which is already adequately restrained in the source nation). In these circumstances, there can be no international understanding. Alienated cultural property that is returned must be kept physically safe and must be preserved. Restitution is acceptable when ancestral property has retained its meaning for lineal descendants, provided they can preserve and care adequately for the object in question. In addition, access for the general public and scholarly community and laws that will render future export unlawful may be required, if the facts of the case demand this. If the objectives of embargo legislation will be easier to achieve,[22] export legislation in developing source states allows for exchange and lending agreements, the release into trade of less significant or excess material as a trade-off for financial assistance, training facilities and preservation and display.

Authors agree that a foreign possessor may retain alienated cultural objects lacking in uniqueness,[23] or objects or art of a type of which there are many examples and the return of which would simply cause duplicity or 'bad object relations'.[24]

The 1995 Rome Convention allows a margin of discretion in the application of the *lex situs*, which normally plays a significant role in determining title and disposition. It recognises the number of considerations that urge rethinking of the *lex situs* rule and the prerogative of territorial links.

The fact that the 1995 Rome Convention does not contain any blanket provision on the application of foreign rules of direct application could be explained by the possible consideration

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[22] Church 'Evaluating the Effectiveness of Foreign Laws on National Ownership of Cultural Property in US Courts' 1992 *Columbia Journal of Transnational Law* 179, 225; Murphy 'The People's Republic of China and the Illicit Trade in Cultural Property: Is the Embargo Approach the Answer?' 1994 *IJCP* 227, 235.

[23] *E.g.* Pecoraro 1990 *Virginia Journal of International Law* 33, 45.

[24] See *e.g.* Moustakas 'Group Rights in Cultural Property: Justifying Strict Inalienability' 1989 *Cornell Law Review* 1179, 1223, 1225.

that an unwilling defendant might have too wide a scope for delaying proceedings by introducing arguments based on a variety of different laws. A codified special connection rule would have expanded the potential extraterritorial scope of foreign regulatory legislation. However, such a rule might have implied solidarity or reciprocity of governmental interests while the existence of solidarity is doubtful. Moreover, it could never be fact-sensitive enough to be viable. Creating a new choice of law rule carries certain risks. The level of the nation of origin's diligence in pursuing its claim may be disregarded. The claims of the place where the object or collection is kept may be disregarded. Nonetheless, if the Convention precludes recognition of foreign mandatory rules, it does not preclude recognition of any system other than the *lex fori*, applicable law or *lex situs* (see Article 9).

Paterson sees as the main impediment to both the 1970 Unesco Convention and the 1995 Rome Convention, that they seek to define international standards for export control laws before sufficient consensus has emerged on what those standards should be.[25] He criticises the 1995 Rome Convention for acting precipitously in trying to establish a standard for the critical issue of enforceability. He suggests development of a model national law on export controls as a step towards the crystallisation of international public policy and as evidence of an international public policy favouring equitable controls.

A model law would facilitate reciprocal recognition of foreign export controls and provide a basis for domestic legislation in countries that do not have these, or whose existing laws fail to recognise foreign export controls. Presently however, ratification of the 1995 Rome Convention is the only option for South Africa. It would then be committed to respecting the minimum content of an agreement to recognise and enforce foreign export rules. These criteria for a proper allocation of disputed cultural objects may ultimately supplement judicial doctrine in non-party states. South African constitutional law may allow this to happen, as the Constitution ordains that a court must have regard to public international law applicable to the protection of human rights, and that it may consider comparable foreign case law in interpreting the bill of rights.

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[25] Paterson 1995 *UBC Law Review* 257.

2.4 Commonwealth Scheme

By virtue of its membership of the Commonwealth, South Africa is also bound by the Commonwealth Scheme, which is not a treaty *strictu sensu*. As such, the Scheme does not give rise to enforceable legal obligations, but contains rules that have not reached full normative authority in the traditional sense ('soft law'). There is an expectation that the state that accepts such an instrument or practice will take its content seriously and afford it a measure of respect. If specific enough, the likelihood of being effective in controlling the activities of states is heightened.

The Scheme is included in the discussion of treaties in order to give a more complete picture of international instruments that shape domestic law. As pointed out in chapter 3, member countries need to have laws in place that give adequate protection and make it a criminal offence to breach the export prohibition and to import an item which had been exported unlawfully. South Africa has achieved this by means of section 33 NHRA (see § 3.). A fine or imprisonment not exceeding one year, or both a fine and imprisonment, may be imposed.

The Commonwealth Scheme refers to 'country of location' and 'country of export'. The Scheme as adopted by the Commonwealth refers to the country of location as the country where an item of heritage is located at the time when the country of export institutes proceedings for return of the item. This phrase is likely to be more precise than 'state of origin' and '*lex situs*'. In order to remain in line with the Scheme, South Africa has to restrict its export controls to heritage of real national importance. Preparing a request for return under the terms of the Scheme implies time and resources.

Members of the Commonwealth are required to designate a central authority for the making and receiving of requests for return of cultural heritage and to notify the Commonwealth Secretariat thereof. When a request is received, the country of location has to take appropriate steps in accordance with its laws to secure or safeguard the item. Removal from its territory and destruction would be the most important dangers to be countered. Member countries have to have laws providing adequate protection and will have to make it a criminal offense to breach the prohibition. The maximum penalty under the NHRA is more in line with the Australian

Protection of Movable Cultural Heritage Act 1986, than with the NMA.

The Scheme gives the authorities in the country of location two options as to what action they may take when a request for the return of an item covered by the Scheme is made.[26] Firstly, they may give notice to the holder of the item that, unless court proceedings for return are instituted within a stipulated period, the item will be returned to the country of export. If the holder does nothing, the authorities have to seize and return the item. The central authority in the country of export is then required to hold it for 12 months. Anyone who believes that he or she has an interest can institute proceedings in that country to determine questions of title and compensation. If no proceedings have been instituted, the central authority may deal with the item in accordance with the law of that country.

Under the second option, the authorities of the country of location may institute proceedings 'with a view to securing an order for the return of the item to the country of export' or they may advise the country of export to institute such proceedings. The authorities may take this route when they wish the legitimacy of the export to be established judicially, or when they regard the holder as an innocent purchaser for value who has conducted a diligent search into the provenance of the item.

Costs incurred by the country of location may be charged to the country of export. If they are extraordinarily high, consultation must take place between the two countries.

Commonwealth governments have opted overwhelmingly for an Import Prohibition Scheme put forward in the 1984 Consultative Document, as it could be introduced relatively easily and created the least practical (manpower and financial) and legal problems for Commonwealth courts.[27] The Scheme is based on export prohibition, and does not specify the precise legal or administrative means by which return is to be ensured. The Scheme is compatible with the 1970 Unesco Convention, so long as the Unesco Convention is not interpreted in an overly restrictive

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[26] Set out by O'Keefe 'Protection of the Material Cultural Heritage: The Commonwealth Scheme' 1995 *ICLQ* 147, 155 ff.

[27] O'Keefe 1995 *ICQL* 153.

manner.[28]

Soft law does not necessarily fail to create an expectation that the state that accepts such an instrument will respect its content. Australia and Canada have already adopted effective legislation to further the ends of the Scheme. South Africa's participation in the Scheme is important. It highlights responsibilities of honest dealing.

3. RESPECT FOR PROTECTION IN TERMS OF THE LAWS OF FOREIGN STATES

Among the possible (reciprocal) mechanisms for the return of significant items of the cultural heritage, are protections in terms of the laws of foreign states. The conflicts model also counts among these mechanisms, but forms part of the discussion in chapter 11.

South African legal history shows a measure of insensitivity for the return of objects illicitly exported from a foreign country of origin. At least new order South African legislation no longer displays apathy in respect of objects protected in terms of laws of foreign states. The NHRA now makes provision for the following return mechanisms –

- restriction on the imports of foreign cultural property other than through a customs port of entry, or without an export permit or permission (section 33 NHRA);
- the conclusion of cultural property agreements with reciprocating states; and
- SAHRA to liaise and co-operate with the authority responsible for protection of an object, with regard to its return to its country of origin.

For the first time, provision is made for the controlled import of movable foreign cultural property (section 33). SAHRA must investigate and advise the SAHRA Council on the repatriation of heritage resources which have been removed from South Africa and which SAHRA considers to be significant as part of the national estate.

It is worth noting that the US has enacted progressive legislation specifically for purposes of protecting international cultural resources (legislation on the protection of foreign materials). Nonetheless, this has not dampened the tendency of the US courts to emphasise the public policy

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[28] *Ibid.* 159-160. O'Keefe challenges Bator's interpretation of the Unesco Convention.

of the *forum* in ownership disputes.[29] South Africa has rejoined the international community, and ought to take care that its legislative framework is not unfriendly towards international actors or treasures.

4. CONCLUSION

South Africa has long displayed enthusiasm for preserving tangible remnants of a collective past, and an appetite for art. As an art importing country, the level of participation in international initiatives indicates that it deserves its newly restored status as member of the international community and that it is sensitive to the values that underlie the art of cultural diplomacy.

In its discussion of the programme to implement the right to freedom of culture, the National Action Plan (NAP) fails to list a significant number of international instruments designed to protect cultural objects that are closely linked to human rights protection and to the freedom of culture, religion and language. Measures that deserve to be included are –

- the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict;
- the 1970 Unesco Convention;
- the 1972 World Cultural and Natural Heritage Convention;
- the 1995 Rome Convention; and
- the Commonwealth Scheme.

The failure of the National Action Plan to reflect the broad international cultural heritage context may be due to a rational decision or to oversight. The above-mentioned conventions are closely associated with the rights that accrue to the individual under municipal law and with strategies to curb breaches of human rights, motivated by cultural considerations and manifesting in the destruction of cultural heritage. Furthermore, sensitivity for the application of cultural heritage law may help to counter the effect of threats posed by modernisation and development.

The Conventions listed above are closely associated with, but not an integral part of international

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[29] See the synopsis of laws in Messenger (ed.) in *The Ethics of Collecting Cultural Property: Whose Culture? Whose Property?* (1989) 253 ff (Appendix by Koczka); Phelan 'A Synopsis of the Laws protecting our Cultural Heritage' 1993 *New England Law Review* 63.

human rights law. The cultural rights expressed in various international declarations and agreements such as the 1992 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities require exacting measures of protection against the acts of the State party itself, and against the acts of other persons within the State party. Culturally persecuted individuals and communities do not find adequate protection in the existing human rights framework. Against this background, the NAP must show that the state is committed to protecting all groups in a culture-sensitive manner, so that it becomes possible to be a member of a civic nation and to maintain one's identity as part of a separate cultural, religious or linguistic group.[30]

Recent international developments tend to focus on particular types of objects.[31] Signs of a world-wide move towards reconciliation of opposing values are apparent from the following –

- pleas for restitution of only the most significant objects to their countries of origin;.
- legislation at supranational level, which lays down procedures for requests for return of the most important cultural treasures and the most valuable objects;
- treaties, based on reciprocity, which enforce foreign export prohibitions tacitly; and
- international conventions urging the preservation of findings of outstanding or exceptional value, compelling import prohibitions for materials stolen from public institutions or urging import prohibitions in respect of archaeological and ethnological materials in danger of pillage.

No single international initiative alone can provide complete solutions to the problems raised by the illicit trade. As Part I indicates, much depends on whether a workable international judicial framework can be set up, and on the number of countries that ratify a Convention.

While a universal repatriation standard for cultural objects will remain a challenge for the future, accession to the 1995 Rome Convention, and more visible support for the Commonwealth Scheme will provide procedures for making a request for return.

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[30] Strydom 1998 *SAJHR* 380-1.

[31] 1995 Rome Convention; Museums Association Code of Practice for Museum Authorities. Also Merryman where he reflects on object-oriented concerns which seek to preserve objects, contexts and opportunity for their professional documentation and study. See Merryman 'The Nation and the Object' 1994 (3) *IJCP* 61.

Reasons that underscore the need for South Africa to consider supporting the 1995 Rome Convention, include the following –

- It initiates a process that will enhance international cultural co-operation, and maintain a proper role for legal trading and inter-state agreements for cultural exchanges.
- It does not exclude participation in the Commonwealth Scheme. No right of a state or person to make a claim under restituary remedies available outside the framework of the 1995 Rome Convention, will become limited.
- It provides a more effective alternative to import restrictions, which are popular among the members of the Commonwealth. It regulates international situations exclusively, and places the responsibility to verify that an object is being traded legally, on the buyer. A failure to discharge this responsibility will result in the return of an object. Of all the Conventions discussed, it contains the strictest limitation of protection of the *bona fide* purchaser.
- It adopts a reconciliatory approach to cultural nationalism and the values of preservation, integrity and access. Even the more traditional cultural internationalists agree that restitution to the country of origin or the group of origin is desirable when living cultures still use the objects concerned. In Article 5, the Rome Convention now embodies this consensus with respect to tribal and indigenous cultures.
- It does not assign priority to the prerogative of law of the place that is territorially linked with the object. Restitution is least acceptable when the link between culture and object is only a territorial link.
- It offers a good chance of recovery, while it avoids the pitfalls of a hard and fast return rule.
- It includes rules that ease the application of foreign public law and secure recognition thereof.
- It fits public law claims into a framework.
- Article 5 facilitates the return of archaeological objects, if national laws regulate their excavation and export – without the necessity to revert to considerations of public policy that are relevant in developing common law solutions. Excavation and export need to be regulated nationally, for it is not the role of the 1995 Rome Convention to fill the gaps in foreign public laws.

Although the ultimate success of Article 5 will depend on those states in favour of freer movement of art, there is no apparent reason why ratification would not be acceptable to the South African executive. No matter how dissimilar the export controls of South Africa and another state may be, ways must be found to enforce the export controls of reciprocating states. A state that ratifies the Convention would be committed to respecting Article 5 as the minimum content of an agreement to recognise and enforce foreign export rules.

Factors that militate against becoming a party to the 1995 Rome Convention also exist. The most serious of these is the uncertainty concerning whether a sufficient consensus has emerged on

what the standards for return should be.[32] Overall, however, the advantages of joining the 1995 Rome Convention outweigh the reasons for avoiding it. Advantage ought to be taken of all opportunities for regional co-operation for the protection and exchange of objects.[33]

The Commonwealth Scheme offers an interesting possibility at a stage when South Africa has again been welcomed into its fold. It is part of a web of the international set of rules tailored to the needs of regulated return and arrangements to counter unlawful trade in items of the cultural heritage.

To do justice to the resolve of the 1996 White Paper, both the Commonwealth Scheme and the 1995 Rome Convention deserve consideration as models that will enhance South Africa's ability to recover unlawfully exported items belonging to its cultural heritage. These international initiatives create the hope of achieving some degree of consonance in the decisions of domestic courts in international questions. South Africa is free to subscribe to these international conventions, and to pass implementing legislation under its foreign affairs power. Subscribing to international conventions is not likely to result in over-regulation in the field.

South African courts have not yet had the opportunity to decide on the level of protection they are willing to accord 'international treasures'. Nonetheless, South African law has started to show sensitivity in respect of objects protected in terms of laws of foreign states. National law provides for return mechanisms. For the first time provision has been made for the controlled import of movable foreign cultural property.[34] As regards objects SAHRA considers to be significant as part of the national estate outside of South Africa, SAHRA must investigate and advise the SAHRA Council on repatriation.

Judging from the NHRA, South Africa seems to have chosen to intensify her efforts to achieve more favourable treatment of her claims for the return of illegally exported objects. Since this

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[32] Paterson 1995 *UBC Law Review* 257.

[33] For example, the regional meetings held in the Southern African sub-region, such as the one in Arusha in 1993.

[34] Section 33 NHRA.

choice links up with the conflicts model (Part I chapter 6), the backdrop to this approach is discussed in chapter 11.

CHAPTER 11

SOUTH AFRICAN CONFLICT OF LAWS

1. INTRODUCTION

Private international law is not international law in the strict sense, since no universal body of private international law exists to regulate mutual relations between states. However, its rules and application require an 'international frame of mind'.[1] In accordance with the choice of terminology in chapter 5, the rules of private international law are referred to as rules of the 'conflict of laws'.

It is indicated in Part I, chapter 6, that international co-operation and comity, and the method that underlies the theory of *lois de police* could foster an understanding of the spirit of the foreign law, understood for centuries to embody state ownership and the non-absolute terms of ownership of cultural objects. In Part I, reference was made to the appealing characteristics of a conflicts model, and it was indicated that it may be more preferable than title claims. This chapter explores the South African aspects of such a model in greater detail, since it is also possible that a South African court may in future have to decide to recognise and enforce a foreign judgment concerning ownership of a cultural object. As explained in chapter 5, this aspect forms part of the conflict of laws.

This chapter contains a section concerning mandatory rules, which deals with the question of whether a mandatory rule that comes from neither the *lex fori* nor the *lex causae* or proper law will be applied by a South African court.

This chapter should be seen as a background to one of the potential strategies by means of which the legal protection of cultural heritage could be enhanced. It must be borne in mind, however,

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[1] Edwards 'Conflict of Laws' in WA Joubert *LAWSA vol.* II (first reissue) (1993) § 413. In general, see Edwards 'Public and Private International Law' in Hosten *et al Introduction to South African Law and Legal Theory* (1995) (2ed.) 1333.

that it would be somewhat foolish to pin all hopes on judicial doctrine to put an end to illicit trade.

2. RULES OF CONFLICT OF LAWS IN SUITS FOR RECOVERY

A party relying on foreign law must plead it and prove it by means of appropriate evidence, unless it can be ascertained readily and with sufficient certainty.[2]

There is a fiction in South African law that a person's movables are considered to be situated in his place of domicile.[3] Yet, where ownership of a corporeal movable *res* is in dispute, the *lex domicilii* of the owner will be unknown. The *lex domicilii* rule admits so readily of exception, that the *lex rei sitae* has found wide application as the rule governing the material validity of title and the proprietary effect of a transfer of movable property on the rights of anyone claiming title therein.[4] The decisive moment is the time of the alleged transfer or acquisition of title.[5] Authority exists for the view that the formal validity of transfer of ownership of movables should also be governed by the *lex situs*.[6] The *lex situs* and the *lex loci actus* are bound to coincide in the majority of cases, on account of the abstract system of transfer. In those instances where symbolic or constructive delivery of movables takes place somewhere other than where the *res* is situated (where the thing remains where it is, but the transferee is placed in the position of exercising physical control whenever he or she likes), and the *lex loci* is fortuitous, the *lex situs* may prevail.[7]

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[2] Section 1(1) of the Law of Evidence Amendment Act, 1988 (Act No. 45 of 1988).

[3] The *lex domicilii* of the owner is significant for movables, for the administration of deceased and insolvent estates, for succession to movables, execution of wills and for some of the consequences of marriage.

[4] *Standard Bank v Ocean Commodities* 1983 1 SA 276 (A) at 294D. Forsyth *Private International Law* (1996) 322 points out that the rule is not well-accepted by Roman-Dutch authority.

[5] When a disputed title to movables is referred to their *lex situs* at the time the alleged title was said to have been acquired, the court may apply the internal law of the system without referring to that system's choice of law rules, and consistent with the manner in which the foreign court would apply it in the particular circumstances of the case. For international law purposes, however, the interpretation compels *renvoi*, as Staker has explained. Dicey and Morris (1987) submit that English courts ought to follow the doctrine of *renvoi* to promote certainty and uniformity of result. The *lex situs* rule would then be taken to designate the law applied by the court of the *situs*.

[6] Forsyth (1996) 323; Steinmeyer *Real Rights in Movables and Immovables in South African and German Conflict of Laws: A Comparative Study* LLM-thesis, University of Cape Town (1981) 87-95.

[7] Forsyth (1996) 322.

2.1 Prescription

South African law regards prescription as a question of title to be determined by the *lex situs*.[8] Problems may arise when an object is removed to the territory of another state before the requirements of the law of the previous *situs* have been met. South African law provides for this eventuality. Where the person in favour of whom prescription is running is outside the Republic, prescription will be suspended and the owner will be allowed three years after that person's return to enforce his or her rights.[9] However, the owner would lose this protection if the court were to apply the law of the new *situs*.

2.2 Nature of object

The *lex rei sitae* is applied to determine whether objects are movable or immovable, tangible or intangible, transferable or *res extra commercium* and to which system of law they are subject. The distinction between movables and immovables was taken over in Roman-Dutch law, and many South African statutes utilise the distinction or apply it only in respect of one of the two categories.[10] The jurisdiction of the South African courts to determine claims relating to property or to rights in property is usually discussed with reference to the distinction between corporeal movables and immovables.[11] South African law recognises that movables acquire an immovable character in various ways: they may become permanently attached to an immovable by natural or artificial means, or they may become immovable by destination when it becomes their function to serve the immovable permanently.[12]

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[8] Van der Keessel *Thes Sel* ccvii; Voet 44.3.9; 44.3.12. Krause's translation of § 12 reads –

> If the period prescribed for the completion of prescription be different in the place where the plaintiff is domiciled from that where the defendant is domiciled, the time must be observed which prevails by the law of the place where the defendant resides.

[9] Section 3(1)(b) Prescription Act, 1969 (Act No. 68 of 1969).

[10] P Voet *De Rerum* 23.1; Van der Keessel *Thes Sel* xxxvi; in general Spiro *The Conflict of Laws, being a Collection of the Author's Articles on the Subject Brought up to Date* (1973) 57 ff.

[11] Pollak *The South African Law of Jurisdiction* (1937) 102 ff; Pistorius *Pollak on Jurisdiction* (2ed.) (1993) 89 ff; Forsyth (1996) 189 ff, 296 ff.

[12] Van der Merwe & De Waal *The Law of Things* (1993) 24-5.

2.3 *Res in transitu*

As regards *res in transitu*, an exception enables the courts to determine an applicable law even though the precise location of the object at the time of the transaction is unknown. The validity and efficacy of a transfer is tested by the proper law of the transfer, or a most significant contacts test.[13] The commercial practice of transferring goods in transit by means of documents of title probably explains the lack of authority on this point.

3. MANDATORY RULES

While the idea of direct applicability harbours a rich potential for contributing to this area of law, it does not create a tight protective netting. Those authorities with a penchant for practical solution and market-oriented views find only limited enforcement of foreign laws through treaties or executive agreements acceptable, and only because it ensures reciprocity from foreign nations.[14]

South African authorities tend to maintain a narrow view of *lois de police*.[15] A court will not enforce the penal or revenue laws of another state because to do so would be to carry out acts of sovereignty on behalf of the other state. Although they may not be enforced, they may be recognised for specific purposes.[16] Spiro describes *Regazzoni v KC Sethia*[17] as an application of domestic public policy, declaring that it is up to the *ordre public* of South Africa as the *lex fori* and ultimate decision-maker to decide –

- whether to take account of imperative embargo (restricted circulation) or expropriation in terms of other legal systems;

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[13] Spiro (1973) 19, relying on Dicey. The proper law approach accords with Dicey (1987) 946-7, while the closest (most substantial) connection coincides with Reichelt's alternative connecting factor in the absence of a choice by the parties. Reichelt (1985) 91, 127, 147. Forsyth considers this issue in the latest edition of his book; see Forsyth (1996) 324, expressing support for the *lex loci expeditionis*. Except in the case where the *res in transitu* ceases to be such.

[14] Kenety 1990 (23) *Cornell International Law Journal* 1, 41.

[15] Forsyth (1996) 14, 282, 298-299.

[16] Edwards in *LAWSA vol.* II (first reissue) (1996) § 426.

[17] *Regazzoni v KC Sethia (1944) Ltd.* (2) [1956] 2 All ER 487 (CA) was an instance where the court refused to enforce a contract which required the doing of an act in a foreign country which violates the penal or revenue laws of that country. In this instance, the *lois de police* neatly fitted the mould of the conflictual method.

- whether to consider and defer to foreign public policy of the first level (directly applicable statutes and imperative rules of other legal systems).[18]

Forsyth highlights the following propositions of private international law[19] –

- the local court will apply the rules of a foreign legal system that may render a contract void or unenforceable, only if directed to do so by a choice of law rule;
- the rules of the forum (*lex fori*) are applicable in principle and if intended to override the choice of law process and render legal a contract that is illegal under its proper law, the contract must prevail;
- legal rules, which are drawn from neither the proper law nor the *lex fori* are not applicable although they would render the contract illegal if applied; and
- public policy ensures that the application of the above-mentioned three rules does not lead to a result that is offensive to local principles.

Essentially Article 7(1) of the 1980 Rome Convention on the Law applicable to Contractual Obligations of the European Communities allows a court to give effect to the mandatory rules of the law of another country with which the situation has a close connection, if and insofar as, under the law of the latter country, those rules must be applied irrespective of the law applicable to the contract. Forsyth regards this provision as a great potential infraction of the rule that the local court should apply only rules from the proper law and the *lex fori*.[20] He regards it as an erosion of both the certainty vital in international commercial contracts and of the theoretical foundation that foreign law is applied when the local sovereign so orders.

It is uncertain whether South African courts will be supportive of parties to a contract to transfer ownership or a contract to be performed in South Africa if it requires violation of a foreign law. Edwards indicates that they may refuse to enforce such a contract, since they have accepted the

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[18] Spiro 'Autonomy of the Parties to a Contract and the Conflict of Laws: Illegality' 1984 (12) *CILSA* 202, 207-8. A number of (non-South African) authorities hold a different view: Ehrenzweig-Jayme *Private International Law Vol. III* (1977) 26 refer to comity; Dolinger 'World Public Policy: Real International Public Policy in the Conflict of Laws' 1982 (17) *Texas International Law Journal* 167, 187-8 refers to the *Regazzoni* case as an example of 'deference to foreign public policy'; McLachlan 'The New Hague Sales Convention and the Limits of the Choice of Law Process' 1986 (102) *Law Quarterley Review* 591, 622 refers to the *Regazzoni* case as an example where the court decided on grounds of comity to refuse to enforce a contract offending against the law of a third state.

[19] Forsyth (1996) 299.

[20] *Ibid.* 300.

principle of unenforceability of foreign penal and revenue laws.[21] If the foreign law is the potentially applicable *lex causae* (or even some other law), the court's taking notice of the foreign public law will render the transaction illegal and unattractive.[22] Nevertheless, this is not a matter of absolute certainty. While South African courts are not inhospitable *fora* for a dispossessed owner, and are not closed to suits brought by non-domiciliaries and non-citizens,[23] they have never been utilised in *actiones in rem* concerning cultural objects. Forsyth stresses that it is the prerogative of the sovereign of the place of performance to ordain what is lawful and unlawful there, but that comity and common sense and the public policy argument must show the way.[24]

Since state definitions of what constitutes good title differ, problems flow from application of the law of a foreign country to determine title, if foreign law refuses to recognise certain elements of that country's property laws.

Every state has exclusive jurisdiction over its territory and its population. The judgments of the courts of one sovereign state are rendered effective in the territory of another sovereign state only because, and when, local rules require this. The following section discusses the South African rules on this issue.

4. RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

While recognition means that the local court declares that the foreign judgment has the legal effect that the foreign court intended for it, enforcement means that the domestic court will compel compliance with the provisions of the foreign law.

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[21] Edwards in Vol. II (first reissue) *LAWSA* (1996) § 426 n 5.

[22] Public policy may be used to avoid contracts offending the law of the *forum*, and 'will avoid at least some contracts' which are immoral or illicit by the standards of a foreign state. *Regazzoni v KC Sethia (1944) Ltd.* (2) [1956] 2 All ER 487 (CA) 490 319, opinion Viscount Simonds. *Re Helbert Wagg & Co Ltd. Re Prudential Assurance Co Ltd.* [1956] 1 All ER 129 (ChD) at 13D-E *per* Upjohn J provides authority for recognition of the power of an independent sovereign government to legislate in respect of contracts governed by its own law, and to sustain, modify or dissolve such contracts in this way.

[23] If the defendant who controls the movables is not domiciled in the area of the court but the objects are to be found inside its area or in the Republic, jurisdiction can be established. However, domestic courts will not have jurisdiction to order *incolae* defendants to return movables situated outside the Republic. See Pollak (1937) 118; Pistorius (1993) 101-2.

[24] Forsyth (1996) 302-303.

A foreign judgment is not directly enforceable in South African courts, but a South African court will enforce the judgments of a foreign court if certain requirements are met, *e.g.* that the foreign court had 'international competency'.[25] The common law seldom provides concise and clear-cut answers in this area of the law, and judges have not always tried to develop it further. Forsyth remarks that there is great scope for legislative reform, but that more harm than good will be done if it is not deftly done.[26] The requirements[27] include that recognition and enforcement –

- must not be against public policy;
- must not involve enforcement of a foreign penal or revenue (fiscal) law (discussed above); and
- must not involve foreign legislation –
  - which discriminates against nationals of the *forum* in time of war by legislation which purports to confiscate movable property situated in the foreign, *forum* state; or
  - that is aimed at confiscating the property of particular individuals or classes of individuals.

5. CONCLUSION

Generally, South African choice of law rules are underdeveloped and their application to cultural objects unpredictable. The rule most likely to apply by default is the rule governing proprietary effects of a transfer, which remains non-specific in the context of objects of cultural significance. The rules surrounding contractual aspects of transfers are not irrelevant here, but unless the parties have contracted out of title-passage rules by designating the law of a particular jurisdiction, the rule for proprietary effects will prevail.[28]

In South Africa, the theory concerning rules of direct applicability (*lois de police*) is limited to the directly applicable rules of the *forum* and their application to private contractual relations.

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[25] Edwards in Vol. II (first reissue) *LAWSA* § 476, 477.

[26] Forsyth (1996) 361.

[27] Spiro (1973) 257.

[28] Dicey & Morris (1987) 945; see also Pecoraro 'Choice of Law in Litigation to Recover National Cultural Property: Efforts at Harmonization in Private International Law' 1990 *Virginia Journal of International Law* 9. For an analysis of the rules applicable to international sales and contractual effects of a transfer, see Viejobueno 'Private International Law Rules relating to the Validity of International Sales Contracts' 1991 *CILSA* 172 ff.

Nothing compels or prevents the application of foreign *lois de police* to a case at bar in a South African court. Nothing impels South African courts to refuse to aid parties to a contract to transfer ownership or a contract to be performed in South Africa, which requires violation of a foreign law, (be it the potentially applicable *lex causae* or some other law). Generally however, foreign principles of public policy regarding ownership are likely to be respected only where they are congruent with the conflictual paradigm: that is, where they form part of the potentially applicable *lex causae* and without giving effect to the sanctions and the penalties of the foreign law. Faced with a mandatory rule as part of the *lex fori*, the court is most likely to apply the rule at least in so far as it demands application, whether choice of law is made by the parties or left for the court to decide. In the final analysis, it will be the willingness on the part of South African courts to disregard their choice of law rules and the conflictual method that will determine the frequency of application of foreign *lois de police*.

South Africa cannot expect of other countries what it would not do itself. The Southern African region has nothing that compares to reciprocal rights of action. On principle, if South Africa could demonstrate a great enough interest in the extraterritorial application of its regulatory laws controlling excavation and/or removal of excavated materials, and the special connection of these rules with a case, a (foreign) *forum* may grant them consideration, even if these laws exist outside of the *lex causae.* Although taking notice of public laws in contractual disputes cannot ensure return, illicit transactions are at least rendered so difficult to enforce that they lose their appeal.

There are several arguments in favour of recognition and enforcement of foreign laws that control excavation and/or removal of excavated materials, or which support the vesting of title in the nation. Firstly, application of foreign rules is likely to make good faith on the part of a purchaser harder to prove to the satisfaction of the civil law systems, as knowledge of the existence of such legal provisions spreads. It would discourage wrongdoers from passing title in jurisdictions with favourable *bona fide* purchaser rules. It would expand the traditional common law doctrine that entitles the original owner to recovery from the *bona fide* purchaser whenever theft has been committed in the chain of title. In countries that have moved towards international recognition, the immunity of trans-border traffickers is impaired and good faith on the part of the purchaser

does not safeguard possession.[29] State museums that have fallen victim to theft are already entitled to return under Article 7(b) of the Unesco Convention. Governments ought to enjoy the same rights as original owners and state museums over objects that fulfil the requirements for 'property for personhood' and 'property for grouphood' of groups or nations – be they the creators, or the descendants of the creators.

A source nation may need to claim title before a South African court in future. Perhaps a South African court could avoid having to make a cumbersome choice between confusing alternatives to the *lex situs* rule, if the ratification of the international set of rules tailored to the return of cultural objects were to be considered. South African substantive law contains no impediment to such a step. The length of the prescriptive period does not differ substantially from the period stipulated in the 1995 Rome Convention.

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[29] If the purchaser is responsible for considering the legal implications of each purchase, it may have a beneficial effect on trafficking. In any event, the ultimate cost is likely to be borne by dealers. See Church (1992) 212 n 168; O'Keefe & Prott *Vol. 3: Movement* (1989) 422, 425; Roodt 'Keeping Cultural Objects "In the Picture": Traditional Legal Strategies' 1995 *CILSA* 314, 326 with further reference.

CHAPTER 12

CONCLUSION

1. OVERVIEW

Part I gives an overview of the meaning and role of cultural heritage at the national and international levels. The ambiguities of culture become more manageable if its relation with development, economic growth, social stability, democracy and peace is canvassed. While the term 'culture' lacks precision and is susceptible to distortion and corruption, culture remains an important aspect of development. In its anthropological sense, the term connotes the total and distinctive way of life of a people or society. In a sociological context, 'culture' functions as a basis of identity and provide motives for behaviour.

The interest on the part of specific peoples in the material aspects of their own culture is reflected in constitutional documentation. A number of national laws rely on the mechanism of inventories and control lists. There are also instances where constitutional documents rely on conventions to define cultural heritage. Whether or not group and national tensions are adequately solved in these cases for them to become meaningful trading partners, is an open question.

Many ethnocultural conflicts cannot be resolved simply by ensuring respect for basic individual rights. Protection of culturally persecuted communities in the existing human rights framework is not water-tight. International law standards and trends regarding protection of cultural objects differ according to whether protection is required in times of war or peace. International criminal jurisdiction exists with respect to war crimes involving cultural heritage and crimes against humanity. Considering the nature of internal and international conflict, it is important for states to be aware of the latest international law developments. Earlier conventions have developed on the basis of a national idea, for example those that regulate import and export of cultural objects. Progress is evident from the latest international initiatives based on object-related values, which place more emphasis on claims for restitution of cultural objects. Since the international protection of cultural rights found in various international and regional instruments can flesh out

claims before a domestic court, selected international materials were considered, including those containing minority rights. Minority groups that seek recognition and accommodation of their cultural difference claim special measures to be taken towards this end. Finding a balance with the principle of non-discrimination means that the right to culture should not be used to protect group interests at the expense of equality and human dignity, and should be recognised where its recognition could add a significant developmental impetus.

Definitions from selected national laws, on the other hand, give an idea of what states regard as worthy of protection.

International and regional initiatives that create mechanisms that facilitate return do not conclusively address the complex issue of who owns cultural property. This necessitated an investigation of different conceptions of and discourses on property and intellectual property.

The restitution of property stolen, lost or misappropriated across state boundaries is a complex issue that is explained with reference to examples. Strategies for retention and recovery include rules belonging to the area of the conflict of laws and import and export laws. The trans-national consequences of recovery are investigated, with reference to case studies of selected countries.

In South Africa, the new order is based on a Constitution that shows a commitment to protect multiculturalism. Income levels and the degree of social cohesion are factors that may hamper an effective system of cultural heritage management. Given that there is no shared language, tradition or ancestry, constitutional devices have been included to deal with the divergent forces and conflicts in the South African state.

Internally, measures have been adopted to facilitate the management of cultural resources and to hamper the flow of cultural heritage or heritage objects to the outside world. Developments pertaining to the legal protection of intangible heritage, such as a legislative framework for language and indigenous intellectual property rights legislation, have been particularly slow in coming. Externally, South Africa faces a number of options under public international law. In order to fully understand these options, the conflicts model must be considered against the

backdrop of South African conflict of laws. The suitability of different international agreements have been indicated.

Culture could never be the prerogative of any single discipline. Both parts of the study are concerned not only with the physical existence and survival of cultural objects, but also the preservation and continuation of the social roles fulfilled by them. The order in which conservation actions are taken, is important: if conservation, documentation and preservation practices are not of a good standard, the expectation that the law will protect rights, may be frustrated. African states rely heavily on retentionist laws, and while this is understandable from the viewpoint of their past experience and the social roles of cultural objects in African societies, these strategies are doomed to fail if the means for proper conservation practices cannot be found. For a state to be in a position to satisfy citizens' claims to the protection of cultural heritage of their communities, it has to solve the tension between group rights and the nation. If these tensions remain, relaxation in national controls in respect of outflow cannot reasonably be expected.

At least as significant as the particular threats in the case of the material heritage of South Africa, are the threats against the intangible heritage. The concept of cultural objects is becoming more widely defined to include the sub-national (group) and the intangible such as knowledge or world view. Claims to ownership of intangible heritage present particular demands. The export of intangible heritage cannot be limited, and its return cannot be negotiated. This study indicates the importance of continual reassessment and improvement of our own methods to define and interpret our heritage, since a skewed understanding of the intangible will narrow access to the tangible. Ideally, the process of identification should not be a bureaucratic enterprise, but rather an ongoing process of national self-education and self-definition.

On the aspect of the protection of intangible heritage, Part II indicates that precious little has been done in South Africa to date to strike a balance between recognition of indigenous knowledge and traditional practices and development. Efforts to do so will need to recognise that development strategies have no hope of success if they do not preserve, and enrich, cultural values and cultural heritage. In the area of cultural heritage, development and the right to culture

require that the necessary know-how and the tools by means of which to own and preserve culture, and to utilise and exploit cultural resources, be imparted.

A number of benchmarks can be identified in order to do an evaluation in two main areas –

- progress towards the model of the cultural state; and
- protection of the cultural heritage.

The capacity and will to deal with cultural conflict within the ambit and scope of the constitutional state is of relevance. There is no single test or indicator to guide the evaluation of how far South Africa has come. In order to conduct an evaluation, a common understanding of what true protection would imply in the case of South Africa, is necessary.

2. 'TRUE' PROTECTION

2.1 Free(r) trade versus retentionist policies

South Africa must remain well aware of those economic forces from outside and within that seek to force an outflow of cultural objects by whatever means. True 'protection' of the cultural heritage must make sense economically and developmentally.[1] This may imply support for a right to restitution, restricted imports and exports, and ownership in respect of representative collections of the best examples of own culture to enable its people to instruct its children and stimulate its artists.[2] At the same time, true protection may also imply support for freer trade in respect of other types of items.[3]

Among the factors that influence the commitment to protect cultural heritage are the degree of

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[1] The thoughts of Borodkin 'The Economics of Antiquities Looting and a Proposed Legal Alternative' 1995 *Columbia Law Review* 377 make for interesting reading. She favours a government agency to regulate discovery and sale; true auctions at which state-certified antiquities are supplied, so as to encourage reporting and allow prices for the pieces with proper and complete provenance to rise; and a controlled legalised trade to reward those who do provide information.

[2] Other examples are: fragile objects; objects dependent on context for their significance; objects with inadequate records; objects that cannot be moved without being damaged; works that rely on integrity.

[3] Such as surplus objects; movable objects that bear no significant relation to national culture; perhaps even objects movable without threatening object- and context-related values, loss of physical and contextual integrity or threat to the identity of nations or groups.

social cohesion (one language and one religion) in the country, and relative median income of the population.

The argument enunciated by Murphy that export of only the most significant cultural objects should be prohibited, is fully valid in countries with a high degree of social cohesion. If the degree to which the country operates as a social, ethnic, linguistic and cultural unit is high, it becomes easier to determine what is 'most important'. If the relative median income is above average, there is bound to be more collectors and museums interested in purchasing objects and conserving them. In many African states, however, the process of identifying what is 'most important' has its pitfalls. The economic, social and cultural order that informs the decisions of developed countries concerning the protection of cultural heritage should not be imposed on the developing world.

For cultural nationalism to expand and encompass 'internationalism', a culture must first become truly localised. Cultural objects will only 'be able' to go everywhere once they can thrive locally. This explains why the developing world tends to adopt retentionist policies. To expect them to 'let go' and support free movement would be inappropriate if they are not ready to do so. The relatively affluent nations of the world have experienced cultural nationalism and are simply more prepared to support free movement of cultural objects.

Anomalies arise when the developed world, or nation or community, insist on the same rules for indigenous communities and minorities. Two different sets of rules ought to apply. Arguably, the developed world does not lose much if its cultural heritage becomes a commodity. However, if an indigenous community loses a sacral object, it may lose the core meaning of its tribal life.

In as much as it is able to, the law ought to prevent a minority from becoming separated from its heritage. Often, minorities and the objects that carry significance for them have not had the opportunity to 'be at home' where they are. In South Africa, the San Diaspora (Bushmen) has appealed for protection against exploitation, and for other races to 'stop stealing from them'.[4]

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[4] *Beeld* 25 April 2000, 6.

They plan to approach the government to prevent museum personnel from removing San title deeds, cast in stone, from their original place, to be stored in museums. It remains difficult to decide when the allocation of special resources and recognition of rights are justifiable as a means to rebuild and strengthen a minority culture, or when resources are better spent facilitating the integration of the remaining members into the majority culture and institutions. Nonetheless, as a basic guideline, the choice should be left to an indigenous population or minority to relinquish their identity as a distinct society. In order to give minorities the opportunity to be at home where they are, they need the opportunity to choose to retain their cultural heritage.

2.2 Accepting illicit export in certain unavoidable instances

There are cases in which it would be best to accept that illicit export is irreversible and to trust that the values of cultural internationalism or utility will secure a sufficient level of protection.

Among such cases are antiquities in archaeological sites that can be moved without a significant loss of physical and contextual integrity or threat to the identity of nations or groups.

3. MEASURING UP AGAINST THE IDEALS OF THE CONSTITUTIONAL STATE

A constitutional state in the material sense goes a step further than the formal constitutional state and is imbued with abiding values that render law and its application meaningful. It creates space for values of freedom, equality and justice to guide the state to self-realisation. It also creates space for different cultural forms of life to co-exist. Commentators have noted certain danger signals for the South African constitutional state, including criminality, corruption, theft and lack of responsible decision-making.

3.1 Threats to heritage

The 1996 White Paper and the current legislative framework are indicative of the efforts being made by government to achieve cultural heritage protection. However, the levels of criminality, corruption and theft leave a question mark on the success of these efforts.[5] Newspapers regularly

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[5] Wiechers 'Grondslae van die Moderne *Rechtsstaat*/Foundations of the Modern *Rechtsstaat*' *WA Joubert Commemorative Lecture* Unisa, 1998, 13. Wiechers refers to a number of signs signalling danger for the South African *Rechtsstaat* –

report on criminal attacks on dealers and on corruption and financial crises in the arts.[6] The cultural state is threatened by these influences and is particularly vulnerable to a lack of legal certainty and personal and cultural security of its citizens.

In early 1999 it was reported in the media that relations between DACST and NAC, the museums, the performing arts councils and the broader arts community had broken down.[7] The presidential review commission recommended that DACST be absorbed into the Department of Education.[8] Such a move would be particularly detrimental to the cultural state ideal should education be made to serve a single cultural identity and the control of management bodies be regarded as the panacea for the ills of the past.

Progress with the establishment of the Commission for the Protection and Promotion of the Rights of Cultural, Linguistic and Religious Communities has been particularly slow. At one stage, the government seemed uncertain about whether the body should be established at all. Cabinet has now approved the proposed legislation. Nonetheless, the tardy process is creating frustration.

The Commission to be established will, of course, not make cultural conflict disappear by a stroke of magic. Conflict can set the constitutional state in motion. However, the overlaps with the functions of other constitutional bodies are certain to cause further delays.

- The watering down of the multi-party democracy.
- Benefits and advantages, that are accorded to the previously disadvantaged in a way that threatens free association and individual merit.
- The dividing line between the judiciary and the executive, which at times becomes very thin.

[6] *E.g. Beeld* 19 April 2000, 7; reports about the State Theatre *supra*.

[7] *The Sunday Independent* 3 January 1999, 10.

[8] *Ibid.*

4. MEASURING UP AGAINST THE IDEALS OF THE CULTURAL STATE

4.1 Attributes of the cultural state

As discussed in Part I, Huber attributes five inter-linked meanings to the concept *Kulturstaat.*[9] As a whole, these five precepts describe the autonomy of culture as an inner way of being that unfolds by itself –

- The state leaves culture to itself and does not threaten or interfere in culture.
- The state protects, cares for, promotes, transfers and carries culture forward in a way that respects the self-unfolding of culture.
- The state maintains a balance between freedom and interference. In order to achieve this, an authorised government authority is given competency to differentiate between culture and non-culture.
- The state has competence in matters of culture, is master thereof, becomes identical therewith, so that culture can be master of and provide content to the state.
- The state is a synthesis of the state moulding culture and culture moulding the state.[10]

It follows from these precepts that where they exist, the state needs to remove obstacles preventing cultural identities from forming.

4.2 Benchmarks deriving from attributes of the cultural state

An important benchmark of progress towards the cultural state model is the acceptance and integration of the meaning and implications of the constitutional state as *cultural state* in South Africa. The way in which the state administration functions could assist this analysis. In fact, all the components of the state may be tested against this standard including the judicial, political and parliamentary systems. Another aspect of state functioning that may be evaluated is the legislative framework, the structure and content of which are indicative of the kind of social rules society subscribes to. While the primary function of the constitutional state seldom co-incides with secondary aims of government policy, the substance of the constitutional state determines the legitimacy of the secondary aims of the state.[11]

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[9] Huber 'Zur Problematik des Kulturstaats' in Häberle *Kulturstaatlichkeit und Kulturverfassungsrecht* (1982) 122, 125 ff.

[10] "n [S]intese van die kulturele gestaltegewing deur die staat en staatlike gestaltegewing deur kultuur'; see Van Wyk 1991 *Stell LR* 187.

[11] National Population Unit, *The State of South Africa's Population Report 2000*, 28.

Apart from the obvious question concerning acceptance of the cultural state concept, the cultural state standard prompts us to investigate –

- whether the Constitution serves as a practical basis for culturally sensitive law; and
- whether the National Action Plan for implementation of the bill of rights supports the cultural state concept.

As regards administrative measures of the state, Huber's model is clear: the technical precautions of officials or cultural organisations *cannot* give substance to 'culture', but the cultural state *may not* 'make' or give substance to culture (compare the cultural state standard as described by Häberle).

These questions can be answered with reference to the legislative framework. Areas of clear progress can be distinguished from areas that are a cause for concern. The extent to which 'policy gaps' have remained in the legislative framework must also be investigated.

4.2.1 Priorities of and values guiding the state

The Constitution does not characterise the Republic as a social welfare state as such. The priorities of the South African state are squarely focused on meeting basic needs for water, sanitation, health services, education, housing and infrastructure.[12] Social upliftment and economic development constitute welfare aims that are, in the main, pursued through the medium and framework of the law.

The general principles for heritage resource management, set out in the NHRA, 1999, include the injunction that policy, administrative practice, legislation, as well as the identification, assessment and management of heritage resources must promote social and economic development.[13]

The discussion in chapter 8 indicated that equality is a basic value that guides the state and

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[12] *Id.* 27.

[13] Section 5(6) and 5(7) NHRA.

frames the exercise of the limitation of rights. The right to culture relates to the equality clause in a way that essentially subjects it to the equality clause. It is understood that equality cannot be achieved by the mere prohibition of discriminatory measures. Substantive equality needs to be fostered. In the cultural sphere, equity, parity and proportionality (the equal treatment of cultures) foster cultural harmony.

Chapter 8 further showed that the South African Constitution displays a high level of cultural awareness, so that a cultural state is not precluded by the Constitution. In fact, the Constitution offers a solid basis for culturally-sensitive law. The extent to which the cultural state standard is accepted and integrated, becomes clear not only from the Constitution, but also from the implementation of the bill of rights.

4.2.2 Implementation of bill of rights

As highlighted in chapter 8, the bill of rights contains a guarantee of a sphere of freedom for the individual and the group in relation to culture. The National Action Plan (NAP) drawn up for the implementation of the bill of rights, reveals much about actual levels of commitment to the realisation of the right to culture. The NAP declares that the right to culture is central to the enjoyment of other fundamental human rights, such as the right to equality, and proceeds to identify several challenges in creating an enabling environment for the right to culture, among others –

- providing adequate resources;
- affirming diversity yet building a common nation;
- withstanding the dominance of foreign and western culture;
- clarifying the meaning of self-determination in the South African context;
- developing an inclusive common memory and heritage; and
- finding a balance between universal and customary values and practices.

According to the NAP, the judiciary, PANSALB and the Council of Traditional Leaders play key roles in advancing cultural rights. Co-ordination and delineation of the functions of PANSALB, the Human Rights Commission, the Public Protector and the envisaged Commission on the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities and its

cultural councils are key factors in the birth of a cultural state. Most of the practicalities of the protection of cultural rights will be determined by such a delineation. Providing these institutions with adequate resources is vital, since a lack thereof will affect the quality of the services they render.

The level of commitment displayed by the NAP to the protection of the right to culture is not high. As indicated in chapter 11, the NAP fails to list a significant number of international instruments that are important to the freedom of culture, religion and language. The NAP could do more to support the cultural state.

4.2.3 Functioning of the state administration

An audit of the overall management measures regarding national museums and works of art at the associated institutions of DACST,[14] revealed that inadequate measures existed in 1997 to ensure –

- the effectiveness of museums; and
- that personnel practices and the organisational structure support the achievement of objectives.

The audit also revealed that no measures had been instituted to ensure the proper record-keeping of particulars with regard to the storage and condition of art and museum collections. Consequently, regular inspections could not be carried out at the National Cultural History Museum, the South African Museum or the South African History Museum. The regular inspection of museum collections was hampered by the unsuitable storage thereof at *e.g.* the Coert Steynberg Museum and the Willem Prinsloo Agricultural Museum.[15]

In some cases, insurance claims could not be paid owing to the unsuitable storing conditions prevailing at the museum concerned. Security measures were not in place, and this could be linked to the thefts that took place at the Kruger House and the Pierneef Museum during working

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[14] Auditor-General *Performance Audit: Overall Measures regarding National Museums and Works of Art* (1997).

[15] *Ibid.* 4.

hours. The report mentions examples of sprinkler systems that were installed in some museums for protection in case of fire. These could cause extensive damage if used. Climate control systems were not fully operational and attempts to control humidity were inefficient. Damp control in the basement area of *e.g.* the South African Art Gallery was found to be ineffective.

To a large extent, the myth referred to in Part I is present in the state administration: that, in order to forge a shared nationhood, the political and administrative functions must derive from a central seat and that rigidly uniform structures are needed for the state administration, administration of justice, finance, education and culture.

In this regard, Strydom[16] refers to the homogenising logic of the new cultural value system, in terms of which restructuring is determined by the national demographics of the country, and even non-state institutions must comply with the standard mathematical calculation.

A cultural dictatorship, however, would be the very antithesis of the cultural state.

In order to affirm diversity, the state needs to recognise a diversity of social spheres. The ideal or proposed requirement 'to withstand the dominance of foreign and western culture' needs to be confined to the political sphere. Structural limitations that obstruct equality will not disappear unless all institutions and enterprises are placed on an equal footing with the dominant culture. At the same time, the state must demonstrate that it is committed to freedom of association and receptive to legal claims emanating from this freedom. A balance may then be found between universal and customary values and practices.

4.2.4 Parliamentary measures to protect art

Parliament has a restoration division, and is currently planning to appoint a full-time curator.

Art works from the old order are not being stored in ideal conditions.[17] While all artworks

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[16] Strydom 'The International and Public Law Debate on Cultural Relativism and Cultural Identity: Origin and Implications' 1996 *SAYIL* 1, 5.

[17] *Rapport* 20 Augustus 2000, 18.

belonging to Parliament have been itemised, none of the works are insured. Works that are no longer on display are due to be transferred to the Northern Flagship. The Flagship will store the works in the former Mint Building, which was allocated to the National Cultural History Museum in 1992.

4.2.5 Attitudes of citizens

The level of sensitivity of citizens regarding the imponderables that need to be traded off in the ethical choice to protect cultural objects could indicate how far the state has come in delivering on its undertakings. However, only a reliable survey could possibly yield the data needed to make reliable deductions.

4.3 What the legislative framework reveals

The following issues require clarification –

- whether the state actively promotes culture without 'making' or 'juridifying' culture;
- whether the state threatens or interferes with the cultural heritage;
- the level of commitment to the conservation of the heritage;
- the extent to which the state promotes and protects heritage; and
- whether the state allows opportunities for community and private sector involvement in the promotion and protection of the cultural heritage.

In the realm of culture, the core responsibilities of the state may be defined to include the following –

- to create the appropriate institutional arrangements to advance and promote arts, culture and heritage;
- to design effective policy and legislation to attain this objective;
- to manage the process of transformation in the cultural arena;
- to lobby government to achieve more funding; and
- to represent the interests of the South African community in government and international forums.[18]

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[18] *The Sunday Independent*, 3 January 1999, 10.

DACST was slow to deliver on the institutional framework recommended by ACTAG. After the publication of the 1996 White Paper, the NAC was the first statutory body established. The body issued its first grants in February 1998. The National Film and Video Foundation got under way in 1999. Heritage structures are still in a preliminary phase, finding their feet. Budgets are shrinking and communication with those affected is limited. The process of transformation was managed by appointing new and inexperienced boards, which were unable to provide direction under severe financial constraints. Key theatres are excluded from funding.[19]

While the budget as such has not increased significantly, the number of bodies handing out grants has. In 1994 there was only one provincial arts and culture department separate from the education department, whereas now there are six. However, the existence of more provincial structures has not secured more funding.

The legislative framework originated in the 1996 White Paper. Evaluation requires that we first ascertain whether it is responsive to the 1996 White Paper ideals. The legislative framework may also be interrogated by means of questions such as the following –

- Does it contain improvements on the weak areas of the old order conservation laws?
- Judging from the framework, is the state a threat to culture or protector of culture?
- Does it display commitment to the protection of the right to culture?
- Does is juridify culture?
- Does it display a high level of co-operation and co-ordination?

No particular importance should be attributed to the order in which these questions are treated.

4.3.1 White Paper on Arts, Culture and Heritage

As part of the policy phase of the legislative process, the 1996 White Paper serves as an informative and helpful point of orientation in the evaluation process. Its points of departure and assumptions are important, for they disclose how the ethical-political self-understanding – that South Africans are a diverse nation in the process of building one nation – influences policy on

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[19] *Id.*

how to deal with cultural differences.

The 1996 White Paper aspires towards a national self-understanding that does not draw on ethnicity. In its definition of the term 'culture' it refers only to 'social groups'; in its definition of 'heritage' to a 'shared culture'. The 1996 White Paper does not adopt an entirely neutral argument in cultural matters, but moves in the direction of a transformed meaning. If the direction of the 1996 White Paper is interpreted as the proclamation of a new leader culture, there are important warnings to be heeded. This new leader culture can exist 'in organic harmony with the instruments of power from which it seeks to colonise all other institutions'.[20] In terms of this neutrality, reference to cultural differences is dismissed as a weakening of democracy and consequently it tends to emphasise that all cultures are essentially the same.[21]

A cultural moulding to determine attitude and action, but which denies the reality of ethnical difference, may cause the ideal of national self-understanding to remain forever out of reach.

4.3.2 Responsiveness of new order legislation to White Paper ideals

The new conservation legislation *e.g.* the NHCA, 1999 and the NHRA, 1999 entrench positive policy thrusts that link up with the ideals expressed in the 1996 White Paper with reference to support, inclusiveness and conservation. Most of the reforms effected in the new legislative framework go beyond the merely semantic. A large number of structures and routes of access have been set up to extend support to artists.

In exercising the core functions of government, it is quite in order to have hands-on public governance as opposed to 'arms-length' governance. Despite the undertakings of the 1996 White Paper, the National Arts Council turned out not to be arms-length in the true sense. The body is not free from ministerial control. Similarly, the National Heritage Council (NHC) and the South African Heritage Resources Agency (SAHRA) operate at arms-length from government only to a

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[20] Strydom 1996 *SAYIL* 1, 20.

[21] Similarly, the ideology of linguistic diversity presupposes that all languages are morally equal so that each has the right to be used freely and without restriction. See Mazrui & Mazrui *The Power of Babel: Language and Governance in the African Experience* (1998) 52.

limited extent, under the direction of a Council of Ministerial appointees. In the case of SAHRA, nine of these appointees must represent the provinces, and 'qualifications', 'special experience' and 'interest' are to influence their selection. In the case of provincial heritage authorities, the MEC must take into account 'special competence', 'experience' and 'interest' in the field of heritage resources.

While arms-length governance in arts, culture and conservation is preferable, it must be appreciated that independent experts on culture are always to an extent subservient, to the state machinery – it being the one to decide who fits the profile of so-called 'independent expert' in the first place.

4.3.3 Improvements on weak areas of the old order conservation laws

In a pluralist legal order, culture ought to be conceived of as open-ended. If culture becomes 'over-juridified', cultural development may easily be forced in one direction.

Current reform legislation cannot be described as overly prescriptive or as an over-juridification of culture. The NHRA grants scope to all relevant cultural and cultural heritage values in the identification, assessment and management of heritage resources.[22] In fact, the current legislative framework has many positive features. Among these are the following –

- Cultural value is no longer commensurate with administrative mechanism.[23]
- Physical and historical context receives adequate emphasis.[24]
- The framework discourages 'monumentalisation' policies[25] and encourages resource management[26] if need be, on an agency basis.[27]
- Strategies are designed to prevent delays in the process leading up to declaration of real estate under the control of the state,[28] *e.g.* by way of a heritage agreement.

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[22] Section 5(7)(a) and (b) NHRA.

[23] Section 3(3); section 6 NHRA.

[24] *E.g.* section 48 (2) NHRA.

[25] *White Paper* Chapter 3 'New Policies and Institutional Frameworks' 19-20 lists monuments as one of 14 organs embodying creative expression.

[26] *E.g.* sections 5 and 6 NHRA; section 10(1)(e) NHCA.

[27] Section 8(6)(b) NHRA.

It remains to be seen whether South Africa will succeed in coming to terms with the problems of identification of a core national heritage, ownership, lack of exposure to the international scene and lack of a pool of well-trained specialists.

Another positive improvement is that co-ordination between conservationists and planners has been built into the conservation process of the NHRA, covering instances where the consulting bodies fail to reach consensus on the relevant planning measure.[29] Planning and conservation legislation is more fully integrated into one system. Development control has gained a more conservation-orientated character, and liaison and decision-making procedures have been spelt out.[30]

Penalties, an aspect the NMA was silent about, have been included in the National Heritage Resources Act, 1999. In terms of section 51(8) NHRA, when a person has been convicted of damaging or altering a protected heritage resource, the court must order that the offender make good the damage to the satisfaction of the heritage authority in addition to any other penalties. If this is not feasible, it must order the offender to pay the heritage authority a sum equivalent to the cost of making good the damage caused. In terms of section 51(13) NHRA, community service may be ordered in the case of vandalism.

4.3.4 State interference with heritage: achieving a balance

From time to time there are indications that the state interferes with heritage. The reaction of the Department of Justice to *obiter* remarks of Tshabalala J in *S v Matomela* [31] is a case in point. Malan characterised this as a decision depicting an imbalance between the principle of equality and the principle of majority rule. If majority sentiment about Afrikaans as a national asset should determine the future of Afrikaans, despite the well-pronounced resistance of the Afrikaans

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[28] Section 9; section 25(2)(f); section 27(20) NHRA.

[29] In general, see section 27(13), (14); section 28(6); section 31; section 38(4) NHRA.

[30] Section 38 NHRA.

[31] 1998 (3) BCLR (Ck).

minority to the violation of that part of their identity, the decision amounts to tyranny of the majority.[32]

Very few cases that have come before South African courts thus far have focused on the cultural heritage as such. Implications regarding harmonisation of equality and cultural diversity and protection of the cultural heritage must be deduced from the *In Re Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995*, *Makwanyane* and *Soobramoney* cases, discussed in chapter 8. Generally, case law bears out the following –

- that the state may have to do more than merely allow people to practice their own culture without hindrance; and
- that the right to culture cannot be used to protect the interests of a group at the expense of the rights to equality, non-discrimination and dignity of others.

Historical restitution claims pertaining to land is an important topic in post-apartheid South Africa was not canvassed as it falls outside the scope of this study.

4.3.5 Commitment to the right to culture and conservation of the heritage

The level of awareness the legislative framework displays with regard to the need to preserve information about cultural objects and sites is indicated by promotion of systematic identification and recording of the national estate and the obligation on SAHRA to maintain a register.[33] Scrutiny of the concept 'culture' in perennial writings indicates that such a register is even more crucial than putting in place identification procedures, in order to ensure that administrators understand their functions to conserve and speed up the preparation of lists.[34]

On a very practical level, the cultural state standard implores us to investigate what levels of awareness exist among officials concerning the preservation needs of cultural objects and the speed with which officials are preparing lists and inventories of objects. Does official action reflect appreciation of the cultural heritage of all? An informed evaluation of the practices of

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[32] See 'Die Saak vir die Gebruik van Afrikaans in die Howe volgens die Maatstawwe van 'n Demokratiese Gemeenskap' *FAK Conference on Language in the Courts* Centurion (21 March 2000) 4.

[33] Section 13(c), 32, 39 and 41 NHRA.

[34] Sax 'Heritage Preservation as a Public Duty' 1990 *Michigan Law Review* 1142, 1167.

heritage officials is not possible at the pre-implementation stage. Nonetheless, it is evident that officials adopt federalist or centrist positions opportunistically, motivated by what is expedient. At least three world heritage sites have received recognition to date. Speed as regards the preparation of lists may be improved upon, to help prevent losses to museums on the scale South Africa is suffering at present. Judging from the performance audit of the Auditor-General, not all inventories meet international standards.[35]

When it comes to the levels of control over performance of heritage officials, it is noticeable that the NHRA does not provide for a governance agreement between the Minister and the SAHRA Council. It is not clear how government will set out its expectations in respect of the management of cultural objects and living heritage. Fortunately, the obligation to identify performance indicators and the need for the conclusion of performance contracts are embodied in the new Public Finance Management Act, 1999. The performance of officials will be measured in terms of effectiveness, efficiency, economy and transparency. From now on, the Annual Reports of Departments and statutory bodies will have to indicate whether decisions and actions have met each of these criteria.

4.3.6 Intergovernmental co-operation

As stated in chapter 8, the danger of legislation enacted at both levels is that it may lead to a lack of co-ordination. Different norms and standards set by different legislative instruments will also cause difficulty. Provincial Culture Councils should generally be able to co-operate and liaise with other Provinces concerning the promotion of culture. Whether their potential as intergovernmental bodies will be utilised is still uncertain at this stage. These Councils cannot automatically take on the role and functions of the Provincial Language Committees established by PANSALB. The Cultural Councils are financed by the respective Province for cultural purposes, which may or may not include language.

In respect of the level of co-operation implied and co-ordination fostered by the legislation, it must be noted that the NHRA does not prescribe formal processes to facilitate intergovernmental

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[35] Auditor-General *Performance Audit: Overall Measures regarding National Museums and Works of Art* (1997) 5 with respect to the Boom Street Museum situated in Pretoria.

relations and responsibilities in respect of the national estate and provincial and local heritage resources. It does not establish a framework for the different spheres of government to co-operate and leaves Provinces free to shape constitutional practice through heritage agreements. Heritage agreements provide for the conservation, improvement or presentation of a clearly defined heritage source.[36] SAHRA or a provincial heritage resources authority may enter into agreements with another provincial authority, with local authorities, any conservation body, person or community for the execution of a heritage agreement. SAHRA must consult with the NHC, heritage institutions, government structures, local authorities, the community and other bodies in the performance of its functions. Heritage authorities and local authorities must co-ordinate the presentation and use of places of cultural significance and heritage resources that form part of the national estate.[37]

The Constitution allows local governments to have representation in the NCoP.[38] Constitutional provisions require the national and provincial governments to consult with organised local government when their interests are affected.[39] Local governments within the same geographical area co-operate on certain matters already and contractual forms of co-operation exist. Municipalities may, in their capacity as legal persons, conclude contracts under private law to co-operate in certain fields. However, Provinces are yet to create formal advisory forums or even a second house in the provincial legislature to facilitate co-operation and consultation. The standing rules of national and provincial legislatures have not been amended to afford local government the opportunity to give evidence on local government issues before committees.[40]

The current national legislation is no model of harmonised co-operative governance. The Minister and MECs do not act as a collective with a consensus view in respect of all matters

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[36] Section 42 NHRA.

[37] Section 44 NHRA.

[38] Compared to countries such as Germany, Austria and Belgium, this feature is unique.

[39] Compare also section 163 of the Organised Local Government Act, 1997 (Act No. 52 of 1997).

[40] De Villiers' suggestion that legislation be enacted that will enable local governments to establish public law forums (like the Belgian *intercommunales* model) which can take care of certain matters on behalf of local governments (a kind of non-elected supra-municipal forum) has not materialised. See De Villiers 'Local-Provincial Intergovernmental Relations: A Comparative Analysis' (1997) 12 *SAPR/PL* 469, 490.

cultural. Since the mutual appreciation of other cultures or a true 'meeting of cultures' would require a full-sized national initiative coupled with local initiatives,[41] Provincial Arts Councils and Heritage Authorities may have a role to play. They are being established, yet meetings between the Minister and MECs still take place purely voluntarily. As such, monitoring of attendance or relations cannot take place. Joint decision-making is not immediately apparent, nor monitored. If Ministers become overly careful not to interfere with one another's powers, co-ordination will be fruitless.

The current position is a friendly environment for spontaneous strides in policy development, yet there are a number of negative features to it –

- content and structure are absent in co-operative relationships;
- commitments are not strengthened by the structure;
- little opportunity exists for scrutiny of intergovernmental co-operation; and
- procedures are not clear and certain.[42]

4.3.7 Cultural participation

The ideal of the cultural state will be served by structures that are established for cultural participation, which in turn create and enhance routes of access for all to cultural heritage. Examples of pluralist advisory bodies that exist for consideration and determination of financial support include the NAC and Provincial Arts and Culture Councils. Provincial heritage authorities, PLCs and NLBs are also advisory bodies representing diverse geographical and linguistic interests. There are, furthermore, regional councils for cultural affairs under a recent amendment of the Culture Promotion Act, 1983, and cultural councils under the Commission for the Protection and Promotion of the Rights of Cultural, Religious and Linguistic Communities.

Duplication of functions seems to present a danger more real than that of limited access.

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[41] Kruger 1994 *Stell LR* 25.

[42] Existing examples include the Fiscal Relations Act, 1997 (Act No. 97 of 1997) which institutionalises a Budget Council comprising the Minister and the MEC for finance of each province and a Local Government Budget Forum, whose membership includes the Budget Council and representatives from local government. See De Villiers 1997 (12) *SAPR/PL* 469, 490 and 'Intergovernmental Relations in South Africa' 1997 (12) *SAPR/PL* 197.

4.3.8 Opportunities for community and private sector involvement

Compared to the previous dispensation, the current legislative framework creates more scope for non-government involvement.

The NHRA creates scope for financial incentives for conservation as prescribed. Where limited resources prevent or constrain compulsory purchase of an object by SAHRA, private institutions may become involved in a panel that includes dealers and collectors, appointed by the Minister to determine the amount of a fair cash offer.[43] The Minister may publish, in the form of regulations, financial incentives to conserve heritage resources and MECs and local authorities may do the same as part of their town planning schemes.[44] However, the NHRA does not spell out strategies to secure private sector involvement.

The demand for democratisation of non-state institutions and the failure to appreciate the fundamental difference of political and non-political spheres of existence complicate matters considerably.[45] If political values apply to the non-political institutions of society, everything becomes subservient to the desires of the leading political movement. Cultural relativism does not have the mechanism to prevent the legal institutions from becoming just another realm of culture expected to guard that culture.

4.3.9 Conclusion

It is clear that some progress has been made by the state regarding the protection of the cultural heritage. The executive is also aware of the requirements of a cultural state.

The relationship between culture, the right to culture and cultural heritage is a delicate one, because each is pervertable, albeit by different influences. In a multicultural society, each form of life requires the 'opportunity to grow up within the world of a cultural heritage'.[46] To ensure that

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[43] Section 32(29) NHRA.

[44] Section 43 NHRA.

[45] Strydom 1996 *SAYIL* 1, 21.

[46] Habermas 'Struggles for Recognition' in Gutman (ed.) *Multiculturalism: Examining the Politics of Recognition* (1994) 107, 131.

this remains possible, the following are essential –

- the conception of culture must remain open-ended; and
- the commitment to conservation of all cultures must remain high.

The following deductions in respect of the role of the Constitution and constitutional bodies may be made –

- The Constitution must gain greater practical significance for the South African government, who must govern in the interest of all of those governed.
- The Constitution must gain greater practical significance for the average South African citizen.
- The financial and administrative independence of statutory bodies such as PANSALB is imperative to the setting of executive priorities.

The NAP's commitment to the right to culture could be improved in many ways. Implementation of the right to culture will only be partially complete if the right to the protection of the tangible cultural heritage is not accounted for or monitored under the NAP. An overall historical and/or archaeological preservation programme is needed. While it seems that the necessity for a cohesive programme has been realised, the practical implementation is lagging behind.

In respect of the state administration, proper record-keeping measures are long overdue. Security measures are imperative. The law cannot compensate for planning and contingency plans that were not in place at crucial times.

5. CONTROLS IN THE SYSTEM

In a multicultural and multilingual society, consensus on the procedures for the legitimate enactment of law and the legitimate exercise of power hold the citizenry together. The Constitution is a pivotal part of the common domain of the nation. No culture-specific claim of differential treatment should ever be allowed to negate constitutional rights and freedoms and the procedural consensus that depict universal legal principles.

Proper control and management of heritage resources imply a global, holistic and long-range approach. If prevention of looting and inexpert excavation and salvage is important, the efficient

and effective use of existing resources is even more so.

On the whole, the legislative framework does not contain much by way of anti-corruption provisions. The control and monitoring of heritage objects is done through the administration of permits in terms of section 48 NHRA.

To minimise the risk of misuse of power and resources, ministerial discretion is best insulated from short-term political pressures and improper influences and must be based on competent analysis. The Minister controls all appointments to the SAHRA Council and the MEC all appointments to provincial heritage authorities.

The question is whether appropriate remedies exist to increase control of power and to limit abuse of power.

Nationhood cannot be forged through centralised functions and uniform structures. Political insistence upon extending 'Africanisation' to non-political life will not accomplish the aim of building a nation since the dominant or leading culture then becomes the only benchmark for what is acceptable. If such a meaning is ascribed to culture and its importance is over-estimated, legal, administrative and political activity may elevate culture (or rather non-culture) to a state religion. In the modern constitutional state, pluralism allows active policies to ensure cultural survival. In South Africa, the survival of cultural communities is at stake and action is needed. However, the survival of a democratic culture is equally important. Without it, a new elite, disinterested in policies promoting diversity and bent on the survival of its particular culture, will impose its world view.

To confer client status on culture in celebration of a state apparatus, can only mean that cultural heritage in all its forms will become a certain victim.

Cultural heritage lies central to how individuals, communities or nations identify themselves. Accepting the challenge of cultural self-determination within a political framework facing humanity at this point in our history, implies also a willingness to develop or improve our

strategies for the identification, protection and nurturing of our cultural heritage. But we need to do more than that: building a culture of democracy implies that we cannot afford to discontinue, or interrupt, the search for a minimum of shared values that can preserve peace. The fullest range of diplomacy is required, and with it, the deepest commitment.

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